

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.06.2018
Pronounced on : 11.10.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1339 of 2001

1.Angamoopan
2.Murthy
3.Podian

... Appellants/Defendants 1 to 3

Vs.

1.Mariappan

...1st Respondent/Plaintiff

2.Appachi Moopan

...2nd Respondent/5th Defendant

3.Saraswathi

...3rd Respondent
LRs of deceased 4th Defendant

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 06.02.2001 on the file of the Principal District Court, Erode in A.S.No.174 of 1999 confirming the Judgment and Decree of the District Munsif-cum-Judicial Magistrate Court at Perundurai dated 28.04.1999 in O.S.No.611 of 1996.

For Appellants : M/s.Mythili Suresh
for Sarvabhauman Associates

For Respondents : M/s.S.Kathiravan
for M/s.Sunder Mohan for R1
Set exparte for R2 and R3

J U D G M E N T

This second appeal has been filed by the defendants 1 to 3 against the judgment and decree passed by the District Judge, Erode in A.S.No.174 of 1999 dated 06.02.2001 confirming the judgment and decree passed by the District Munsif-cum-Judicial Magistrate, Perundurai, in O.S.No.611 of 1996 dated 28.04.1999.

2. The first respondent herein has filed a suit in O.S.No.611 of 1996 on the file of the District Munsif-cum-Judicial Magistrate, Perundurai, to declare his right of using

the suit cart track, to grant permanent injunction restraining the defendants 1 to 3 from putting up any construction in the suit cart track and also interfering with his right to use the suit cart track and for mandatory injunction to remove the construction made by the defendants 1 to 3 in the suit cart track.

3. The learned District Munsif, by the judgment dated 28.04.1999, has decreed the suit as prayed for and granted two months time to remove the construction made in the suit cart track. Aggrieved by the same, the defendants 1 to 3 have filed an appeal in A.S.No.174 of 1999 on the file of the Principal District Judge, Erode. They also filed an application in I.A.No.459 of 2000 to appoint an Advocate Commissioner to make a local inspection and note down the physical features in and around the suit property. The learned Principal District Judge by the Judgment dated 06.02.2001 has dismissed the application in I.A.No.459 of 2000 and also dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the defendants 1 to 3 have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are, in brief, as follows:

a) The plaintiff and the fifth defendant are the sons of one Chennimooipan. Fourth defendant is the wife of the said Chennimooipan and mother of the plaintiff and the fifth defendant. First defendant is the cousin of the plaintiff. The defendants 2 and 3 are the sons of the first defendant.

b) Originally, the plaintiff's father Chennimooipan, the first defendant and a third party got shares in R.S.No.228/8, 9 and 10 of Seenapuram Village. An extent of 77 cents in R.S.No.228/9 was allotted to the plaintiff's father Chennimooipan in an oral partition took place in the year 1969 between the first defendant, Chennimooipan and the third party. After the said oral partition, the plaintiff's father and his family members have been in possession and enjoyment of the property situated in R.S.No.228/9. The first defendant was allotted the land situated in R.S.No.228/8. The owner of R.S.No.228/10 had sold his lands to various third parties. The first defendant had constructed a house on the northern portion of R.S.No.228/8 and the plaintiff's father had put up a cattleyard on the southern portion of his land in R.S.No.228/9.

c) The plaintiff's father has been enjoying a cart track with a breadth of 10 feet leading from Kunnathur main road through Veeranampalayam and on the southern portion of the first defendant's land in R.S.No.228/8. The said cart track has been enjoyed by the plaintiff's father and his family since 1969 openly, continuously without any interruption from any quarter.

So the plaintiff's family has acquired a right of easement over the said cart track by way of prescription. There is no other cart track or pathway to the plaintiff's land except the suit cart track and thereby the plaintiff has got right in the cart track by easement of necessity also. Subsequent to the death of plaintiff's father, the plaintiff and the defendants 4 and 5 have been using and enjoying the suit cart track without any interruption. But on 04.12.1996, the defendants 1 to 3 attempted to obliterate the suit cart track. Hence, the plaintiff has filed the suit for declaration and permanent injunction.

d) During pendency of the suit, the defendants 1 to 3 with an ulterior motive have put up a construction encroaching the suit cart track by 8 feet breadth and 45 feet length and hence, the plaint has been amended seeking mandatory injunction to remove the aforesaid objectionable portion of construction.

5. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 and 3 are, in brief, as follows:

The allegation that the plaintiff's father Chennimooan was allotted an extent of 77 cents in R.S.No.228/9 in the oral partition effected in the year 1969 is false. It is true that in the resurvey, the defendants 1 to 3 and others were allotted specific shares and separate sub-division numbers were given to the parties concerned. It is false to say that the plaintiff's father has been enjoying the cart track with the breadth of 10 feet leading from Kunnathur main road through Veeranampalayam natham and on the southern portion of the first defendant's land in R.S.No.228/8. There is no such cart track at any point of time. The allegations that the plaintiff's family acquired right of easement in respect of the said cart track by prescription and also easement of necessity are all false. The allegation that the defendants 1 to 3 have attempted to put up a construction in the suit cart track on 04.12.1996 is false because there was no cart track on the southern portion of R.S.No.228/8. The suit has become infructuous. As per the Commissioner's Report, the defendants 1 to 3 have already completed their house within the limit of their patta land. Therefore, the defendants 1 to 3 prayed to dismiss the above suit.

6. The averments made in the additional written statement filed by the first defendant and adopted by the defendants 1 to 3 are in brief as follows:

The relief of mandatory injunction is not maintainable as it is barred by limitation. The allegation that inspite of the plaintiff's resistance, the defendants 1 to 3 have put up construction is false. The defendants 1 to 3 have constructed the wall in their patta land and therefore, the defendants 1 to

3 prayed to dismiss the above suit.

7. Based on the aforesaid pleadings, the learned District Munsif-cum- Judicial Magistrate has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and one more witness was examined as PW2. Exs.A1 to A4 were marked as Exhibits on the side of the plaintiff. On the side of the defendants 1 to 3, the first defendant examined himself as DW1 and one more witness was examined as DW2. Exs.B1 and B2 were marked on the side of the defendants 1 to 3. The Advocate Commissioner was examined as CW1. His report and plan were marked as exhibits C1 and C2 respectively.

8. The learned District Munsif-cum-Judicial Magistrate, after considering the materials placed before her, found that the plaintiff is entitled for the relief of declaration and permanent injunction and also for the relief of mandatory injunction. Accordingly, she decreed the suit as prayed for and directed the defendants 1 to 3 to remove the objectionable portion of the construction within two months from the date of decree. Aggrieved by the same, the defendants 1 to 3 have filed an appeal in A.S.No.174 of 1999 on the file of the Principal District Judge, Erode. They also filed an application under Order 26 Rule 9 and under Section 151 CPC in I.A.No.459 of 2000 for appointment of an Advocate Commissioner to make a local inspection and note down the physical features in and around the suit property. The learned Principal District Judge, by the judgment dated 06.02.2001 has dismissed the application in I.A.No.459 of 2000 and also the appeal in A.S.No.174 of 1999 and thereby confirmed the judgment and decree passed by the trial court. Aggrieved by the same, the defendants 1 to 3 have filed the present second appeal.

9. This court at the time of admitting this second appeal has formulated the following substantial questions of law:

"1. When the first respondent himself admitted the existence of an alternative way to reach his land, whether the courts below are correct in law in granting the first respondent the right of the easement by necessity, overlooking the provisions of Section 13 of the Indian Easements Act, 1882?

2. When there is absolutely no evidence to show the existence of the alleged cart track or the first respondent's enjoyment of the same, whether the courts below are correct in law in holding that the first respondent is entitled to easementary right by prescription, overlooking the provisions of Section 15 of the Indian Easements Act, 1882?"

10. Heard Ms.Mythili Suresh for M/s.Sarvabhauman Associates and Mr.S.Kathiravan for M/s.Sunder Mohan, learned counsel appearing for R1.

11. Question Nos.1 and 2:

The learned counsel for the appellants/defendants 1 to 3 has submitted that the courts below failed to see that the first respondent failed to establish the existence of the alleged suit cart track. She further submitted that the courts below failed to consider that the plaintiff in his evidence, has admitted the existence of an alternative way to reach his land. She further submitted that the courts below failed to consider that in the Commissioner's Report and plan, it is not stated about the existence of suit cart track. She further submitted that the courts below failed to consider that the plaintiff has to succeed on the strength of his case and he cannot stand on the weakness of the case of the defendants 1 to 3 and therefore, she prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the plaintiff's suit.

