



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.11.2016

CORAM :

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THE HONOURABLE MR. JUSTICE S.S.SUNDAR

Second Appeal (MD)No.56 of 2011

1.Dharmaraj Robert Manickam

2.Stephen

... Appellants/Appellants/Plaintiffs

-Vs-.

1.Rajendran

2.Sellathai

3.Gnanaraj

... Respondents/Respondents/ Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 28.09.2010 and passed in A.S.No.83 of 2007 by the Hon'ble Sub Court, Thoothukudi as confirmed by the judgment and decree dated 15.03.2007 and passed in O.S.No.29 of 2006 by the Hon'ble District Munsif Court, Sathankulam.

For Appellants : Mr.G.Prabhu Rajadurai

For Respondents : Mr.Subbiah

JUDGMENT

The plaintiffs in the suit in O.S.No.29 of 2006 on the file of the District Munsif Court, Sathankulam, are the appellants.

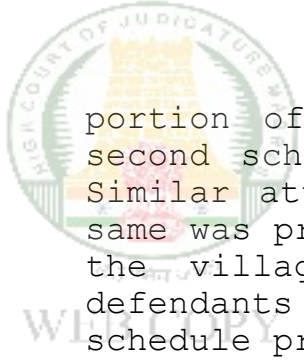
2. The plaintiffs filed a suit in O.S.No.29 of 2006 for a declaration that the suit second schedule is a public cart track and for mandatory injunction to remove the encroachment made by the first defendant in respect of a portion of the second schedule namely the first item of second schedule and to recover possession. The suit is also for a permanent injunction restraining the defendants from interfering with the plaintiffs' enjoyment over the second schedule public cart track. The suit is filed in a representative capacity.

3. The brief facts that are stated by the appellants in the plaint are as follows:

(a) The suit first item belongs to the first plaintiff. The suit second item is a common cart track belongs to Government and the same is being enjoyed by the public for more than four decades. The said pathway is also detailed in the village Field Map.

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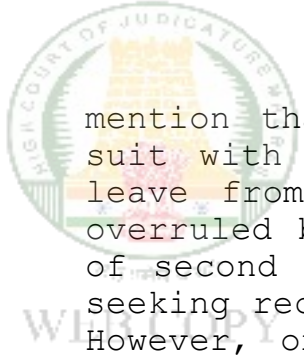
(b) The first defendant who has no right in respect of any portion of the second schedule has encroached into to the eastern



portion of the second schedule which is shown as first item of second schedule by construction of a house during January, 2006. Similar attempt was also made by the defendants 2 and 3, but the same was prevented by the timely action of the plaintiffs along with the villagers. When a criminal complaint was given against defendants 2 and 3, they admitted before the police that the second schedule property is a common pathway and that they will not indulge in any kind of encroachment. Since the first defendant is also making attempt to put up a construction even in front of the plaintiffs' house, the plaintiffs are constrained to file the suit for declaration, mandatory injunction and permanent injunction as prayed for.

4. Surprisingly, the first defendant has not filed any written statement. However, the second defendant filed a written statement denying the averments in the plaint. The second defendant, of course, has disputed the existence of suit pathway / public cart track and the existence of pathway as detailed in the village Field Map. It is the specific case of the second defendant that the suit has been laid only to prevent defendant 2 and 3 to put up construction in their properties. It is the further case of the second defendant that the entire land in Survey No.327/1C belonged to Church of South India and was given to the people of Ananthapuram village by way of plots for their residence. The second defendant also pleaded that the title in respect of the suit second schedule vest only with the Church of South India but possession has been handed over to the individual persons who have also transferred by subsequent transaction. The second defendant's husband purchased the portion of the property in Survey No.327/1C from one Ponnaiah Nadar in the year 1960 and 1968 through unregistered sale deed (Seven cents). However, the plaintiffs are claiming pathway right running across the land purchased by the second defendant's husband. The second defendant also questioned the maintainability of suit without permission of Advocate General as contemplated under Section 91 C.P.C. and without impleading the Government.

