

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :21 .08.2018

PRONOUNCED ON:11.09.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.343 of 2015

and

M.P.No.1 of 2015

1. Kaliappa Gounder

2.Subramani

3.Palanisamy

4.Thangavel

5.Venkatachalam ...Appellants/Defendants

Vs.

M.Velusamy ... Respondent/Plaintiff

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 26.03.2014 made in A.S.No.10 of 2013 on the file of the Subordinate Court, Perundurai, reversing the judgment and decree dated 19.08.2013 made in O.S.No.100 of 2008 on the file of District Munsif-cum-Judicial Magistrate, Perundurai.

For Appellants : Mr.S.Kaithamalai Kumaran

For Respondent: Mr.M.Guruprasad

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and Decree dated 26.03.2014 passed in A.S.No.10 of 2013 on the file of the Subordinate Court, Perundurai, reversing the judgment and decree dated 19.08.2013 passed in O.S.No.100 of 2008 on the file of District Munsif-cum-Judicial Magistrate, Perundurai.

2. The Second Appeal has been admitted on the following substantial questions of law.

(1) Whether the lower appellate court is justified in reversing the judgment of the lower court by placing entire burden on the defendants to prove their case without following the mandatory principle that the plaintiff has to succeed on his

own pleadings and evidence and not on the weakness of the defendants' case?

(2) Whether the lower appellate court is justified in decreeing the suit without considering the fact that the Advocate Commissioner's report and plan would establish presence of an alternate cart track, which had been used by the plaintiff?

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 plaintiff has laid the suit against the defendants for the reliefs of declaration and permanent injunction in respect of the suit cart track. Now, according to the plaintiff's case in brief is that he owns the property lying in R.S.No.99 on the strength of the sale deeds dated 25.09.1970 and 14.09.1989, which documents had come to be marked as Exs.A1 to A3 and further according to him, the defendants are owning land properties in R.S.No.95 and it is also stated that the third parties own land in R.S.Nos.97 and 98. Now, according to the plaintiff, the suit cart track runs in between R.S.Nos.97, 98 and 99 and R.S.No.95 and it is stated accordingly that, the suit cart track has been in the enjoyment of the plaintiff and his predecessors in title and further, it is stated that except the suit track, the plaintiff has no other access to reach the land in R.S.No.99 and it is the case of the plaintiff that the defendants on account of enmity, had attempted to obliterate the suit cart track with the use of JCB machine and in that end, preventing the plaintiff from using the said cart track and accordingly, it is stated that the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5. The defendants would resist the plaintiff's suit by contending that they own land in R.S.No.95 situated to the south of R.S.Nos.98 and 99 and it is their case that no track is in existence between the land of the defendants and the lands comprised in R.S.Nos.98 and 99 and no cart track exists between the abovesaid survey numbers as projected in the plaint and accordingly, it is contended by the defendants that it is false to state that the plaintiff and his predecessors in interest, had been using the cart track over a long period of time and further according the defendants, the plaintiff is having a pucca access through the road facilities on the northern side of his lands and the plaintiff have been using the said roads as access to his property and therefore, according to the defendants, with a view to create the cart track in the land of the defendants, the plaintiff has come forward with the present suit containing false allegations and hence the suit is liable

to be dismissed.

6. Based on the materials placed on record and on an appreciation of the same, the trial court was pleased to dismiss the plaintiff's suit. However, the first appellate court has found acceptance with the plaintiff's case and thereby decreed the suit in favour of the plaintiff. Impugning the same, the present Second Appeal has been laid.

7. The plaintiff has laid the suit claiming the relief of declaration in respect of the suit cart track said to be lying in between R.S.Nos.97,98 and 99 and the land of the defendants lying in R.S.No.95. However, the plaintiff has not clearly spelt out as to the nature of the right, he seeks to enforce in respect of the suit cart track. It is not made clear as to whether the plaintiff is claiming any absolute right over the suit cart track or easementary right over the suit cart track and if easementary right, the nature of the easementary right he seeks to enforce in respect of the suit property. Thus, it is found that the plaintiff is not clear about the nature of the right he seeks for in respect of the suit cart track. However, during the course of arguments, the plaintiff's counsel would contend that the plaintiff is seeking the right over the suit cart track by way of grant. Accordingly, it is for the plaintiff to establish that the right had been conferred on him and his predecessors in interest in respect of the suit cart track, by way of grant as contended. In this connection, as above noted, the plaintiff relied upon Exs.A1 to A3 sale deeds for claiming title to the lands in R.S.No.99 and as rightly found by the trial court, when according to the plaintiff, the suit cart track runs in between the lands in R.S.Nos.97, 98 and 99 and the land in R.S.No.95, as rightly found by the trial court, the plaintiff having laid the suit claiming the relief of declaration in respect of the suit cart track, the plaintiff should have endeavored to implead the owners of the lands comprised in R.S.Nos.97 and 98 as parties to the suit. However, the plaintiff has not chosen to implead the owners of the abovesaid survey numbers and according to the plaintiff, inasmuch as the abovesaid land owners had not objected the plaintiff's claim of right over the suit cart track and in view of the same, they are not required to be added as parties to the suit. However, as regards the abovesaid claim of the plaintiff, there is no acceptable material placed on record. When the suit has come to be laid for the relief of declaration also and, it is the specific case of the plaintiff that the suit cart track lies on the southern end of Rs.S.Nos.97,98 and 99 and the northern end of R.S.No.95, for a complete adjudication of plaintiff's claim of title to the suit cart track, as rightly determined by the trial court, all the land owners abutting the said cart track should have been made as parties for the purpose

for effective adjudication of the claim projected by the plaintiff in respect of the suit cart track and thus, it is found that the trial court has rightly determined that the plaintiff's suit has to fail on the failure of impleading the land owners of R.S.Nos.97 and 98.