12. The learned counsel for the first respondent, on the contrary, has contended that since the first defendant while examining himself as DW1 has admitted that the plaintiff is entitled to have only 2 feet pathway, it has to be presumed that the plaintiff is entitled to have a cart track over the suit property. He further submitted that the defendants 1 to 3 have not pleaded in their written statement that the plaintiff is having alternative cart track to reach his lands. He further submitted that in the Advocate Commissioner's report and plan also, it is not mentioned that the plaintiff is having any alternative cart track to reach his lands. He further submitted that the plaintiff has not admitted in his evidence that he is having alternative pathway to reach his lands.

13. He further submitted that the evidence of PW1 and PW2 would clearly show that as soon as the defendants 1 to 3 made an attempt to put up a construction obstructing the cart track, the plaintiff has filed a suit and after knowing the said fact, the defendants 1 to 3 have hurriedly put up the construction and taking into consideration of all the aforesaid facts, the trial court has rightly decreed the suit and the first appellate court also confirmed the same and in the said factual concurrent findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

14. According to the plaintiff, the lands situated in R.S.No.228/8, 9 and 10 of Seenapuram Village originally belonged to his father Chennimooan, first defendant and a third party.

His further case is that in the oral partition which took place in the year 1969, the property measuring about 77 cents situated in R.S.No.228/9 was allotted to the plaintiff's father Chennimooan; the property situated in R.S.No.228/8 was allotted to the first defendant and the property situated in R.S.No.228/10 was allotted to the third party. In the written statement, though the defendants 1 to 3 have denied the allegation that the plaintiff's father Chennimooan was allotted an extent of 77 cents in R.S.No.228/9 in the oral partition effected in the year 1969, in paragraph No.3 of the written statement, it was pleaded that it is true in the resurvey, the first defendant and others were allotted specific shares and separate sub-division numbers were given to the parties concerned. Further, the first defendant, while examining himself as DW1, has admitted in his cross examination that originally his land, plaintiff's land and Krishnasamy's land were in one unit and he purchased a common one-third share in the aforesaid lands and after his purchase, his land has been sub-divided as R.S.No.228/8. Since the lands situated in R.S.No.228/8, 9 and 10 originally belonged to a common ancestor, the plaintiff is entitled to have a cart track from the panchayat road to reach his lands.

15. As per the Commissioner's report and plan (Exs.C1 and C2), a cart track runs from the Kunnathur-Perundurai Road, towards north and the said cart track runs even beyond the lands of the defendants 1 to 3. The plaintiff's land is surrounded by the patta lands. On the western side, the land belonging to the defendants 1 to 3 is situated. A new building has been constructed by the defendants 1 to 3 by leaving 2 feet road. The DW1 has stated in his evidence that the plaintiff has to go to his land from the aforesaid north-south cart track through the said two feet pathway. Admittedly, the lands belonging to the plaintiff and the defendants 1 to 3 are agricultural lands. Unless carts, tractors, lorries etc., are being taken to the plaintiff's land, the plaintiff cannot enjoy his land. As already pointed out that the lands belonging to both parties originally belonged to a common ancestor. In such a case, the plaintiff would have used the lands of the defendants 1 to 3 for taking carts, tractors, etc., Since the defendants 1 to 3 have suddenly attempted to put up a construction obstructing the aforesaid cart track, the plaintiff was constrained to file a suit for declaration of his easementary rights in respect of the suit cart track and also for permanent injunction. Even after filing of the suit, the defendants 1 to 3 have not stopped their construction work. On the contrary, they have hurriedly put up a construction obstructing the cart track and hence the plaintiff has amended the plaint seeking the relief of mandatory injunction to remove the aforesaid objectionable portion of the construction.

