

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.11.2017

PRONOUNCED ON: 04.12.2017

CORAM:

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. Nos.1169 & 1170 of 2001

and

C.M.P.Nos.12383 & 12384 of 2001

S.A.No.1169 of 2001

1.Ammavasai Gounder @ Kaiponnan

2.Periyakutti @ Muniappan

3.Chinnakutti @ Muniappan

4.Perumayee

5.Rajammal

6.Easwaramoorthi

7.Gurumoorthi

...Appellants/Plaintiffs

Vs.

1.Muniappa Gounder

2.Palaniappa Gounder

3.Ponnaya

...Respondents/Defendants

S.A.No.1170 of 2001

1.Ammavasai Gounder @ Kaiponnan

2.Chinnakutty @ Muniappan

3.M.Gurumoorthi

...Appellants/Defendants

Vs.

1.Karuppannan

2.Senthilvadivu

3.Easwaramoorthi

4.Kavundiappa Gounder

...Respondents/Plaintiff

Common Prayer:- Second Appeals filed under Section 100 of C.P.C., against the judgment and Decree 14.07.2000 made in A.S.No.56 of 1999 and A.S.No.55 of 1999 respectively on the file of the Subordinate Court, Bhavani, Erode district, reversing the judgment and decree dated 29.04.1999 in O.S.No.463 of 1986 and O.S.No.430 of 1998 respectively on the file of the Principal District Munsif Court, Bhavani, Erode District.

For Appellants
in both Second Appeals

: Mr.R.Selvakumar

For Respondents
in both Second Appeals

: No appearance

C O M M O N J U D G M E N T

Challenge in these second appeals are made to the judgment and Decree dated 14.07.2000 made in A.S.No.56 of 1999 and A.S.No.55 of 1999 respectively on the file of the Subordinate Court, Bhavani, Erode district, reversing the judgment and decree dated 29.04.1999 made in O.S.No.463 of 1986 and O.S.No.430 of 1998 respectively on the file of the District Munsif Court, Bhavani, Erode District.

2. O.S.No.463/1986 has been laid for declaration and permanent injunction.

3. O.S.No.430/1998 has been laid for permanent injunction.

4. It is found that the property, in dispute between the parties involved in both the suits is the same, accordingly, it is found that though separate trials were conducted in respect of the above said two cases, materials in common relied upon by the parties in the respective suits had been exhibited in both the suits and accordingly, it is found that in both the suits, the appellants in the present second appeals have lost their case before the first appellate court and accordingly, they have preferred the second appeals.

5. The case of the appellants, in brief in both the cases, is that the suit property is located in R.S.No.129/14 of Varadhanallur Village, Bhavani Taluk and the appellants, one Palaniappan and Muniagounder, are entitled to the suit property and the suit property is a cart track and the appellants and the above said persons are in possession and enjoyment of the suit property and R.S.No.130/10 of Varadhanallur Village measuring an extent of 0.09.0 hectares also belonging to the appellants absolutely and enjoying the same and the respondents have no manner of right, title and interest over the suit property. The cart track running in the suit property vests with the appellants and the above mentioned persons and accordingly, registered in their names in the revenue records and in a partition effected between the first appellant and his brother on 30.06.1986, the first appellant was allotted "C" schedule properties under the partition deed and the suit property has been included as item 3 of the "C" schedule properties of the partition deed and the lands of the defendants are situated to the south of the suit property and they have no manner of right,

title and interest over the suit property and their lands are located in resurvey Nos.280 and 281 of Varadhanallur Village and as enmity had crept in between the parties, the respondents are attempting to encroach into the suit property without any authority and hence, the appellants had been necessitated to lay the suit for appropriate reliefs in O.S.No.463/1986 and the respondents in second appeal No.1170 of 2001 had levied the suit falsely against them in O.S.No.430 of 1998, thus according to them, the said respondents have no right, title and interest over the suit property and hence, it is contended on their behalf that the said respondents are not entitled to obtain the relief of permanent injunction as prayed for in O.S.No.430/1998. Thus, it is found that the appellants claim right, title and interest in the suit property on the same lines both in O.S.No.463/1986 and O.S.No.430/1998.

