

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.01.2017

PRONOUNCED ON : 27.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.389 of 2011

&

MP.No.1 of 2011

1.Athappan (deceased)

2.Rangasamy

3.Muthusamy

4.Palaniappan

5.Sengoda Gounder

6.Pulli Gounder

7.Kuppusamy

...1 to 7 Appellants/Appellants/
Defendants 1,4 to 9

8.Ravichendran

9.Kathirvel

...8 & 9th Appellants

(Appellants 8 & 9 brought on record
as the LRs of the deceased 1st
appellant vide order of Court
dated 15.11.2016 made in
CMP Nos.17588 to 17590 of 2016
in SA.No.389 of 2011).

Vs.

1.Sengoda Gounder

2.S.Natesan

...1st and 2nd Respondents/
Respondents/Plaintiffs

3.Karuppa Gounder

4.Ramasamy

... 3rd & 4th Respondents/Respondents
/Defendants 2,3

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 29.10.2010 made in A.S.No.13 of 2010 on the file of the Subordinate Judge, Tiruchengode, Namakkal District confirming the Judgment and Decree dated 10.12.2009 made in O.S.No.200 of 2000 on the file of the Additional District Munsif Court, Tiruchengode, Namakkal District.

For Appellants : Mr.V.Raghavachari for
M/s.R.Jayaprakash

For Respondents : Mr.K.V.Sundararajan for
M/s.K.Vellairaj.

JUDGMENT

Challenge in this second appeal is made by the defendants against the Judgment and decree dated 29.10.2010 made in A.S.No.13 of 2010 on the file of the Subordinate Judge, Tiruchengode, Namakkal District confirming the Judgment and Decree dated 10.12.2009 made in O.S.No.200 of 2000 on the file of the Additional District Munsif Court, Tiruchengode, Namakkal District.

2.The second appeal has been admitted and the following substantial question of law is formulated for consideration.

(a)Whether the Courts below are right in decreeing a suit which is against the evidence let in by the parties to the suit?

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

4.The suit is in respect of the cart track alleged to be situated in S.Nos.319/1 and 320 and stated to be 13 feet width, running on the eastern side of the above said survey numbers, north south for having access to Namakkal Main Road and for taking vehicles as well as cattle.

5.The plaintiffs are claiming title to the above said suit cart crack under the Sale Deeds dated 14.10.1969 and 25.08.1985 marked as Exs.A1 and A2 respectively. Now according to the plaintiffs, the first plaintiff's father and one Palani Nadar had purchased the common 1/4th share in S.No.319/2 from some of the defendants and their ancestors under Ex.A1 and the second plaintiff had purchased the common 1/8 share of Palani Nadar from the legal heirs of Palani Nadar under Ex.A2. Therefore according to the plaintiffs, they are given the right over the suit cart track under the above said sale deeds and inasmuch as the defendants without any authority under law, attempted to interfere with the possession and enjoyment of the plaintiffs in

respect of the suit cart track and also made attempts to obliterate the same, the suit has come to be laid by the plaintiffs.

6.Per contra, the defendants in the written statement have pleaded that there is no such cart track in S.Nos.319 & 320 as alleged by the plaintiffs at any point of time and in the sale deeds pertaining to the suit survey numbers, barring Ex.A1, there is no reference about the suit cart track and according to the defendants, the plaintiffs cannot seek any relief as regards the suit cart track not in existence and hence the suit is liable to be dismissed.

7.As regards the purchase of the first plaintiff's father and Palani Nadar under Ex.A1, the 1/4th share in S.No.319/2, the same is not disputed by the defendants. Similarly, the purchase of the second plaintiff, as regards the common 1/8th share in S.No.319/2 under Ex.A2 is also not disputed by the defendants. Now according to the defendants, the reference about the cart track has been incorporated in Ex.A1, contrary to the physical features obtaining in the locality and when the suit cart track as described in the plaint does not exist, there is no scope for incorporating the said cart track in Ex.A1 and further according to the defendants, the anterior title deeds of the suit survey numbers did not depict the existence of suit cart track, as described in the plaint and inasmuch as the suit cart track was never in existence at any point of time, the plaintiffs have no cause of action to institute the suit with reference to the same.

8.Even though the plaintiffs have claimed that the second plaintiff has purchased the common 1/8 share in S.No.319/2 under Ex.A2, a perusal of Ex.A2 would go to show that there is no reference about the suit cart track in the sale deed. The deed recites that the purchaser is entitled to only use the mamool pathway and in particular, there is no reference about any right given to the purchaser under Ex.A2, as regards the 13 feet width suit cart track in the above said suit survey numbers. Therefore, as rightly argued by the defendants counsel, if really the suit cart track of a width of 13 feet had been in existence, as putforth by the plaintiffs, reference about the same would have been incorporated even in Ex.A2. However, the document marked as Ex.A2 is conspicuous as regards the absence of the suit cart track of a width of 13 feet, as described in the plaint. Further, according to the defendants, the anterior title deeds pertaining to the suit survey numbers also do not depict the existence of the suit cart track as described in the plaint. In this connection, reliance is placed upon the title deeds marked as Exs.B1 and B2. A perusal of Exs.B1 and B2 would

also go to show that as put forth by the defendants, there is no reference about the suit cart track as described in the plaint and the recitals as regards the usage of mamool pathway alone is mentioned.