16. The learned counsel for the appellants referring to the copy of the deposition of PW1 filed along with the typed set of papers contended that the PW1 has admitted the existence of an alternative pathway through Krishnamurthy's land. A perusal of the said copy of the deposition of PW1 shows that PW1 has admitted that he used to go to his land through Krishnamurthy's land, but the said statement is not found in the original deposition of PW1. On the contrary, the original deposition shows that he has stated that the said Krishnamurthy's land is situated on the east of his land and the said Krishnamurthy has to go to his land through an itteri. Therefore, the contention of the learned counsel for the appellants that the PW1 has admitted in his evidence about the existence of the alternative pathway cannot be accepted.

17. Taking into consideration the admission made by the DW1 that the plaintiff is entitled to use pathway which is running on the land of the defendants 1 to 3 and that the said pathway is only to a breadth of 2 feet and that the plaintiff could not take cattles, carts, etc., through the said pathway, the courts below have come to the conclusion that the plaintiff might have used the suit cart track for taking the carts, cattles to his lands from the date of oral partition i.e., from the year 1969. The courts below also came to the conclusion that the defendants 1 to 3 have suddenly attempted to put up a construction with a view to prevent the plaintiff from using the suit cart track and hence, the plaintiff was constrained to file a suit for declaration and injunction and even thereafter, the defendants 1 to 3 have hurriedly finished the construction and hence the defendants 1 to 3 are bound to remove the said objectionable portion of the construction. This court is of the view that in the aforesaid factual concurrent findings, this court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants.

18. In the result, the second appeal is dismissed. No costs.

gv

WEB COPY

Sd/-

Assistant Registrar (CS III)

//True Copy//

Sub Assistant Registrar

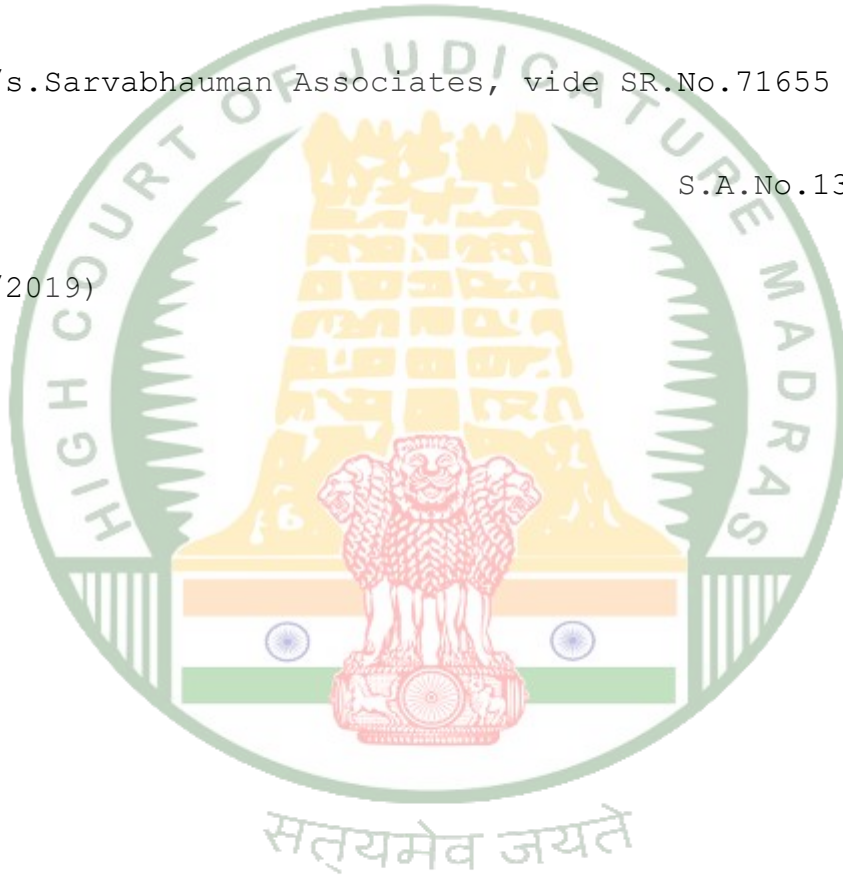
To

1. The Principal District Judge,
Erode.
2. The District Munsif-cum-Judicial Magistrate,
Perundurai
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.Sarvabhauman Associates, vide SR.No.71655

S.A.No.1339 of 2001

Kak(14/03/2019)



WEB COPY