6. The case of the respondents, in brief in both the second appeals, is that the appellants do not have title to the suit property as put forth by them and they are not in possession and enjoyment of the suit property as claimed by them and the mere issuance of patta during resurvey proceedings would not confer any title on the appellants to the suit property. The suit is bad for non joinder of Palaniappan and Muniagounder, who are also alleged to be the owners of the suit property and the respondents are entitled to the property situated in survey Nos.280 & 281 of Varadhanallur Village and the respondents are using the suit property as an access to reach their above said lands from the days of their predecessors in interest and accordingly, have prescribed their right to use the same and the suit cart track/itteri is situated about 100 yards from Bhavani Mettur main road and proceed westwards and after several turns it reaches the Vellitirupur road and the suit cart track/itteri runs in Thalakulam Village and reaches Vellitiruppur road and the suit cart track is a well laid out cart track and had been in existence from time immemorial and running in survey No.129/14 and 130/10 and not only the respondents but also the entire public of Varadhanallur Village have been using the suit cart track for reaching the Vellithiruppur road and the appellants' land is at a higher level than the suit cart track and that apart, the appellants have also enclosed their lands on the south with wire fence and the respondents have also pleaded in O.S.No.430/1998 that the suit cart track originally belonged to Marappagounder vahaiyara and family and some of the respondents being the grandson of Marappagounder and as the other respondents also own lands at Varadhanallur Village, according to them, the title deeds pertaining to their lands clearly disclose the existence of the suit cart track and Marappagounder also while selling his land had not alienated the suit cart track and reserved the same for having access to the lands and therefore, the suit cart track had been used by

the respondents as well as the others for having access to their respective lands and the appellants have never the exclusive use of the suit cart track and the respondents are also entitled to use the cart track as an easement of necessity as they have no access to reach their lands, the contents of the partition deed dated 30.06.1990 is not admitted and the appellants are trying to encroach into the suit property illegally and they have no cause of action to institute the suit and accordingly, the respondents in second appeal No.1169/2001 resisted the suit laid by the appellants in O.S.No.463/1986 and the respondents in S.A.No.1170/01 had laid the suit in O.S.No.430/98 seeking the relief of permanent injunction on the footing that the appellants, under the guise of claiming absolute title to the suit property, attempted to interfere with their enjoyment of the suit property as such.

7. In O.S.No.463/86, in support of the appellants case, PWs1 & 2 were examined and Exs.A1 to 4 were marked and on the side of the respondents/respondents in second appeal No.1169 of 2001, DWs1 and 2 were examined and Exs.D1 to 9 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties in the above said suit and the submissions made, the trial Court was pleased to accept the case of the appellants in the above said suit and accordingly, granted the decree claimed by them in the said suit. On appeal, the above said judgment and decree of the trial Court was set aside and the first appellate Court by allowing the appeal preferred by the respondents in second appeal No.1169/2001, thereby, dismissed the above suit laid by the appellants. Aggrieved over the same, the second appeal No.1169/2001 has been preferred.

9. In O.S.No.430/1998, in support of the case of the respondents in second appeal No.1170/2001, they being the plainitffs in the said suit, PW1 has been examined and Exs. A1 to 3 were marked and on the side of the appellants, DW1 was examined and Exs.D1 to 3 were marked. Exs.C1 and C2 were also marked. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit.

10. On appeal, it is found that in support of the respondents case, additional documents have come to be marked as Exs.A4 to A6. On a consideration of the materials placed, the first appellate Court pleased to set aside the judgment and decree of the trial Court and by allowing the appeal, decreed the suit as prayed for in the said suit. Aggrieved over the same, the second appeal No.1170/2001 has been preferred.

11. At the time of admission of the second appeal No.1169/2001, the following substantial question of law were formulated:

" Whether the lower Appellate Court is right in reversing the judgment of the Trial Court without examining any independent witness to prove that the suit property is a common property meant for general public?"

12. At the time of admission of the second appeal No.1170 of 2001, the following substantial questions of law were formulated:

" (i) Whether the decree of Easement by necessity could be granted to the plaintiffs without a relief of declaration over the same?

(ii) Whether the lower Appellate Court is right in relying on survey records marked in the connected suit O.S.No.463/86 when the same is not proved by either the Survey officials or any independent witnesses, that the suit property is a common track?".