5. The trial Court after giving a finding against the plaintiffs with regard to the existence of suit cart track in suit second schedule, rejected the case of encroachment of such pathway by first defendant. The trial Court also found that the suit is bad for non-joinder of necessary parties namely the State Government and the Church of South India. Aggrieved by the dismissal of the suit by the trial Court, the plaintiffs filed an appeal in A.S.No.83 of 2007 on the file of the Sub Court, Tuticorin. The lower appellate Court after considering the evidence on record found that the plaintiffs have established the existence of the suit cart track as described in the suit second schedule. Though the finding with regard to the existence of suit cart track and the obstruction put up by the defendants were in favour of the plaintiffs, the lower appellate Court has held that the suit is bad for non-joinder of both the State Government as well as the Church of South India who are the owners of the suit cart track. It is also relevant to



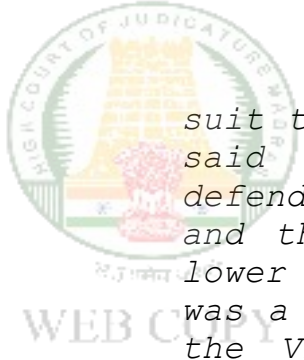
mention that the objection raised by the second defendant in the suit with regard to the maintainability of the suit for want of leave from Court as contemplated under Section 91 of C.P.C. was overruled by the lower appellate Court. Similarly, the contention of second defendant that the suit for mandatory injunction without seeking recovery of possession was negatived by the appellate Court. However, only on the issue regarding the non-joinder of necessary parties namely, the State Government as well as the Church of South India, the lower appellate Court has dismissed the appeal. Hence, the present Second Appeal has been filed by plaintiffs.

6.The learned counsel for the appellants has raised the following question of law:

Whether the Courts below is correct in law in dismissing the suit for non-joinder of Government as a party to the suit having held that the suit properties are cart track?

7.The learned counsel for the appellants submitted that the only factual issue that arise for consideration in this second appeal is regarding the existence of a pathway in the suit second schedule and its character as public cart track. The trial Court having found that the cart track as pleaded by the plaintiffs is in existence for a long time and that the public cart track was being enjoyed by the villagers by relying upon the Commissioner's report and plan and the document Ex.A4 namely the Village Field Map ought not to have been dismissed the suit on the ground of non-joinder of necessary parties. The learned counsel relied upon a judgment of this Court in the case of **Karuppa Thevar and 6 others v. V.P.Kaluva Thevar and another** reported in **2002 (1) CTC 338** wherein it has been held as follows:

"8. If we take the first substantial question of law for consideration, an answer is found immediately in Pakkla alias D. Parvath Nadar and Ors. v. P. Aiyasami Ganapathi and Ors., 1969 (1) MLJ 638. In that case, the suit was filed on behalf of the Villagers of a particular village to restrain the defendants from laying salt pans in the bed of the suit tank, there by making the water in its useless to the people for bathing and taking drinking water. It was resisted contending inter alia that the plaintiffs were not representatives of the village, that the villagers used to take water from another tank, that there were salt pans all over the suit land, that the suit land was fit only for raising salt pans and that there was no drinking water in the locality. The trial court in that case though found that villagers used to take water from the suit tank, that cattle also used to drink water from it and that the Villagers used to take bath and wash their cattle therein, but still during the ten years proceeding almost on all the sides of suit tank with the result that even of the rain water were to gather and flow into the

