

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.11.2016

PRONOUNCED ON : 03 .01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.Nos.1229 of 2010 & 102 of 2011

&

M.P.Nos.1 of 2010 & 1 of 2011

S. A.No.1229 of 2010

1.Karuppanna Gounder
2.D.Lakshmi
3.K.Kavitha

...Appellants in S.A.No.1229 of
2010/Plaintiffs

Vs.

Kolandasamy

...Respondent in S.A.No.1229 of
2010/Defendant

S. A.No.102 of 2011

Kolandasamy

...Appellant in S.A.No.102 of
2011/Defendant

Vs.

1.Karuppanna Gounder
2.D.Lakshmi
3.K.Kavitha

...Respondents in S.A.No.102 of
2011/Plaintiffs

Second Appeals are filed under Section 100 of Civil Procedure Code,

(i)against the judgment and decree dated 17.03.2010 made in A.S.Nos.81 of 2008 on the file of the Principal Subordinate Court, Erode confirming the judgement and decree dated 30.06.2008 in O.S.No.658 of 2005 on the file of the first Additional District Munsif Court, Erode(S.A.No.1229 of 2010).

(ii)against the judgment and decree dated 17.03.2010 made in Cross Objection in A.S.Nos.81 of 2008 on the file of the Principal Subordinate Court, Erode confirming the judgement and

decree dated 30.06.2008 in O.S.No.658 of 2005 on the file of the first Additional District Munsif Court, Erode(S.A.No.102 of 2011).

For Appellants in S.A.No.1229 of 2010
& respondents in
S.A.No.102 of 2011 : Mr.N.Manokaran

For Appellants in S.A.No.102 of 2011
& respondents in
S.A.No. 1229 of 2010 : Mr.T.Murugamanickam

COMMON JUDGMENT

S.A.No.1229 of 2010

The plaintiffs in this Second Appeal have impugned the judgment and decree dated 17.03.2010 made in A.S.No.81 of 2008 on the file of the Principal Subordinate Court, Erode, confirming the judgment and decree dated 30.06.2008 made in O.S.No.658 of 2005 on the file of the first Additional District Munsif Court, Erode.
S.A.No.102 of 2011

The defendant in this second Appeal has challenged the judgment and decree dated 17.03.2010 made in Cross Objection in AS.No.81 of 2008 on the file of the Principal Subordinate Court, Erode, confirming the judgment and decree dated 30.06.2008 made in O.S.No.658 of 2005 on the file of the first Additional District Munsif Court, Erode.

2.The suit has been laid by the plaintiffs for permanent injunction.

3.The suit property is stated to be situated in Erode Taluk, Erode Village, S.F.No.286/1 corresponding to R.S.No.343/2, the cart track runs on its western side to a width of 16 feet and to the length of 150 feet. So it could be seen that the suit property according to the plaintiffs, is a cart track running in RS.No.343/2 of a particular width and length. Now according to the plaintiffs they claim easementary right over the suit property by grant, by prescription and by easement of necessity. The plaintiffs case is that originally S.F.No.286/1 corresponding to R.S.Nos.343/1, 2, 3 of Erode Village formed a single unit and subsequently, by division of the properties through various modes, the suit cart track had been formed and hence the plaintiffs are claiming easementary right to the suit cart track as above mentioned.

4. According to the plaintiffs inasmuch as the defendant without any authority attempted to obstruct their peaceful and enjoyment of the suit cart track, they had been necessitated to lay the suit for permanent injunction. The defendant in his written statement has denied all the averments put forth by the plaintiffs in the plaint. That apart, as regards the suit cart track, the defendant has not made any individual case or claim. All that he would state is that the plaintiffs by their money power and men are trying to form a new cart track along the western portion of the defendant's property to a width of 16 feet and hence the plaintiffs are not entitled to claim the relief sought for.

5. The Courts below have after an analysis of the oral and documentary evidence adduced by the parties have found that the plaintiffs are entitled to a pathway right to a width of 4 feet and to a length of 150 feet on the western side in R.S.No.343/2 on the ground of easement of necessity and accordingly, to the above extent decreed the suit in favour of the plaintiffs. Aggrieved over the findings of the Courts below above mentioned, both the plaintiffs and the defendant have preferred the present second appeals respectively.

6. The Second Appeals were admitted and the following substantial questions of law are formulated for consideration in these Second Appeals:
S.A.No.102 of 2011

(i) Whether the judgments of the Courts below are vitiated in that they have granted a right of way over the land of the appellant, particularly when the suit is only for permanent injunction, and, no declaratory relief of any easementary right has been prayed for?

