

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.10.2018

PRONOUNCED ON : 29.10.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.560 of 2015

1. A.Kathirvel
2. K.Thilaikarasi ...Appellants/Defendants.

Vs.

1. C.Thiagarajan
2. C.Iyyanar ...Respondents/Plaintiffs.

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.02.2014 passed in A.S.No.23 of 2013 on the file of the principal subordinate Judge, Salem, confirming the judgment and decree dated 27.09.2012 passed in O.S.No.508 of 2008 on the file of the II Additional District Munsif, Salem.

For Appellants : Mr.S.Kalyanaraman
For Respondents : Mr.S.K.Raghunathan, Senior Counsel
for Mr.S.Kaithamalai Kumaran

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 21.02.2014 passed in A.S.No.23 of 2013 on the file of the principal subordinate Court, Salem, confirming the judgment and decree dated 27.09.2012 passed in O.S.No.508 of 2008 on the file of the II Additional District Munsif Court, Salem.

2. The second appeal has been admitted on the following substantial question of law.

"a) Whether the suit for bare injunction in respect of the suit cart track is maintainable in the absence of the relief seeking for declaration of the title over such cart track especially when the defendants in their statement disputed the claim of the plaintiff and claim the suit cart track as their exclusive property? "

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The suit has been laid by the plaintiffs for the relief of permanent injunction in respect of the cart track as described in the plaint restraining the defendants from denying the plaintiffs right of the usage of the same and it is stated that the cart track branches out from Veerapandi road towards south and runs through survey Nos. 79 and 78 shown as ABCD in the plaint plan of a width of 15 feet leading to Annamalai patty. On a reading of the plaint averments, as rightly put forth by the defendants, the plaintiffs have not made it clear as to on what basis, they seek the right in respect of the usage of the cart track in question. At one place, the plaintiffs would aver that the defendants and the other land owners are using the cart track in question as a public pathway. Further, the plaintiffs would also aver that the suit cart track has been in their exclusive possession from ancient time and it is the plaintiffs' ancestors, who had formed the suit cart track and thereby the plaintiffs are having independent right in respect of the same. In addition to that, the plaintiff would also aver that they and their forefathers have been using the suit cart track uninterruptedly for more than the statutory period and thereby they have acquired the prescriptive right of easement in the usage of the same. Therefore, as above pointed out, when the plaintiffs have claimed various modes of rights in respect of the suit cart track, at the first instance claiming the same as their private cart track and that they have independent right and inconsistently later pleading that they have prescriptive easementary right in respect of the same on account of uninterrupted usage for more than statutory period and would also at one place aver that the defendants and others had been using the suit cart track as a public pathway. It is thus found that the plaintiffs are not sure as to the nature of the right they seek to enforce in respect of the suit cart track and accordingly they are unable to present a clear and consistent picture as to how they claim the right in respect of the suit cart track. When the abovesaid pleas projected in the plaint by the plaintiffs for claiming the right in the suit cart track are found to be mutually contradictory and inconsistent, as rightly argued, it is evident that the plaintiffs are not sure as to the nature of the right they seek to enforce in respect of the suit cart track. Accordingly, as rightly put forth, conveniently, the plaintiffs had not sought for the relief of declaration in respect of the suit cart track as to the nature of the right they seek to enforce with reference to the same. If according to the plaintiffs, the suit cart track is the public pathway and the defendants are obstructing their usage of the same, they should have sought for the necessary declaration pertaining to the same. If according to the plaintiffs, the suit cart track is their exclusive cart track and it is only they who are