9. Further, it is the case of the defendants that the first defendant had purchased the property in the suit survey numbers from the other defendants under the Sale Deed dated 28.08.1989 marked as Exs.B3 and in the same also there is no reference about the suit cart track as described in the plaint. It could therefore be seen that other than Ex.A1, the reference about the suit cart track is conspicuously absent in the other title deeds produced in this case. As rightly put forth by the defendants' counsel, when the defendants have specifically taken a plea in the written statement that there is no existence of the suit cart track on ground as described in the plaint and also denied the usage and enjoyment of the plaintiffs with reference to the same at any point of time, the plaintiffs on seeing the defence put forth in the written statement should have sought for the relief of declaration as regards the alleged suit cart track and in the absence of the plaintiffs seeking the relief of declaration and prosecuting the suit only for the relief of permanent injunction, on that ground alone, according to the defendants counsel, the suit is not maintainable and in this connection, he placed reliance upon the decision reported in 2008(4) SCC 594 (Ananthula Sudhakar Vs. P. Buchi Reddy (dead) by LRs and Others).

10. A perusal of the above said decision would go to show that when the plaintiffs claim of the existence of the suit cart track and the enjoyment of the same has been vehemently opposed by the defendants, when a cloud over the title of the plaintiffs claim has been specifically raised in the written statement, it could be seen that the plaintiffs' suit simpliciter for bare injunction would not be proper. If really the suit cart track had been in existence and been in the usage and enjoyment of the plaintiffs and others for having access to the road, as rightly put forth by the defendants counsel, the plaintiffs on seeing the defence taken in the written statement should have amended the relief sought for, particularly, should have sought the relief of declaration also in respect of the alleged suit cart track. On the other hand, in the light of the above said decision, it could be seen that the suit laid by the plaintiffs simpliciter for bare injunction without seeking the relief of the declaration of the alleged suit cart track, in particular, would not be sufficient and adequate. In such circumstances, it could be seen that the suit laid by the plaintiffs, as such, is not maintainable.

11. Now, according to the plaintiffs, claiming right over the suit cart track under Ex.A1, it is their case that they had been in the possession and enjoyment of the same for having access to the main road. Even, on the defendants denying the same in the written statement, the plaintiffs have not taken any steps immediately to have the suit property inspected by the Advocate Commissioner with the help of a Taluk Surveyor to point out the existence of the cart track available on ground. On the other hand, it could be seen that during the course of the suit, the Advocate Commissioner had inspected the suit property and filed his report and plan, which has been marked as Exs.C1 & C2. In Exs.C1 & C2, the Advocate Commissioner has pointed out that on inspecting the property, he did not find any suit cart track on ground and accordingly, submitted his report and plan with reference to the same.

12. Even thereafter, the plaintiffs have not cared to amend the relief sought for by them and if according to the plaintiffs, the suit cart track had been obliterated by the defendants, after the institution of the suit, they would have sought for the relief of mandatory injunction also. But the plaintiffs have not come forward with any such relief in the suit by way of amendment. As regards the report and plan of the Advocate Commissioner, Exs.C1 and C2, it is admitted that the plaintiffs have not preferred any objection to the same. It could therefore be seen that the plaintiffs have accepted the report and plan of the Advocate Commissioner but however, they would state that after the institution of the suit, the defendants have obliterated the suit cart track. In this connection, the first plaintiff examined as PW1, during cross examination, would state that when the Advocate Commissioner inspected the site, the defendants obliterated the same by using the tractor and prior to the obliteration of the same, the suit cart track was in existence and running to a length of about 200 feet. Further, according to PW1, the 200 feet length cart track had been obliterated by the first defendant about 9 years back. Therefore, even according to the admission of PW1, it could be seen that the suit cart track had been obliterated by the first defendant, 9 years prior to the date of his deposition. It is found that the first plaintiff was examined as PW1 on 04.06.2009, the suit has come to be laid by the plaintiffs on 25.08.2000, it could therefore be seen cumulatively analysing the evidence of PW1, as well as the report and plan of the Advocate Commissioner, that even on the date of the filing of the suit, the suit cart track was not in existence. If really the suit cart track had been in existence on the date of the filing of the suit and if really the defendants had attempted at that point of time to obliterate

the suit cart track and thereby the plaintiffs had been necessitated to lay the suit for permanent injunction, immediately on the filing of the suit, the plaintiffs would have endeavoured to take out a commission and made attempts to show the existence of the suit cart track by acceptable evidence. However, the plaintiffs have not taken any steps immediately in this regard. On the other hand, the Commissioner, who had inspected the suit property had not noted the existence of any suit cart track in the suit property. It is found that the Advocate Commissioner inspected the suit property on 10.02.2001 i.e., within six months from the date of the filing of the suit. Even on that date, according to the Advocate Commissioner, the suit cart track has not been in existence.

