

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1008 of 1998

1. K.Muthusamy Gounder
2. M.Thangaraj ... Appellants/Plaintiffs/Appellants

versus

1. L.Nachimuthu
2. M.Sundaram
3. S.Samiappan
4. V.Kolandasamy Gounder
5. P.Balachandran ... Respondents/Defendants/Respondent
(R4 and R5 remain ex parte before
the trial court)

Second Appeal filed under Section 100 of C.P.C. against the Judgment and Decree dated 01.09.1997 made in A.S.No.12 of 1995 on the file of the Principal District Judge (II Additional District Judge In-Charge), Erode, by confirming the Judgment and Decree dated 23.12.1994 made in O.S.No.792 of 1993 on the file of I Additional District Munsif, Erode.

For Appellants : Mr.R.Babu
for M/s.N.Manokaran
For R1 to R3 : No appearance

JUDGMENT

The un-successful plaintiffs, who lost the permanent injunction suit before the Courts below, have come forward with this second appeal.

2.The sum and substance of the plaint averments are as follows:

(i) The first plaintiff is the father of the second plaintiff. The defendants are the adjacent land owners of the plaintiffs. The suit property herein is the ancestral property belonging to the 1st plaintiff having obtained through a partition deed dated 26.02.1957. In the said partition deed, the suit property was allotted to him as one of the items in 'A' schedule property. Thereafter, the plaintiffs being the joint family members are in possession and enjoyment of the said

property without any interruption. The defendants 1 to 4 are the grandsons of one Sengodagounder and Velappagounder, who were the adjacent land owners of the northern side of the plaintiffs' land. The 4th defendant sold his part of the land to the 5th defendant. In between the suit property and the defendants' land, there is no common pathway. To reach the suit property, the plaintiffs are using the north-south cart track as shown in the plaint plan. The said cart track was originally an odai, but, due to drought condition, it was converted into a cart track. The defendants are using the east-west cart track on the northern side as shown in the plaint plan to reach their land.

(ii) The plaintiffs and the defendants are using the above said cart track respectively. On the southern side of the suit property, there is a newly formed Housing Unit, which is called as PKN Nagar. While so, the defendants proposed to sell their lands by dividing the same as house sites. Due to the non-availability of the well beaten cart track, the purchasers offered a very low price. Hence, they approached the plaintiffs and demanded them to allow the defendants to form a 30 feet cart track in the middle of the suit property to reach their land from southern side of the housing unit. The plaintiffs rejected their offer, since their offer is unreasonable one. Having aggrieved by the same, the defendants started to give trouble to the plaintiffs' peaceful possession and enjoyment of the suit property. On 22.05.1993, the defendants with rowdy elements tried to form a cart track in the middle of the suit property, but, their attempt was thwarted by the plaintiffs with the help of their neighbours. Hence, the plaintiffs filed a suit for permanent injunction restraining the defendants, their men, agents from forming a cart track in the middle of the suit schedule property or in any way interfering in the plaintiffs' peaceful possession and enjoyment of the suit property.

3. The sum and substance of the written statement filed by the 1st defendant is as follows:

(i) The defendants denied the averments contained in the plaint, stating that the plaintiffs suppressed the material facts with ulterior motive. The cart track as shown in the plaint plan on the northern side only belongs to Valappa Gounder and Mosuvana Gounder. After the death of Velappa Gounder, his son Subramaniam, grandsons Anbalagan and Tamilarasan are entitled to the said Cart track along with Mosuvana Gounder. Originally, the suit property belongs to the defendants and the land on the south of the suit property which is now formed as P.K.N.Nagar, totalling 8.39 acres in S.F.No.42 corresponding R.S.No.44 belonged to one Velappa Gounder. The said Velappa Gounder had two sons namely Perianna Gounder and Muthusamy Gounder. After the death of the said Velappa Gounder, his elder son Muthuswamy Gounder has been enjoying the northern half, i.e. the properties that now belongs to the defendants and

the plaintiffs and his brother Perianna Gounder have been enjoying the southern half (now P.K.N. Nagar) after leaving a way to take cart, cattle and others to the northern portion of the land.

