

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 23.04.2018****PRONOUNCED ON : 04.06.2018****CORAM****THE HONOURABLE MR.JUSTICE T.RAVINDRAN****S.A.No.1521 of 2004**1.Ramasamy
2.Ramanathan

...

Appellants

Vs.

Lakshmi @ Rajammal

...

Respondent

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 29.04.2003 passed in A.S.No.116 of 2002 on the file of the Subordinate Court, Bhavani, reversing the Judgment and Decree dated 10.10.2002 passed in O.S.No.49 of 1999 on the file of the Principal District Munsif Court, Bhavani.

For Appellants : Mr.N.Manokaran

For Respondent : Mrs.P.Saritha
for Mr.D.Sivakumar**JUDGMENT**

This second appeal is directed against the Judgement and Decree dated 29.04.2003 passed in A.S.No.116 of 2002 on the file of the Subordinate Court, Bhavani, reversing the Judgment and Decree dated 10.10.2002 passed in O.S.No.49 of 1999 on the file of the Principal District Munsif Court, Bhavani.

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

"(i) Whether a claim based on adverse possession and easementary right based on necessity can go together in the eye of law?"

(ii). In the absence of any pleading and proof of a right to use the passage based on adverse possession, has not the lower appellate Court committed an error of law in granting such a right?"

3. Considering the scope of the issue involved in this second appeal lying in a narrow compass, it is unnecessary to discuss in detail about the case of the parties at length.

4. The suit has been laid by the plaintiff in respect of the cart track and it is found that the plaintiff has sought for declaration in respect of the suit cart track by way of easement of necessity and the consequential relief of permanent injunction as regards the same.

5. The defendants contested the plaintiff's suit inter alia that the plaintiff is not entitled to the reliefs sought for and further, according to the defendants, there is no cart track as described in the plaint and

hence, the plaintiff cannot lay any right over the suit cart track as such and further, according to the defendants, the plaintiff is having alternative way to reach her property and further, it is stated that the plaintiff without disclosing as to where the suit cart track lies and the nature of right prayed for in respect of the same cannot maintain the suit and considering the fact that the plaintiff is having alternative way to reach her lands, according to the defendants, the plaintiff is not entitled to obtain the reliefs sought for.

6. In the plaint, though the plaintiff prayed for easementary right in respect of the suit cart track, however, a reading of the plaint would go to show that the plaintiff claims right to the suit cart track by way of a Will dated 17.09.1948 executed by her father and accordingly, it is the case of the plaintiff that she has been using the suit cart track for gaining access to her other lands right from the days of her forefathers and accordingly, her father had bequeathed the said right in her favour under the abovesaid Will.

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7. The claim of right to the suit cart track by the plaintiff, as rightly determined by the trial Court, it is found that the plaintiff herself is not sure as to in what capacity or right, she is claiming the right in respect of the suit cart track. When, according to the plaintiff, as adduced during the course of evidence as well as in the plaint, that she is claiming right to the suit cart track by way of the Will dated 17.09.1948, which document

has come to be marked as Ex.A1, as rightly determined by the trial Court, no reference about the suit cart track is made in the suit Will. On the other hand, one of the boundaries is shown as iteari and the said iteari cannot be deemed to be the suit cart track without any material pointing to the same. Accordingly, it is found that the right over the suit cart track claimed by the plaintiff by way of Ex.A1 Will as such cannot be accepted, when the said document aforesated does not contain any reference about the suit cart track as described in the plaint.

8. As rightly contended by the defendants, a reading of the plaint would go to show that the plaintiff has not disclosed, as to in which survey number, the suit cart track exists and to whom, the said survey number belongs to and as against whom, the plaintiff is claiming the easmentary right in respect of the suit cart track. Very vaguely, the plaintiff has claimed the right in respect of the suit cart track as if the same had been used from the days of her forefathers and accordingly, the said right had been bequeathed in her favour by her father under Ex.A1 Will. However, when it is found that the suit cart track has not been referred to in Ex.A1 Will and there is no material to hold that the suit cart track as such has been used by the plaintiff from the days of her forefathers, it is found that as rightly determined by the trial Court, the plaintiff would not be entitled to seek any right whatsoever in respect of the suit cart track.

9. Insofar as this case is concerned, as seen from the commissioner's report and plan marked as Exs.C1 to C4, there is an alternative cart track for the plaintiff to have access to her lands and this fact has been admitted by the plaintiff also during the course of her evidence. Accordingly, when it is found that as admitted by the plaintiff herself as well as seen from the commissioner's report and plan that the plaintiff is having other access to reach her property and the plaintiff has not established the existence of the suit cart track, as such, merely on the footing that the alternative cart track is not convenient for the plaintiff to reach her property by itself would not entitle the plaintiff to seek right over the suit cart track by way of easement of necessity. Accordingly, it is found that the trial Court finding that the plaintiff has alternative cart track to reach her lands, on that basis rightly negated the claim of the plaintiff to use the suit cart track by way of easement of necessity.

10. As rightly putforth, for claiming the right by way of easement of necessity in respect of the suit cart track, there should be materials to show the unity of ownership of the dominant and servient tenement at one point of time and further, there should be evidence that at a later point of time, the dominant and servient tenement became separated or divided and accordingly, the right had been sought for in respect of the suit cart track by way of easement of necessity. However, with reference to the abovesaid material facts for sustaining the right of easement of

necessity, they are completely absent in the present case, neither having been averred in the plaint nor being adduced during the course of evidence. On the other hand, when it is found that the plaintiff is claiming right over the suit cart track only by way of the Will Ex.A1 and when the cart track is not mentioned in the said Will and that apart, when the plaintiff has also not established the authenticity of the Will as per the requirements of law, it is found that particularly, when as admitted by the plaintiff and also seen from the commissioner's report and plan, the plaintiff has got an alternative cart track to reach her lands, the trial Court has correctly appreciated the materials placed on record and dismissed the plaintiff's suit. The reasonings of the first appellate Court that the alternative cart track shown to be in existence, not being found to be convenient for the plaintiff to reach her lands and on that basis, the endeavour of the first appellate Court, in upholding the plaintiff's case is found to be not in consonance with the principles of law, as regards the easement of necessity and accordingly, it is seen that the first appellate Court has erred in upholding the plaintiff's right over the suit cart track contrary to the pleadings and materials placed in respect of the same.