13. Now according to PW1, the cart track, which was in existence had been obliterated by the defendants i.e., the first defendant about 9 years back. Therefore, it could be seen that obviously the suit cart track was not in existence on the date of the filing of the suit. Only on that account, it could be seen that the plaintiffs have also not cared to seek the relief of declaration as regards the suit cart track, despite the defence raised by the defendants in the written statement. Therefore, the above facts would only go to show that there had been no existence of suit cart track on ground as claimed by the plaintiffs at any point of time, particularly, on the date of the filing of the suit and accordingly, the plaintiffs are unable to place any material to hold that the suit cart track was in existence and been in the enjoyment of the plaintiffs as stated by them.

14. Now according to the plaintiffs, as stated in the plaint, they are claiming the right over the suit cart track both by way of grant as well as on the ground of necessity. It has not been explained by the plaintiffs properly as to how they could claim easementary right over the suit cart track both by way of grant as well as on the ground of necessity.

15. As rightly pointed out by the defendants counsel, the cause of action for the relief of easementary right by way of grant and the cause of action for the relief of easementary right on the ground of necessity are different and both would not go together. Therefore, the plaintiffs are themselves not clear as to on what basis they are claiming right over the alleged suit cart track. This also throws a great doubt in the plaintiffs case.

16. As seen above, the plaintiffs are claiming the cart track right only under Ex.A1. If really, the cart track as described in the plaint had been in existence from time immemorial, as rightly pointed out by the defendants counsel,

reference about the same would have been noted in the anterior title deeds namely Exs.B1 and B2 or the other subsequent sale deeds namely Exs.A2 and B3. However, other than Ex.A1, there is no reference about the suit cart track. Further, even in Ex.A1, there is no mention of the existence of suit cart track of a width of 13 feet as described in the plaint. Even on that aspect, Ex.A1 does not support the plaintiffs case. It could therefore be seen that when there is no proper explanation on the part of the plaintiffs, as to how such a recital as regards the existence of the alleged cart track had been incorporated in Ex.A1, the duty is cast upon the plaintiffs to examine the authors of the document namely Ex.A1, to substantiate their case. No doubt, the authors of the document are some of the defendants and their ancestors. Even then the plaintiffs should have endeavoured to summon them in support of their case and should have elicited the answers from them as to under what circumstances the said recital had come to be incorporated in Ex.A1.

17.As rightly put forth by the learned counsel for the defendants, if they did not support the plaintiffs case as such, as per law, the plaintiffs on seeking the permission of the court should have treated them as hostile witness and thereby attempt to elicit the truth from them about the suit cart track by way of cross examination. However, the plaintiffs have not endeavoured to summon their vendors to substantiate their case. When their vendors themselves have disputed the recitals as regards the suit cart track in Ex.A1 and when the plaintiffs have not established the existence of the suit cart track on ground at the time of the filing of the suit and when according to the plaintiffs, the suit cart track had been already obliterated by the first defendant, the case of the plaintiffs that they had been in possession and enjoyment of the suit cart track under Ex.A1 cannot be countenanced. Other than PW1, the plaintiffs have examined PW2 in support of their case. However, considering the evidence of PW2, it could be seen that there has been enmity prevailing between PW2 and the defendants and in such circumstances, no safe reliance could be attached to the evidence of PW2 alone to uphold the plaintiffs case. Therefore, it would not be safe to place reliance upon the testimony of PW2 alone in the absence of any other evidence on the side of the plaintiffs to hold that the suit cart track had been in existence as pleaded by the plaintiffs.

18.The defendants counsel in support of his argument placed reliance upon the decisions reported in 2009(1)CTC 753(Chellam Iyer and another Vs. J. Ranganathan and 3 others), 2006 (5) SCC 545(Hero Vinoth(minor) Vs. Seshammal), 1997(1) CTC 348 (Murugesu Moopanar Vs. Sivagnana Mudaliar), 2007 SCC OnLine Mad 230(B.Sivaraman(deceased by LRs Vs. S.Ramalingam), 2008(1) CTC

137(N.Boriah Vs. The Nilgiri Co-Operative Printing Press by its Special Officer, Charring Cross, Ootacamund). The principles of law out lined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

19.In the light of the above discussions, it could be seen that the courts below have erred in decreeing the suit laid by the plaintiffs without proper appreciation of the evidence on record adduced in the matter. Therefore, the findings and conclusions of the courts below for accepting the plaintiffs case are nothing but erroneous and perverse. In such view of the matter, the substantial question of law formulated in this second appeal is answered in favour of the defendants and against the plaintiffs.

20.In conclusion, the judgments and decrees of the courts below are set aside and the suit laid by the plaintiffs is dismissed. Accordingly, the second appeal is allowed. No costs. Consequently, miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Subordinate Judge,
Tiruchengode, Namakkal District.
2. The Additional District Munsif,
Tiruchengode, Namakkal District.

Copy to

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.K.Vellayaraj, Advocate Sr.5430
+1cc to Mr.R.Jayaprakash, Advocate Sr.5413

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