(ii) In the year 1930, the said Muthusamy Gounder sold his share 4.19 $\frac{1}{2}$ acres to Muthu Gounder and 5 others, with Mamool cart track, which runs through Perianna Gounder's land. The grandfather of the Sengoda Gounder purchased 1.05 acre in common out of 4.19 $\frac{1}{2}$ acres with Mamool cart track and same is in possession and enjoyment of the first defendant. The said Komara Gounder's share of 1.05 acre devolved on his grandson Kolandaswamy, the 4th defendant herein. The grandfather of 1st plaintiff purchased 2.10 acres in common out of 4.19 acres from the vendees of Muthuswamy Gounder by name Kolandayana Gounder and Palani Gounder. Therefore, from 1930 onwards, the said Muthusamy Gounder sold his share to the vendees of Muthusamy Gounder. The defendants have been enjoying the cart track which runs through the said property and PKN Nagar from east west itteri upto his land comprising about 1.05 acres purchased in common out of 4.19 acres.

(iii) The plaintiffs with ulterior motive to purchase the defendants' share and others to plough the entire land that belong to them. The defendant and his predecessors-in-title are using and enjoying the cart track which runs through the suit property peacefully, uninterruptedly from 1930 onwards. Further, except the cart track which runs through the suit property, there is no other way to reach the defendants land. Therefore, the defendants are entitled to the cart track as easement by prescription.

4. Before the trial Court, on behalf of the plaintiffs, the first plaintiff examined himself as PW1 and one Chinnasamy was examined as PW2 and Exs. P1 to P6 were marked. On behalf of the defendants, the first defendant examined himself as DW1 and one Muthusamy was examined as DW2 and Exs. D1 to D4 were marked. During the course of trial, an Advocate Commissioner was appointed, whose report and sketch were marked as Exs. C1 and C2. The trial Court, after hearing both sides and on appreciation of the documentary evidence, dismissed the suit. Aggrieved by the same, the plaintiffs filed an appeal before the lower Appellate Court. The lower Appellate Court also dismissed the appeal and confirmed the Judgment and Decree passed by the lower Court, against which, the present second appeal has been filed by the plaintiffs.

5. At the time of admission of the second appeal, this Court framed the following substantial question of law:

"Whether the Judgment and Decree of the lower appellate Court are sustainable in law as the lower appellate court has not applied the

correct proposition of law applicable to the facts of the case and not appreciated the entire evidence available on record."

6. The learned counsel appearing for the appellants would submit that the suit schedule property belongs to the plaintiffs and the same was purchased by the first plaintiff's ancestors and it is a joint family property. The defendants are the adjacent land owners of the northern side of suit property. There is no common pathway to reach the suit property. The plaintiffs are using the north-south cart track, which initially was odai and due to the drought condition, it was converted into the cart track to reach the suit property as there was no pathway available therein. Therefore, the defendants decided to form a 30 feet cart track in the middle of the suit property, for which, they approached the plaintiffs to sale away a part of their land, but, they refused to part of their land. Aggrieved by the same, the plaintiffs were interfered by the defendants with the peaceful possession and enjoyment of the suit property. Hence, the plaintiffs filed the suit for permanent injunction against the defendants. However, the Courts below, without considering the materials filed by the plaintiffs, arrived at an erroneous conclusion and rejected the relief as against the plaintiffs. Aggrieved by the same, the present second appeal has been filed by the plaintiffs.

7. Heard the learned counsel appearing for the plaintiffs. The respondents 4 and 5 remained ex parte before the lower court. On behalf of the other respondents, no one appeared before this Court. Hence, this Court is constrained to decide the substantial question of law based upon the materials available herein.