exercising the independent right and that the defendants have no manner of right in respect of the same and despite the same the defendants are interfering with their right unlawfully, the plaintiffs should have sought for the necessary relief of declaration concerning the same. If according to the plaintiffs, they are exercising only the easementary right in respect of the suit cart track and the same had been in their usage for more than the statutory period and thereby, they had perfected their right to the same as per law and despite the abovesaid position, the defendants are disturbing their enjoyment of the same, the plaintiffs should have claimed the necessary relief of declaration of easementary right to which they are entitled to. Further, if according to the plaintiffs, the suit cart track is the only mode of access for reaching their lands and there is no other access to have ingress into or egress from their lands, the necessary relief of easement by necessity should have been prayed for by the plaintiffs in support of their case. However, the plaintiff had not prayed for any declaration of title in respect of the suit cart track and they have laid the suit simplicitor for the relief of permanent injunction. Even in the plaint, the plaintiffs would aver that during the first week of January 2007, the defendants started denying the plaintiff's right of usage of the suit cart track with false proclamations and thereby attempted to prevent the plaintiff from using the same by using force and on 20.09.2007 the plaintiffs had given a police complaint with reference to the same. In such view of the matter, when the plaintiffs are put in notice even prior to the institution of the suit that the defendants had been denying their right of usage of the suit cart track, while instituting the suit, as rightly put forth, the plaintiffs should have endeavored to seek the necessary relief of declaration concerning the same and despite the above position, the plaintiff's having not sought for the relief of declaration of their alleged right in the suit cart track, on that score alone, it is found that the suit laid by the plaintiff is not maintainable.

5. In addition to that, the defendants in their written statement had clearly disputed the right and entitlement of the plaintiffs to the usage of the suit cart track in all aspects as averred in the plaint and though the defendants have admitted that the cart track is in existence in survey No.79 and 78, according to them, the said cart track has been formed only by their predecessors in interest for their use and enjoyment and usage of others as detailed in the written statement and plaintiffs are not entitled to use the same in any manner as the plaintiffs are having other pathway / access on the eastern side of their lands and in such view of the matter, contended that the plaintiffs have no cause of action to institute the suit and therefore the suit is liable to be dismissed.

6. Despite the above pleas put forth by the defendants in the written statement, even thereafter, the plaintiffs had not chosen to amend the plaint seeking the relief of declaration as to the nature of the right which they seek to enforce in respect of the suit cart track. As rightly argued, when the defendants have thrown a stout challenge to the entitlement or the right of the plaintiffs in the usage of the cart track and the plaintiffs are also aware of the same even prior to the institution of the suit, atleast, after knowing the defence version from the averments contained in the written statement, the plaintiffs should have taken appropriate steps to amend the plaint and include the necessary relief of declaration for enforcing their nature of right in the usage of the suit cart track. The plaintiff having failed to amend the plaint seeking the relief of declaration of their alleged title to the suit cart track, it is seen that the plaintiffs' suit should fail on that ground.

7. From the evidence of the fourth plaintiff examined as PW1 and the materials placed on record, it is seen that the plaintiffs lands are situated in survey No.93 and the defendants lands are in survey No.94 and the defendants lands are situated to the south of the plaintiffs land. Now, as per the evidence of PW1, in the partition deed marked as Ex.B1, the boundary of the lands in survey No.93/3 is shown to be the east of north-south iteri and further also admitted that none of their documents depicted any right of pathway to them in survey No. 78 and 79 and further also admitted that at present they are having access to their lands through the ridge portion and further admitted that in the photographs shown to him, adjacent to the compound wall of KPR mill, there is a pathway and the said pathway runs from Veerapandi road and therefore from the abovesaid evidence of PW1, when it is found that the plaintiffs had not been conferred any right in respect of the pathway lying in survey No. 78 and 79 in any of their documents and on the other hand, when the plaintiffs have other access to reach their lands as admitted by PW1 and when the plaintiffs have failed to establish or prayed for the necessary reliefs as regards the alleged nature of the right in respect of the suit cart track and when it is found that the suit cart track does not form part of the lands belonging to the plaintiffs for entitling the plaintiffs to use the same as a matter of right, as no reference is made pointing to the same in the documents projects by the plaintiffs, in such view of the matter, it is found that PW1's evidence would be sufficient to non suit the plaintiffs' from claiming any right in respect of the suit cart track.