13. The suit property is the cart track. There is no dispute with reference to the character of the suit property as above stated between the parties. Now, the appellants claim exclusive title to the suit property. Accordingly, they have sought for the relief of declaration as regards the suit cart track in O.S.No.463 of 1986. Per contra, the respondents have pleaded that the suit cart track is an access used by the respondents as well as the villagers of Varadhanallur for having access to their respective lands and it is stated that the suit cart track has been used as the access to reach Vellithiruppur, from Bhavani main road and the suit cart track runs through Thalakulam. Therefore, considering the rival contentions between the parties, at the outset the appellants having laid the suit claiming absolute title to the suit cart track and also sought for the relief of declaration with reference to the same, it is for the appellants to establish that they have exclusive title to the suit cart track as put for the by them. However, it is found that as rightly determined by the first appellate Court, the appellants have failed to establish that they have any exclusive right, title and interest in the suit cart track. A perusal of the case projected by the appellants, both in O.S.No.463 of 1986 and O.S.No.430 of 1998, it is found that the appellants have no where stated as to on what basis they claim exclusive right, title and interest over the suit cart track. That apart, they have also not placed any acceptable and reliable title deeds as such for claiming absolute ownership over the suit cart track. All that they had done is to project

certain revenue records and based on the revenue records, it appears that they seek to obtain exclusive right over the suit cart track and even the partition deed relied upon by them dated 30.06.1986 does not confer any absolute right or title to the appellants as such over the suit cart track. It has not been explained on what legal basis they had included the suit property in the said partition deed. As rightly put forth, the said deed is not binding on the respondents. Therefore, it is seen that there is no valid material on the part of the appellants to uphold their case of any exclusive right over the suit cart track.

14. From the materials placed, it is seen that the suit cart track runs through Thalakulam, from Bhavani main road and reaches up to Vellithiruppur. Therefore, it is seen that the suit cart track being a well laid out cart track and been in use for a long period of time, it is found that the same are found to be reflected in the field and village maps as found from the documents placed by the respondents. If really, the suit cart track had not been existence from time immemorial and not a well laid out cart track, the same would not have been reflected in the field maps placed by the respondents.

15. It is further noted that the documents produced by the respondents as rightly found by the first appellate Court dated 29.08.1983 and 07.07.1931 would all go to show that the suit cart track had been in existence for a long period of time and accordingly, the parties, while conveying their respective properties in and around the suit cart track, had thought it fit and necessary to leave the suit cart track as such for enabling them to have access to their respective lands and accordingly, it is seen that in the above said sale deeds, the suit cart track had been reserved only for access to reach the lands of the respective parties and if really, the suit cart track had been the exclusive property of any person, necessary title deeds pointing to the same would have been placed in the matter. Even though the appellants would claim absolute right to the suit cart track, have not placed any valid title deed as such to establish they have absolute title to the suit cart track. That apart, as noted by the first appellate Court also, the partition deed marked as Ex.B3 also would go to show that the properties are described only as stating situated to the south of Thalakulam suit cart track. Therefore, it is found that as observed by the first appellate Court, if really, the suit cart track had been the exclusive property of the appellants, in Ex.B3, while describing the properties therein, it would have been mentioned as to the south of the suit cart track belonging to the appellants. However, there is no reference as such contained in Ex.B3.

16. In this matter, the Commissioner had been appointed and he had filed his report and plan and accordingly, it is seen that the lands of the appellants are situated to the north of the suit cart track and the lands of the respondents are situated to the south of the suit cart track and it is also noted that the width of the suit cart track is not uniform at various points as found by the appellate Court and from the Commissioner's report and plan, it could be seen that the suit cart track is the access for the adjoining land owners to reach their respective lands to Bhavani main road, while proceeding to Vellitiruppur via Thalakulam and therefore, it is found that no person including the appellants could claim any absolute right over the suit cart track.

17. That apart, as found by the Advocate Commissioner, it is found that there is a clear demarcation between the appellants' property and the suit cart track and accordingly, it is found that the Advocate Commissioner had noted in his report that live wire fence and also thorn fence were lying on the south of their lands dividing the suit cart track from their lands. Accordingly, it is held by the first appellate Court that if really, the appellants had any exclusive title to the suit cart track as such, there would have been no necessity for keeping any live wire fence or thorn fence between the lands of the appellants and the suit cart track. Therefore, this aspect of the matter also would go to establish that the appellants do not have any exclusive title to the suit cart track and also not having any exclusive possession and enjoyment of suit cart track. As already noted, inasmuch as the suit cart track is a well laid out cart track and been in existence from time immemorial, the same had come to be reflected also in the survey records projected by the respondents and accordingly, it is noted that the suit cart track had been used by the general public of Varadhanallur village and therefore, the appellants cannot claim any exclusive right to the suit cart track.