8. It is seen from the records that the trial Court as well as the first appellate Court, in order to appreciate the physical feature of the suit property, relied on the Sketch, Ex.C2 filed by the Advocate Commissioner and concluded that the property which is in possession of the plaintiff and the defendant are situated in a single plot in P.K.N. Nagar. It was further concluded that originally suit property was owned by one Velappa Gounder and even at that time, there was no pathway in existence on the Southern and Northern side of the said land, as contended by the plaintiff and there was only one pathway in existence. For coming to such conclusion, the trial court as well as the first appellate Court relied on the evidence of DW2 and rendered a finding that DW2 is the great grand son of Vellappa Gounder. Vellappa Gounder had two sons namely Muthusamy Gounder and Perianna Gounder. DW2 is the grand son of Perianna Gounder. DW2 has deposed that from Southern side to Northern side of the suit property which is in possession of the

plaintiffs and the property of the defendants, there was a pathway which was used even by Muthusamy Gounder. It is this pathway which was used both by the plaintiffs and the defendants for a long time and there was no separate pathway in existence for the ingress and egress of the plaintiffs and defendants. Therefore, both the trial court and the first appellate Court rejected the contention of the plaintiff that there was a cart track on the Northern side of the suit property running from East to West. The trial court also further rendered a finding that even though the plaintiff pleaded that there is a fencing in between the suit property and the property of the defendants running from East to West, it was falsified by the deposition of DW2, Village Administrative Officer as well as the sketch drawn by the Advocate Commissioner under Ex.C2. The trial court as well as the first appellate Court also pointed out the discrepancy in the deposition of the first plaintiff, as PW1 with respect to the existence of the cart track in his chief examination. The courts below also pointed out that the deposition of PW1 is contrary to Exs. C1 and C2 filed by the Advocate Commissioner. The relevant portion of the deposition of PW1 reads as follows:-

"..... என் நிலத்திற்கு தெற்கு வடக்காக பஞ்சாயத்து ரோடு வருகிறது. பெருந்துறை ரோட்டில் இருந்து என் காட்டு வரை ரோடு வருகிறது. அது PKN குயபயச ஒட்டி போகிறது. இந்த ரோடு ஆனது கிழ மேலாக வந்து வளைந்து தென் வடலாக செல்கிறது. என் காட்டிற்கு தென் வடல் பஞ்சாயத்து ரோட்டில் இருந்து செல்வோம். பிரதிவாதிகள் அவர்கள் காட்டிற்கு தென்வடல் பஞ்சாயத்து ரோட்டு வழியாக வடக்காக சென்று மொகவண்ணக்கவண்டர் வீடு வரை வண்டிப்பாதை சென்று பிறகு அங்கு இருந்து ஒத்தை அடி பாதையாக 350 அடி செல்லுகிறது. அந்த பக்கம் பாதையே இல்லை என்று சொன்னால் தவறு....."

9. Above all, the courts below pointed out that the suit property as well as the property of the defendants were the lands of one and the same person namely Velappa Gounder and later a portion of the property was sold in favour of third parties by his son Muthusamy Gounder. Therefore, the courts below concluded that the subsequent purchasers of the land were using the cart track which is in existence in the suit property owned by the plaintiff and such pathway is being used for a long time. Thus, it is evident that the plaintiffs themselves have admitted that there was a pathway from the panchayat road upto the defendants' land. In such view of the matter, it can safely be concluded that the suit cart track is being used by the defendants for a long time which serves as easement to the defendants. In such view of the matter, this Court is of the view that the Courts below have extensively appreciated the oral and documentary evidence made available to come to a correct

conclusion that the defendants cannot be restrained from using the suit cart track, which serves as an ingress and egress to and from the lands owned by them in the suit property. I do not find any reason to interfere with such a factual findings rendered by the courts below. Accordingly, the substantial questions of law are answered against the appellants.

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

Sd/-
Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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TO

1. THE PRINCIPAL DISTRICT JUDGE,
(II ADDITIONAL DISTRICT JUDGE IN CHARGE),
ERODE.

2. THE I ADDITIONAL DISTRICT MUNSIF,
ERODE.

3. THE SECTION OFFICER, V.R. SECTION,
HIGH COURT, MADRAS. (2 COPIES)

S.A.No.1008 of 1998

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TR(20/04/2018)

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