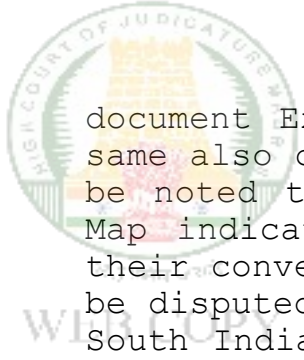


suit tank, it could not but be saltish and it could not be said that water had become saltish because of the defendants laying salt pans in a portion of the suit tank and the plaintiffs were not entitled to injunction. The lower Appellate Court held that the property in dispute was a tank and it had been recognised and used as such by the Villagers in general and that the question as to whether the water from the tank was fit for domestic use or not was foreign to the scope of the enquiry on hand, but the question was whether the defendants, though they were some of the Villagers, were as of right entitled to convert the property or any portion thereof into salt pans that they were not so entitled and therefore the injunction prayed for had to issue. This was confirmed by this court. In the second appeal, similar contentions as are raised were put forth before the learned Judge. The tank being a Government property was not the property of the villagers in general and there could be injunction at the instance of the plaintiff herein and that it was for the Government who were the owners of the tank to prevent the defendant from doing anything on the property. The plaintiff would have a cause of action only if they had some right in the tank. The remand who prayed for giving finding as to whether the plaintiffs had any right over or in respect of the tank as a finding on that point was necessary for a proper disposal of the appeal. The learned Judge held that,

" Once it was established that the Villagers had common right over the water in tank for purposes of using it for their bathing and drinking purpose, any interference with that right would give them a cause of notice, even though the interference was not in respect of a land belonging to the plaintiffs. The action of the defendants would amount to a nuisance."

In coming to the said decision the learned Judge referred to a number of treatise on this point by eminent jurists. In my view, the ratio of the above decision will squarely apply to the facts of the present case. Therefore, the lower Appellate Court was not justified in holding that the Government was a necessary party to the suit. The appellants were entitled to maintain the suit without impleading the Government as a party.

8. It is not in dispute that the plaintiffs claimed right of enjoyment over the plaint second schedule only on the ground that the property is a public cart track. The Commissioner's report clearly support the case of the plaintiffs in establishing the existence of the cart track and the obstruction that is caused by the first defendant across the suit cart track. The document Ex.A4 clearly indicates that the public cart track has been detailed in the Village Field Map pursuant to the survey during settlement. The



document Ex.A4 has been marked through a revenue official and the same also corroborates the Commissioner's report and plan. It is to be noted that the public cart track detailed in the village Field Map indicates clearly the right of villagers to use the same for their convenience. The existence of the pathway / cart track cannot be disputed by the defendants who are claiming right under Church of South India by oral sale or unregistered sale deeds. The ownership of any land over any land recognised by the Government is also subject to the mamool rights or any easements attached to other lands. Hence, the public cart track which was detailed in the revenue records will confer right on the public which is not opposed to right of ownership even assuming that the ownership vest with either Church of South India or the Government. If this general principle is accepted, the suit filed against the defendants without impleading either the Government or the Church of South India cannot be faulted especially when the right of plaintiff and public are not interfered with by them. The findings of the lower appellate Court on the maintainability of the suit on the ground of non-joinder of necessary party, namely, the State Government or the Church of South India, is therefore legally unsustainable. Since the plaintiffs are entitled to the declaration to declare the suit second schedule property as public cart track and the consequential relief. The judgement and decree of the lower appellate Court in A.S.No.83 of 2007 by the Sub Court, Tuticorin, confirming the judgment and decree of the trial Court in O.S.No.29 of 2006 on the file of the District Munsif Court, Sathankulam, is set aside and the suit in O.S.No.29 of 2006 on the file of the District Munsif Court, Sathankulam, stands decreed.

9.The Second Appeal is allowed. However, there is no order as to costs.

Sd/-

Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar

To

1. The Subordinate Judge, Thoothukudi.
2. The District Munsif, Sathankulam.
3. The Record Keeper
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

- + 1 CC TO Mr.G.PRABHU RAJADURAI, ADVOCATE IN SR No. 65362
- + 1 CC TO Mr.S.SUBBIAH, ADVOCATE IN SR No. 65459

SRM

TE/SV-MMS : 09/02/2017 : 5P/6C

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Judgment made in
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