(ii) When the formation and existence of cart track itself which has been pleaded, but, not proved by the plaintiffs, whether the Courts below were justified in granting a lesser relief which has not been put forward by the plaintiffs?

S.A.No.1229 of 2010

(iii) Whether the Courts below are correct in law in stating that the easement created got extinguished when there is no specific reference about the width and length of the suit cart track in the parent documents?

(iv) Whether there is a misconstruction while interpreting the document creating

easement by grant for decreeing the suit on the ground of easement of necessity?

(v) Whether the Courts below have committed an error in restricting the easement of necessity for pathway when an easement of necessity is one which is not merely necessary for the reasonable enjoyment and also for the convenient enjoyment of the property?

7. It is not in dispute that originally S.F.No.286/1 corresponding to R.S.No.343/1, 2, 3 of Erode Village formed as a single unit. This could be seen from the document marked as Ex.A8 dated 24.08.1938. Therefore, as argued, it could be seen that originally the properties belonging to the parties concerned had been a single unit and thereafter it had become divided by way of various transactions. Now the plaintiffs claim easementary right over the suit cart track under Exs.A1 to 5. Ex.A5 is equivalent to Ex.A9. As found from the recitals of the documents marked as Exs.A1 to A5, it could be seen that as found by the Courts below there is no specific mention of the suit cart track of the width and length measurements as described in the plaint and as put forth by the plaintiffs. Ex.A1 is a Partition Deed dated 09.02.1969. Under the same, it could be seen that Subbayammal had been allotted the 'A' schedule property, K.Duraisamy had been allotted the 'B' schedule property and Chinnammal had been allotted the 'C' schedule property mentioned therein. There is a reference about 'Mavadai Maravadai' in Ex.A1. Further, a perusal of Ex.A1 would go to show that only life interest has been given to Subbayammal and after her demise, her share has to be divided amongst K.Duraisamy and Chinnammal. In the description of the property allotted to K.Duraisamy and Chinnammal, under Ex.A1, it has been mentioned about the right of pathway running north to south to a width of 4 feet and also the pathway is to be used for bringing water from the channel. Therefore, it could be seen that a cumulative reading of Ex.A1 would go to indicate that only a pathway to a width of 4 feet running north to south has been mentioned for the beneficial enjoyment of the sharers concerned. There is no reference about the suit cart track as such in Ex.A1. Ex.A2, a Partition Deed dated 21.01.1988 as rightly found by the Courts below, does not indicate that there is any existence of pathway or cart track in the properties allotted to the parties concerned therein. That apart, it is also found not to be related to the property comprised in the suit survey number, it could therefore be seen Ex.A2 would be of no use to advance the plaintiffs case.

8. Ex.A3, is the Settlement Deed dated 01.03.1991 executed by Chandrasekaran @ Sadasivam, and his sons Surendar and Praveen in favour of K.Duraisamy and his wife Lakshmi, the second

plaintiff. A perusal of the recitals found therein would go to show that there is a description of the 'Mavadai Maravadai' pathway and the irrigational facilities pertaining thereto. Therefore, it could also be seen that Ex.A3 also does not indicate about the existence of suit cart track as described in the plaint and as put forth by the plaintiffs. Ex.A4 is a Sale Deed dated 06.09.1999 executed by K.Duraisamy and his daughters in favour of the first plaintiff. In the recitals found therein there is a mention of Mamool track for the passage of cart and the other vehicles and also the common enjoyment of the sharers thereto. Therefore, only in Ex.A4, there is a mention of the cart track for the parties to have access to reach their properties. Ex.A5 is a Settlement Deed dated 30.12.2004 executed by K.Duraisamy to the plaintiffs 2 and 3, wherein, there is a mention of cart track pathway for taking the cattle and the vehicles of the parties for having access to reach their lands. Based upon the above said five documents alone, the plaintiffs claim easementary right over the suit cart track by grant. However, as rightly found by the Court below, there is no mention of the suit cart track to a width of 16 feet and to a length of 150 feet in R.S.No.343/2, in the above said documents.

9. In such view of the matter, it could be seen that based upon the recitals found in the above said documents we cannot infer and presume that the suit cart track as described in the plaint had been in existence for the enjoyment of the respective sharers to reach their respective properties. Therefore, the Courts below have rightly found that the plaintiffs cannot be granted the relief of easementary right by grant over the suit cart track based upon the recitals found in Ex.1 to A5 and Ex.A8, in particular, when the suit cart track as described in the plaint is conspicuously absent in those documents. No exception could be taken to the findings of the Courts below as regards the above case of the plaintiffs.

