

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.02.2017

Pronounced on : 21.02.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

S.A.No.552 of 1996

1. Rukmani
2. Baskar
3. Prabhu

... Appellants/Defendants 2 to 4

versus

1. Mohammed Yousuff (Died) ... 1st Respondent/Plaintiff
2. Mohammed Sheriff
3. Ahmed
4. Ameena Bi
5. Noorjahan
6. Mehrinnissa
7. Saibunissa
8. Fathima Bee

(1st Respondent died ,
vide order of the Court
dated 07.02.2017 made in
SA 551 & 552/1996)

... Respondents 2 to 8,
Respondents 3 to 9(in As)

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code 1908, against the judgement and decree, dated 24.11.1994, made in A.S.No.127 of 1993, on the file of the Principal District Judge, Salem, confirming the judgment and decree, dated 13.04.1993, made in O.S.No.139 of 1986, on the file of the District Munsif Court, Attur.

For Appellants : Mr.T.Murugamanickam

For Respondents : Mr.P.Jagadeesan for R4 to R6 & R8
For R2, R3, R7 - No appearance

JUDGEMENT

The appellants are the defendants in the suit filed for permanent injunction. Both the Courts below has held in favour of the plaintiffs therefore, against the concurrent finding the defendants are before this Court.

2. The brief facts of the case is that the first plaintiff Mohammed Yusuf and the second plaintiff Urujjaa Bi are husband and wife. The first defendant Krishnamoorthy died pending suit and therefore, his Legal heirs were impleaded as defendants 2 to 4. The circumstances which forced the plaintiffs to file the suit for permanent injunction is that "A" schedule property, which is in S.No.330/2A at Gangavalli Village along with ½ share in the well and land in S.No.331/2, 330/1, with usual pathway and cart-track right were purchased by the first plaintiff and Abdul Salam on 15.10.1969. The property was divided among them on 05.01.1983. Accordingly, as per the said partition, the "A" schedule property, bearing S.No.330/2A, has been allotted to the first plaintiff. The "B" schedule property was purchased by his wife on 11.02.1981 through one Muthuvaradarajan and others. Thus, the plaintiffs are in absolute possession and enjoyment of the property. North of the property the river by name Swetha is running, South of the plaintiff's property the defendants and their Pangalis land are located. The defendants and his Pangalis' have their own pathway and they have no right of cart-track through the plaintiffs' land. However, to create a short cut access to river, the defendants are trying to create a pathway upon the plaintiffs' property. Therefore, the suit for injunction against the men and agents of the defendants is filed.

3. At the time of filing of the suit, one Krishnamoorthy was arrayed as sole defendant. Pending suit, he died, therefore, his wife and children were impleaded as defendants 2 to 4. The defendants contested the suit on the ground that the plaintiffs have purchased the "A" and "B" schedule properties through the lawful owners, but their right is not absolute. It is subject to providing easementary right to the defendants to have access to Swetha river bed, the Gangavalli Village and the defendants are residing on the other side of the Swetha river, which faces North of the properties in dispute. So, they have to reach their land from their house only through the cart-track passing through the plaintiffs' land. The properties of the plaintiffs and the defendants were once upon a time was a contiguous land owned by the defendants family and the cart-track have been used by them to have access to the entire land. While so, Chinnasamy, the father of the first defendant and Chinnasamy's brother Ramasamy and Karuppannan divided the

property among themselves. The suit property in dispute was allotted to Chinnasamy, who had been using the pathway as usual. On 15.07.1966, Chinnasamy and his two sons Krishnasamy and Arunachalam partitioned among themselves and got the partition deed registered. In this partition deed, the right of pathway has been reserved for servient land owner. Ramasamy, who is the senior paternal uncle of the deceased first defendant, left behind his son Dharmalingam to inherit his possession of the land, bearing S.No.328/1C, 329/2B and 329/2D. The said Dharmalingam sold his property to one Abdul Rahman on 10.01.1968. In turn, Abdul Rahman sold the property to one Saravanamuthu and Govindammal on 20.03.1974. In all the sale deeds, the right of access to the land through the common cart-track has been reserved and mentioned.

4. The said Dharmalingam sold the "A" schedule property to the first plaintiff Mohammed Yusuf on 02.01.1983 and the second plaintiff purchased the "B" schedule property from one Muthuvaradarajan on 11.02.1981. Though the property was transferred to several persons and sub divided, the contiguous plot of land owned by the defendants' family and the cart-track is going through the entire stretch of the land. Therefore, the plaintiffs, who have purchased the property sold by the defendants' family members, cannot be deprived of the right to use the cart-track. However, the plaintiffs while ploughing the land obliterated the cart-track and when asked by the defendants, the plaintiffs promised to restore the cart-track after the ploughing. However, contrary to the promise, they did not restore the cart-track, but had approached the Court for injunction as if the defendants are trying to put a new cart-track. In fact, it is an existing cart-track from time immemorial, which has been obligated by the plaintiffs recently.