8. Further, PW2, examined on behalf of the plaintiffs, would admit that adjacent to KPR mill, there is a road proceeding to Annamalai patty and the said road is the panchayat road and both the plaintiffs and the defendants are using the said road for their access. Thus, it is seen from the evidence of PW2 that the plaintiffs are having other access to

reach their lands and for reaching Annamalai Paaty and in such view of the matter, the case of the plaintiffs that they are having the right in respect of the pathway lying in survey No.78 and 79, without establishing the nature of the said right in the manner known to law, by merely claiming the bare relief of permanent injunction, is found to be unacceptable.

9. The Village Administrative Officer examined as PW3 would claim at the first instance that the suit cart track runs in the poramboku land, however, during the course of cross examination, he has admitted that the suit cart track runs in survey No.78 and 79 and he does not know to whom the said survey number belongs to and also admitted that the suit cart track runs both in the poramboku land as well as in the patta land and such being the evidence of PW3 and the documents projected in the matter such as FMBs do not point out that the suit cart track runs exclusively in the poramboku land and on the other hand found running in the patta land and when the plaintiffs have not shown their entitlement or right in using the suit cart track as such, as above discussed, it is found that the evidence of PW3 would be of no use to sustain the plaintiffs' case.

10. No doubt, the defendants have admitted the existence of the cart track in survey No.78 and 79 as above noted, however, the defendants have pleaded that the plaintiffs have other access to reach their lands and the same has also been admitted by PW1 and PW2 as pointed above. On a reading of the documents projected by the defendants, it is seen that the pathway lying in survey No. 78 and 79 is shown to be the access for the defendants and the persons claiming the right through them and in such view of the matter, the above recitals cannot be taken advantage by the plaintiff to claim that they also have right in using the cart track running through survey No. 78 and 79 and that the defendants are not entitled to obstruct the same. When as per the admitted case of the plaintiff, as spoken to by PW1, when none of their documents show their entitlement to use the cart track passing through survey No.78 and 79 and when the plaintiffs are found to be having other access to reach their lands and the plaintiffs have not come out with a clear case as to the nature of the right they seek to enforce in respect of the suit cart track and despite the defendants' stout denial to the plaintiffs right of usage of the cart track even prior to the institution of the suit and also by way of the written statement, the plaintiffs having not sought for the relief of declaration of the nature of the right they seek to enforce in respect of the suit cart track, merely from the fact that the cart tract is found to be running in survey No. 78 and 79 and the same having been admitted by the defendants, that by itself, would not, entitle the plaintiffs to maintain their suit simplicitor for the relief of permanent injunction, more particularly, as above discussed, when the materials placed on record do not show the legal entitlement of the plaintiffs to

use the suit cart track. Other than taking advantage of the pleas of the defendants that the cart track is running in survey No. 78 and 79 and when there is no clear cut evidence on the part of the plaintiffs that the cart track in question runs in entirety through the Government poramboke lands, the courts below are found to have not appreciated the plaintiffs' case in the proper perspective both factually as well as legally and thereby found to have accepted the plaintiffs' case without considering the defence version in the correct angle and in such view of the matter, as rightly contended by the defendants' counsel, the suit laid by the plaintiff for bare injunction simplicitor without seeking the relief of declaration of title for enforcing their alleged nature of right in the suit cart track despite the denial of their alleged right by the defendants in the written statement as well as even prior to the institution of the suit as above pointed out, on that score alone, when it is seen that the plaintiffs' suit is not legally sustainable, the substantial question of law formulated in this second appeal is accordingly answered against the plaintiffs and in favour of the defendants.

11. For the reasons aforesaid, the judgment and decree dated 21.02.2014 passed in A.S.No.23 of 2013 on the file of the principal subordinate Court, Salem, confirming the judgment and decree dated 27.09.2012 passed in O.S.No.508 of 2008 on the file of the II Additional District Munsif Court, Salem, are set aside and resultantly the suit laid by the plaintiff in O.S.No.508 of 2008 is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Principal subordinate Judge, Salem,
2. The II Additional District Munsif, Salem,
3. The Section Officer, V.R.Section,
High Court, Madras.

+ 1 CC to Mr.S.Kalyanaraman, Advocate SR NO 73777
+ 1 CC to Mr.S.Kaithamalai Kumaran, Advocate SR NO 73793

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KJI [CO]
SSM/30.11.2018