8. Furthermore, when according to the plaintiff, he seeks easementary right in respect of the suit cart track by way of grant, however, when under Exs.A1 and A2, the properties conveyed by way of the same has been described excluding the cart track lying on the southern side, it is found that the plaintiff's claim of easementary right by way of grant in respect of the suit cart track based on Exs.A1 and A2 cannot be sustained. The plaintiff has not been granted any right over the suit cart track under Exs.A1 and A2 and on the other hand, only excluding the suit cart track, the land had been conveyed under Exs.A1 and A2 and in such view of the matter, Exs.A1 and A2 would not in any manner be useful to sustain the plaintiff's claim of easementary right by way of grant over the suit cart track. Ex.A3 refers only to the Mamool pathway and when the abovesaid reference of Mamool pathway is not established to be referring to the suit cart track, particularly, the suit cart track as mentioned in the plaint, the trial court rightly did not place reliance upon Ex.A3 for upholding the plaintiff's claim of right over the suit cart track. Thus, it is seen that Exs.A1 to A3 would not be useful to serve the plaintiff's case in any manner, particularly, for claiming the right of easement by way of grant in respect of the suit cart track.

9. In this matter, the Advocate Commissioner had inspected the suit cart track and filed his report and plan marked as Exs.C1 and C2. It could be seen from the Commissioner's report and plan, the existence of the suit cart track in between the abovesaid properties. However, on that score alone, we cannot conclude that the plaintiff's has secured easementary right by way of grant in respect of the suit cart track as put forth by him. Furthermore, on a reading of the Commissioner's report and plan, it is found that he had measured the suit property with the assistance of the surveyor and accordingly, there is a clear mentioning about 16 ft wide pathway in existence on the northern side of the plaintiff's land and accordingly, when the plaintiff has access to his property through the pathway on the northern side measuring 16 ft in width and the plaintiff has failed to establish his claim of easementary right by way of grant in respect of the suit cart track and on the other hand, his sale deeds had been executed only excluding the suit cart track on the southern side, thus, it is found that absolutely, there is no material to uphold the plaintiff's claim of easementary right to the suit cart track. Similarly, the plaintiff also cannot project the easementary right by way of

necessity in respect of the suit cart track as he is having access to his lands on the northern side as noted by the Advocate Commissioner.

10. The position being above, it is seen that the plaintiff having come forward with the suit for the reliefs of declaration and permanent injunction should place acceptable and reliable materials to sustain his case. Though the defendants would dispute the existence of cart track as such, however the materials placed on record, go to show the existence of cart track. However, the first appellate court seem to have accepted the plaintiff's case based on the failure of the defendants to establish the non-existence of the suit cart track and furthermore, the first appellate court by pointing out that the defendants had failed to establish their title to their property, on that basis proceeded to have upheld the plaintiff's case. However, when the suit has come to laid by the plaintiff on a particular set of facts, for claiming the reliefs as prayed for and when the abovesaid case of the plaintiff has been resisted by the defendants in toto, it is for the plaintiff to establish his case by placing acceptable and reliable materials. The plaintiff cannot be allowed to pick holes in the defence version and thereby endeavor to succeed in his case. The first appellate court forgetting the abovesaid basic principle is found to have decreed the suit in favour of the plaintiff on the premise that the defendants have failed to establish their defence and thereby picking holes in the defence version, had accepted the plaintiff's case. However, the abovesaid approach of the first appellate court cannot be sustained in the eyes of law. When as seen from the Commissioner's report and plan, the alternative pathway is available to the plaintiff to have access to his lands and when the plaintiff has miserably failed to establish his alleged right over the suit cart track, moreover, the nature of the right, whether absolute right or easementary right, at any angle, the plaintiff having failed to establish that he has any semblance of right to have access through the suit cart track and as above noted, the plaintiff having failed to implead the owners of the land abutting the suit track, who are found to be proper necessary parties, in all, it is seen that the first appellate court without considering the above aspects of the matter in the right perceptive, proceeded to have erroneously set aside the judgment and decree of the trial court and in such view of the matter, the reasonings and conclusions of the first appellate court for accepting the plaintiff's case cannot be sustained further and are liable to to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

11.In conclusion, the judgment and Decree dated 26.03.2014 passed in A.S.No.10 of 2013 on the file of the Subordinate Court, Perundurai are set aside and the judgment and decree dated 19.08.2013 passed in O.S.No.100 of 2008 on the file of District Munsif-cum-Judicial Magistrate, Perundurai are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Court, Perundurai.

2.The District Munsif-cum-Judicial Magistrate, Perundurai.

Copy to

The Section Officer,
VR Section,
High Court.

+1cc to Mr.M.Guruprasad, Advocate SR.NO.63881

+1cc to M/s.S.KaithamalaiKumaran, Advocate SR.NO.62914

SJ(CO)

sm:10.10.2018

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