5. Based on the pleadings, the trial Court has framed issues, appointed Advocate Commissioner, got his report and examined the witnesses and marked exhibits on the side of the respective parties. Pending suit for injunction filed by the plaintiffs, the defendants 2 to 4 have filed suit for declaration, and mandatory injunction against the plaintiffs herein and others in O.S.No.536/1986. After appreciating the evidence let in by the respective parties, the trial has held that there is no evidence to show that the alleged cart-track runs through S.No.331/2, which is "B" schedule property. Relying upon the evidence of DW1 that without passing through S.No.321/2, there cannot be a cart-track to reach his property and in the cross-examination he has admitted that if cart-track is in S.No.333/3 and 333/4, then he can reach his land without passing through the "B" schedule property owned by the second plaintiff.

6. Thus admittedly appellant need not pass through S.No.331/2 but he can have access through S.Nos.333/3 and 333/4. The rough sketch produced by the defendants and marked as Ex.B1 is contrary to the sketch filed by the Advocate Commissioner. VAO was examined as P.W.2 indicates that the cart-track passes through S.No.331/1, 333/3, 334/4 to reach the S.No.330/2A. Therefore, as admitted by the defendants that he had an easy and short access by way of cart-track through his own land wherein S.No.333/3 and 333/4 and having sold the property to one Kumara Gounder on 17.03.1991, vide Exs.A3 and A14 without reserving right of cart-track, he cannot have a right of access through the plaintiffs' land, which he never had even according to Ex.B2 partition deed.

7. Accordingly, the Courts below have accepted the case of the plaintiffs and granted injunction. This Court finds no reason an interfering the finding of the Courts below, that the plaintiffs have established their right over the suit property and the defendants, who claim easementary right on the plaintiffs' land has failed to prove the same. Unless, the plaintiffs establish that the cart-track is passing through the S.No.330/2B and 331/1, they cannot claim easementary right based on the averment that there was once a cart-track to have an access to the river bed right. It is established that there is no pathway in the plaintiffs' land and also alternatively the defendant has proved that there was an alternate pathway for the defendants through their own land, which they have alienated to one Kumara Gounder without reserving the right of pathway now cannot try to create a new cart-track in the plaintiffs' land only because both the plaintiffs and the defendants trace the title to common owner. In the result, the present second appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

elp

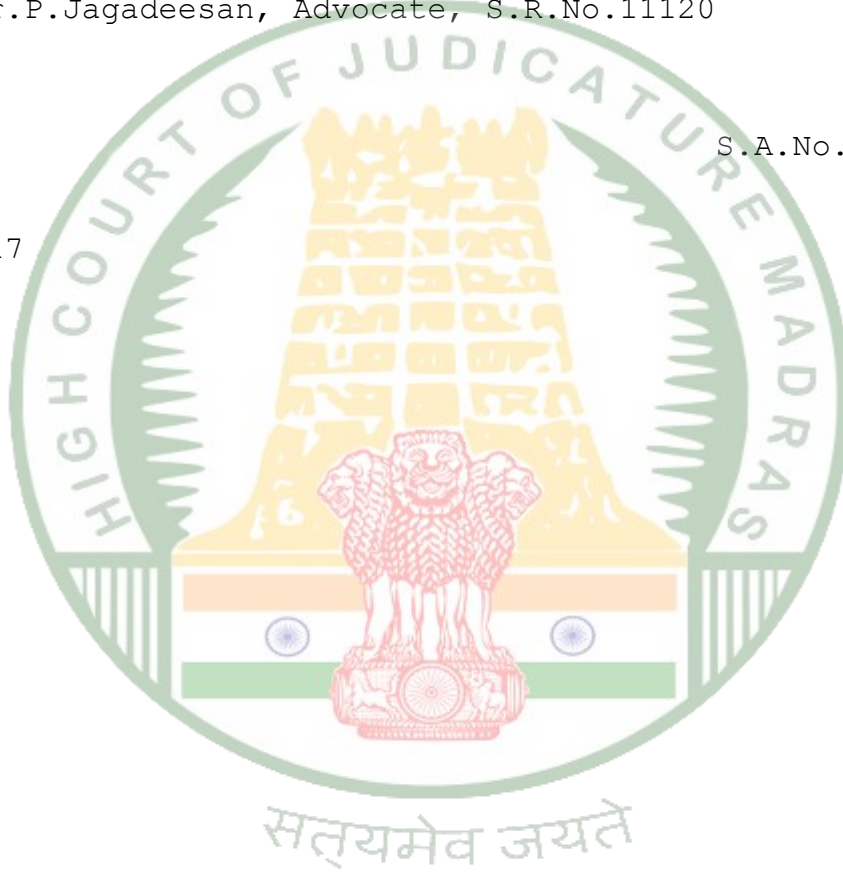
To

1. The Principal District Judge,
Salem.
2. The District Munsif Court,
Attur.
3. Section Officer,
VR Section.

+1cc to Mr.P.Jagadeesan, Advocate, S.R.No.11120

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VD(CO)
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