10. As adverted to earlier, the plaintiffs have also claimed easementary right over the suit cart track by their long and continuous enjoyment i.e., by way of prescription. However, as rightly found by the Courts below, there is no material placed by the plaintiffs to hold that the plaintiffs had been in enjoyment of the suit cart track as described in the plaint for more than the statutory period. Other than the ipse dixit testimony of the first plaintiff, examined as PW1, the plaintiffs have examined K.Doraisamy, as PW2. As rightly found by the Courts below, PW2 cannot be term as an independent witness. He is found to be predecessor-in-interest of the plaintiffs and as such his evidence cannot be readily accepted and he could only be treated as an interested witness. Further, when the evidence of PW1 and 2 do not find support in the recitals found in Ex.A1 to A5, it cannot be held that the

plaintiffs had been enjoying the suit cart track for more than the statutory period and thereby entitled to get the relief of easementary right over the suit cart track by prescription. Therefore, the Courts below have rightly found that the plaintiffs have failed to establish that they are entitled to claim easementary right over the suit cart track by prescription.

11.As found earlier, the Courts below have granted easementary right over the pathway in R.S.No.343/2 to a width of 4 feet and to a length of 150 feet to the plaintiffs on the ground of necessity. It has been found by the Courts below, that other than the suit pathway, there is no access for the plaintiffs to reach their property situated in R.S.No.343/3. Further, from the evidence of PW3, the Assistant Engineer of PWD, the Courts have found that 10 feet width mud road found on the southern side of the plaintiffs property is intended to be used only for employees of the Public Works Department to carry out their work and though the people were allowed to have access through that mud road temporarily the same could be prevented by the authorities concerned, at any point of time for the safety of the channal. Thus, being the evidence of PW3, the Courts below have found that other than the pathway of 4 feet width and 150 feet length, there is no other path for enabling the plaintiffs to reach their properties situated in R.S.No.343/3.

12.Further, the Courts below have also derived support for coming to the above said conclusion based upon the report and plan of the Advocate Commissioner. The defendant has taken a plea that in the guise of filing of the suit, the plaintiffs are attempting to create a new cart track in his property situated in R.S.No.343/2. The defendant in his written statement has not specifically pleaded that there is no pathway at all in his property. Further, the defendant examined as DW1, in his evidence has admitted that his property is situated to the north of the plaintiffs property and for the convenient access to reach his house, in his property he had created a separate pathway on the western side of his property in R.S.No.343/2 and according to the defendant, taking advantage of the same, the plaintiffs have come forward with the suit for creating the suit cart track as described in the plaint. Therefore, it could be seen that as per the evidence of DW1, there is a pathway situated in R.S.No.343/2. According to the defendant that pathway is intended for his self-use and not for the use of the plaintiffs and others. However, as found earlier, the defendant's properties and the plaintiffs properties, were originally formed as a single unit as found in Ex.A8 and later on became divided through various transactions.

13. Such being the position, it could be seen that when the existence of pathway has been made out in R.S.No.343/2 and when the same is found to be the only pathway for enabling the plaintiffs to have access to their properties and when the defendant has not made out that the said pathway is intended for his own use and not to the use of the others, it could be seen that the Courts below have rightly held that the plaintiffs are entitled to get easementary right of the pathway to a width of 4 feet and to a length of 150 feet on the western side in R.S.No.343/2 on the ground of necessity.

14. The Courts below have based upon the provisions found in Order VII, Rule 7 of CPC and also following the decision of the Apex Court granted the lesser relief to the plaintiffs than what had been claimed by the plaintiffs. No exception could be taken to the same as on the facts and circumstances of the case and also on the evidence available on record, the Courts have accordingly granted the suitable relief to which the plaintiffs are entitled to.

15. In such view of the matter, it could be seen that the substantial questions of law framed in S.A.No.1229 of 2010 are answered against the plaintiffs and in favour of the defendant.