18. Another striking feature that is available on ground is that as noted by the Advocate Commissioner and as found by the first appellate Court, it is seen that the appellants' lands are situated one feet higher than the suit cart track and further, it is noted that the lands of the respondents are situated 2 feet lower than the suit cart track. Accordingly, the physical features obtaining in and around the suit cart track would also go to establish that inasmuch as the suit cart track had been reserved for the use of the general public and not to the exclusive use of the appellants, it is seen that the suit cart track is found to be at a lower level than the lands of the appellants and if really, the appellants had any exclusive right to the suit cart track, as determined by first appellate Court, both the lands of the appellants as well as the suit cart track

would have been at the same level and this aspect of the matter also would only disentitle the appellants to claim any exclusive right over the suit cart track.

19. In all, it is noted that though the appellants seek to claim the relief of declaration on the footing that the suit cart track absolutely belongs to them, when the above said case of the appellants is not having the support of any title deed or other acceptable materials and on the other hand, when the appellants seek to claim the said right only on the basis of the revenue records and accordingly, the revenue records placed by the appellants also not showing that the suit cart track had been exclusively allotted to the appellants or any exclusive right conferred on the appellants, it is found that the revenue records projected by the appellants also would not enable them to obtain the reliefs as claimed by them.

20. In the light of the above discussions, it is found that the trial Court, without appreciation of the materials placed on record in the right perspective, has proceeded to uphold the case of the appellants erroneously and accordingly, it is noted that the first appellate Court, on a correct appreciation of the materials placed on record, accordingly, finding that the suit cart track had been in existence from time immemorial and been in use for having access to the lands of the respective adjoining owners and been used by the public in general, it is seen that accordingly and rightly also set aside the judgment and decree of the trial Court and held that the suit cart track is the common property meant for general public. In this connection, it is seen that the respondents have taken the plea in this matter that the suit cart track has been used by the villagers of Varadhanallur village for having access from Bhavani main road to Vellithiruppur via Thalakulam. That being the position and the appellants being the suitors having failed to establish their case and on the other hand, the respondents having established with acceptable materials that the suit cart track has been in existence only for the use of the common public of Varadhanallur village, it is seen that there need not be any separate witness to be examined for the said purpose and the available materials do throw light on the said issue and accordingly, it is seen that the first appellate Court has held that it is a common cart track meant from the use of the general public. Further, the respondents in their pleas have only taken a stand that the suit cart track is also a necessary access to them for reaching their lands from Bhavani road and accordingly, they have also stated that on the ground of easement of necessity, they should be allowed to enjoy the suit cart track without any interference from the appellants. Accordingly, it is seen that the respondents have made necessary pleas in this matter and thus, being the position, the respondents need not

claim any declaratory relief of easement of necessity over the suit cart track as such and in this matter, it is found that there is no necessity on the part of the respondents to claim the relief of declaration for the use of the suit cart track on the ground of easement of necessity. The specific case of the respondents being that the suit cart track had been in existence from time immemorial and the documents placed by them also point to the same and as the existence of the suit cart track had been reflected even in the sale deed Ex.B2, which pertains to the year 1931 and accordingly, the suit cart track having been in existence for a long period of time and well laid out the cart track, it is seen that the same had been reflected in the field map, others records placed by the respondents and in such view of this matter, there is no need for the respondents to establish the revenue records projected by them by examining the survey officials and hence, it is seen that there is no error as such on the part of the first appellate Court in relying upon the survey records for upholding the case of the respondents that the suit cart track is only a common property meant for the general public. Accordingly, the substantial questions of law formulated for consideration in both the second appeals are answered against the appellants and in favour of the respondents.

21. In conclusion, both the second appeals are dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

mfa/sms

To

1. The Subordinate Judge, Bhavani, Erode district.
2. The Principal District Munsif, Bhavani, Erode District.

Copy to: The Section Officer,
VR Section, High Court, Madras.

+ 1 cc to MR. R. Selvakumar, Advocate Sr.85800

S.A.Nos.1169 & 1170 of 2001

SV(CO)

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