11. Insofar as this case is concerned, it is found that the plaintiff has also laid a claim in respect of the suit cart track both by way of adverse possession as well as on the basis of the easementary right by way of necessity and as rightly putforth by the defendants, both the claims are found to be contrary to each other and that apart, when there

is no material placed on record to show that the plaintiff has perfected her right to use the suit cart track by way of adverse possession and furthermore, when it is found that the plaintiff is having an alternative cart track to reach her property and when the plaintiff has not made out a clear case as to on what basis she is seeking right over the suit cart track and the averments contained in the plaint being found to be not depicting clearly the mode of right sought for by the plaintiff as regards the suit cart track as such, the same being found to be very nebulous and vague and that apart, when during the course of evidence, the plaintiff has rested her right only upon to the Will marked as Ex.A1 and when the said Will does not mention anything about the suit cart track and the said Will having also not been established by the plaintiff as per law, as rightly contended, the plaintiff's suit should have been rejected by the first appellate Court on the footing that it is bereft of material particulars for claiming the right of easement over the suit cart track by way of necessity and in the light of the above discussions, I do not find any valid reason and material to uphold the claim of easmentary right by way of necessity in respect of the suit cart track as prayed for by the plaintiff. Thus, it is found that the first appellate Court, on an improper appreciation of the materials placed on record and against the principles of law governing the law apropos of the easement of necessity, is found to have accepted the plaintiff's case, particularly, without their being any material to sustain the same, resultantly, the substantial questions of law formulated in this second appeal are accordingly answered against the

plaintiff and in favour of the defendant.

12. The principles of law outlined in the decisions relied upon by the defendants' counsel reported in **2002 (4) CTC 193 (Mannangatti Gounder Vs. Janarthanam)** and **2000(i) MLJ 431 (Periyanna Gounder (died) and another Vs. Komarasami)** are taken into consideration and followed as applicable to the case at hand.

Winding up, the Judgement and Decree dated 29.04.2003 passed in A.S.No.116 of 2002 on the file of the Subordinate Court, Bhavani, are set aside and the Judgment and Decree dated 10.10.2002 passed in O.S.No.49 of 1999 on the file of the Principal District Munsif Court, Bhavani, are confirmed and accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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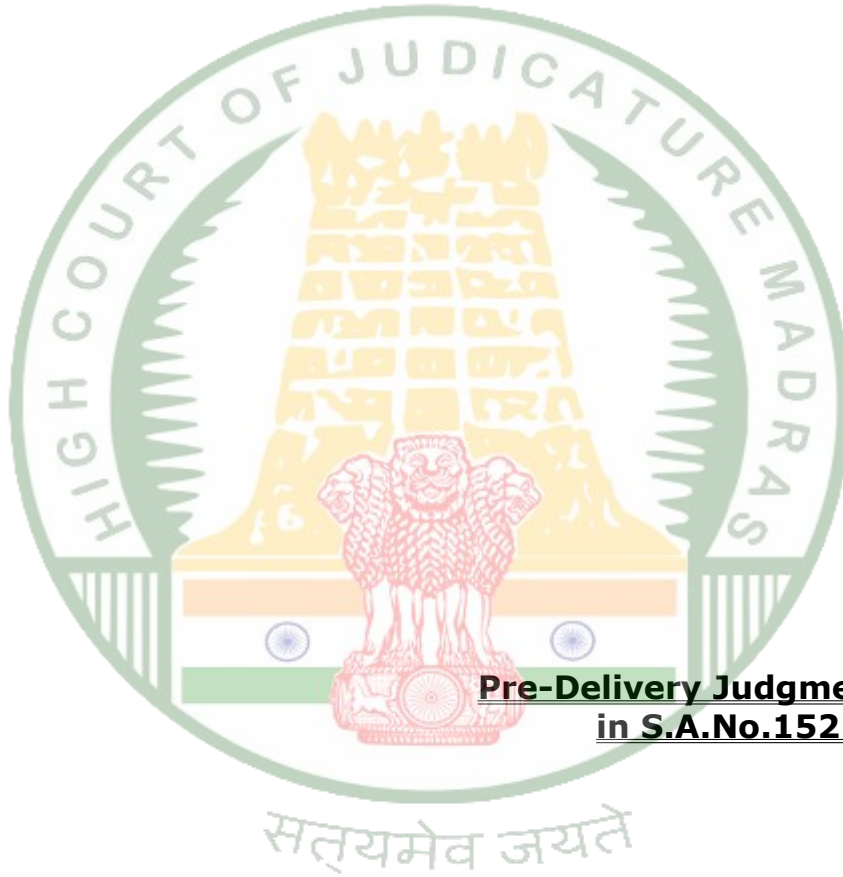
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1. The Subordinate Court, Bhavani.
2. The Principal District Munsif Court, Bhavani.

3. The Section Officer, V.R.Section, High Court, Madras.

T.RAVINDRAN, J.

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**Pre-Delivery Judgment made
in S.A.No.1521 of 2004**

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