16. The defendant has taken a plea that the plaintiffs without seeking the relief of declaration as regards the suit property cannot lay the suit simpliciter for permanent injunction and hence on that score, the plaintiffs suit should fail. However, it could be seen that in the written statement, other than denying the plaintiffs case, the defendant has not set up any new plea as regards the pathway right granted to the plaintiffs. In particular, the defendant has not taken a plea in the written statement that there is no pathway at all in existence in R.S.No.343/2 or the pathway in existence in R.S.No.343/2 is intended for his own use and not for others and that the plaintiffs in particular are not entitled to use the pathway in R.S.No.343/2. In such view of the defence, it could be seen that when the existence of pathway as such has not been controverted and though the plaintiffs have laid the suit claiming the relief for the suit cart track, however, on the basis of the evidence on record, it is found that there is a pathway in existence in R.S.No.343/2. The plaintiffs have established their right of easement over the same on the ground of necessity and when according to the plaintiffs, the defendant had attempted to interfere with the possession and enjoyment of the same, it could be seen that the suit laid by the plaintiffs simpliciter for the relief of permanent injunction on the facts and circumstances of the case, is maintainable and therefore, the plaintiffs suit cannot fail on their failure to ask for the

relief of declaration as regards the pathway. As found earlier, the Courts are justified in granting the lesser relief to the plaintiffs based upon the evidence on record and no exception could be taken to the same either in law or on facts.

17. In the light of the above discussions, the substantial questions of law formulated in S.A.No.102 of 2011 are answered against the defendant and in favour of the plaintiffs.

18. The learned counsel for the plaintiffs and the defendant in support of their case has relied upon the following decisions reported in 2006 (4) CTC 79 (Hero Vinoth (minor) Vs. Seshammal), 2010(1) CTC 455 (Sree Swayam Prakash Ashramam and another Vs. G. Anandavally Ammal and Others), 1997(1) CTC 348 (Murugesha Moopanar Vs. Sivagnana Mudaliar), 2012(6) CTC 892 (Syed Dhasthakeer Vs. Navab John), 2008(6) CTC 237 (Ananthula Sudhakar Vs. P. Buchi Reddy (dead) by LRs and Others) and 2016-5-L.W.211 (Sekar Vs. Ganesan, reply by his Power Agent, Thiruvengadam). The principles of law enunciated in the above said decisions taken into consideration and followed as applicable to the facts and circumstances of the present case.

19. During the course of hearing of the Appeal, the learned counsel for the plaintiffs contended that the first Appellate Court had in verbatim repeated the judgement of the trial Court without any application of mind to the issues involved in between the parties and the same could be evident on a perusal of the judgment of the first Appellate Court and therefore he contended that the first Appellate Court has failed in its duty in approaching the matter as provided under law being the last Court of appreciation of facts and law and so contended that the judgment of the first Appellate Court are liable to be set aside and the matter should be remitted back to the first Appellate Court with a direction to reassess the case of the parties in a detailed manner independently and in this connection, reliance was placed on the decisions reported in 2001(1) CTC 505 (Santhosh Hazari Vs. Purushottam Tiwari (dead) by Lrs), 2011(4) CTC 343 (H. Siddiqui (dead) by LRs Vs. A. Ramalingam), 2015 (1) SCC 391 (Vinod Kumar Vs. Gangadhar), 2014(16) SCC 109 (United Engineers and Contractors Vs. Secretary to Government of Andhra Pradesh and Others).

20. The above contention of the plaintiffs counsel is vehemently opposed by the defendant's counsel. A perusal of the judgement of the first Appellate Court and the trial Court would only go to show that though there are certain repetitions as regards the appreciation of the evidence and the contentions of the parties, it cannot be stated that all together the

judgement of the first Appellate Court is a verbatim reproduction of the trial Court. On the other hand, it could be found that the first Appellate Court has independently considered the issues between the parties at length and had come to the conclusion that the trial court has correctly appreciated the facts and circumstances of the case both legally and factually in the right perspective and accordingly, concurred with the judgement and decree of the trial Court.

21. In such circumstances, the above contention of the learned counsel for the plaintiffs cannot be acceded to straightaway for accepting his request for remittance of the matter back to the first Appellate Court for a reconsideration of the issues again. Therefore, the above plea of the learned counsel for the plaintiffs, on the above ground also the judgement and decree of the first Appellate Court are liable to be set aside does not merit acceptance.

22. In the light of the above discussions, the Second Appeals fail and accordingly, both Second Appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Court,
Erode.
2. The I Additional District Munsif Court,
Erode.
3. The Section Officer,
VR Section, High Court, Madras.

+2cc to M/S.T.Murugamanickam, Advocate sr.324 & 322
+2cc to Mr.N.Manoharan, Advocate sr.734 & 732

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