

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.06.2018
PRONOUNCED ON : 14.06.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1533 of 2004

1. Ragupathi

... Appellants/ Plaintiffs 2 & 3

2. Kumar

Vs.

1. Baskaran

2. Chinnathambi

3. Palanivel

4. Vaithilingam

5. Ranjitham

... Respondents 1 to 5/ Defendants

6. Ambigapathi

... 6th Respondents/1st Plaintiffs

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 22.12.2003, made in A.S.No.15 of 2003, on the file of the Sub Court, Sankari, reversing the judgment and decree dated 31.03.2003, made in O.S. No.81 of 2000, on the file of the District Munsif Court, Sankari.

For Appellant : Mr.N.Manokaran

For R1 to R5 : Mr. P.Jagadeesan

For R6 : No appearance. Set ex-parte
vide order dated 08.06.2018.

JUDGMENT

In this second appeal challenge is made to the judgment and decree dated 22.12.2003, passed in A.S.No.15 of 2003, on the file of the Subordinate Court, Sankari, reversing the judgment and decree dated 31.03.2003, passed in O.S. No.81 of 2000, on the file of the District Munsif Court, Sankari.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction.

4. The case of the plaintiffs, in brief, is that the plaintiffs 2 and 3 are the sons of the first plaintiff's elder brother's son. The defendants 1 to 4 are the sons of the 5th defendant and the defendants 1 to 4 are the sons of another elder brother of the first plaintiff. The suit property is a common cart track and it branches from north south high ways road in S.No.179/9-B-2-B and runs through the defendants' lands in S.No.179/9-B-2-A and the lands of the plaintiffs 2 and 3 in S.No.179/9-B-1 and reaches the first plaintiff's land in S.No.179/9-A on the southern side of the same survey numbers and on the west of the north south high ways road to a breadth of 10 feet and a length of 100 feet as shown in the plaint plan as ABCD. The abovesaid property and other properties originally belonged to the first plaintiff's grand father Muthu gounder and Muthu gounder and his sons partitioned their properties long back orally and were in separate possession of their respective shares and the first plaintiff's father Ayyadurai died fifty years ago leaving behind his four sons, namely, Rajalingam, Sivasankaran, Ambigapathi and Neelamegam and the first plaintiff and his brothers partitioned their properties orally in the year 1976 leaving the suit cart track as a common one. The abovesaid oral partition was given effect to and the plaintiffs are in separate possession and enjoyment of the properties allotted to them and enjoying the suit cart track without any interruption for the past 25 years and the plaintiffs have to take their men and materials from the high ways only through the suit cart track. The plaintiffs are claiming right to the suit cart track by way easement of necessity and by way of long enjoyment and due to family dispute, the defendants are giving troubles to the plaintiffs in the enjoyment of the suit cart track and also trying to obliterate the same and the defendants are not entitled to prevent the plaintiffs to enjoy the suit cart track for having access to their lands and not entitled to obliterate the same and inasmuch as the defendants acts persisted, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit laid by the plaintiffs is not maintainable either in law or on facts. There is no cart track as described in the plaint and the abovesaid alleged cart track is not in existence at any point of time on the southern end of the lands of the parties as claimed in the plaint. The lands in S.No.179/9A and S.No.179/9-B originally belonged to Ayyadurai and his four sons partitioned

the said properties into four shares by forming north south ridges and the western share was allotted to Ambigapathi, the first plaintiff and the next share on the east was allotted to Neelamegam and the third share from the west was allotted to Rajalingam, the father of the plaintiffs 2 and 3 and the fourth share was allotted to the father of the defendants 1 to 4 and the husband of the 5th defendant and the abovesaid partition took place about 25 years ago orally and subsequent to the partition, the allotted shares were sub divided as detailed in the written statement and the parties are in possession and enjoyment of their respective shares and the said partition is a concluded one. The lands in S.No.179/9-B2 lies adjoining the old panchayat road running from K.K.Nagar road to Mettukkadu and it was of inferior soil. So, a larger extent was allotted to that share and the highways department acquired an extent of Hec.0.05.0 of land in the share of the defendants and accordingly, the defendants land had been subdivided as 179/9-B-2A with an extent of Hec.0.02.0 and the same is in the possession of the defendants. At the northern extremity of the lands of the parties, the then panchayat road took a turn and ran along the northern portion and turned towards north portion and turned towards north and running along the eastern border of S.No.180, where there is the Mettukkadu elementary school and the after the formation of the bye pass road, the road was straightened and it runs across S.No.176 and the former road is still available and the parties are using it till then. It runs on the northern border of all the four shares of the parties and at the north western corner of the first plaintiff's land, a burial ground branches from the panchayat road and runs upto the burial ground on the west and this is the road intended for and used by the public from time immemorial and there was no cart track on the southern side of the lands of the defendants and the plaintiffs. When the highways department had formed a bye pass road, they also constructed a culvert near the defendants' share. While the construction was in progress, the bye passers deviated in the lands of the defendants and taking advantage of the abovesaid temporary usage, the plaintiffs invented a case of cart track running along the southern border of the lands of the parties and to the emergent commission showed the altered physical features as if there is no panchayat road but there is only an odai. On the northern side of the lands of the parties there is no odai at any point of time and the depression is caused by the raising of level of the bye pass road. The theory of existence of the cart track is false. The parties have never used the alleged cart track as neither by way of easement of necessity nor prescription as claimed by the plaintiffs and the plaintiffs have no cause of action and the suit for bare injunction regarding easement is not maintainable in law and hence, the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PW1 has been examined, Exs.A1 to A3 were marked. On the side of the defendants, DWs 1 and 2 were examined, Exs.B1 to B8 were marked. Exs.C1 to C3 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit as prayed for. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendants, dismissed the suit laid by the plaintiffs. Impugning the same, the present second appeal has been laid.

8. The following substantial questions of law were formulated for consideration at the time of admission of the second appeal:

"1. Whether the lower appellate Court was right in the view it took that the plaintiffs are using the portion MNOP as the cart track to reach their land without taking note of the existing physical features in the commissioner's plan and report and in the absence of any evidence to reject the plaintiffs claim over the cart track in ABCD?

2. Whether in the absence of any discussion about the incorrectness of the findings of the trial Court, the findings of the first appellate Court is correct in law in view of the decision rendered by the Supreme Court in 2001 (I) Supreme 642?"

9. The suit is laid in respect of the cart track which is shown as ABCD in the plaint plan. The defendants in the written statement as well as during the course of evidence have vehemently disputed the existence of the suit cart track as alleged in the plaint and claimed by the plaintiffs and according to them, there has been no cart track on the southern end of the defendants' lands as projected by the plaintiffs and the cart track has been in existence only on the northern side of the shares allotted to the parties and hence, according to the defendants, the plaintiffs have no entitlement to claim any right in respect of the non existent cart track and hence, the suit is liable to be dismissed. In fact, the defendants have also in specific raised a defence in the written statement that the suit for bare injunction regarding the right of easement is not maintainable in law. Despite the stand of the defendants,

the plaintiffs have not endeavoured to seek the relief of declaration in respect of the suit cart track. The plaintiffs have claimed right over the cart track by way of easement of necessity and by way of prescription. When the existence of the suit cart track itself is in dispute and contested by the defendants tooth and nail and the defendants have also questioned the maintainability of the suit for bare injunction as such, despite the above defence, for no valid reasons, the plaintiffs had not endeavoured to seek the relief of declaration. On the above sole ground, the counsel appearing for the defendants contended that the suit laid by the plaintiffs is not maintainable and on that score alone the judgment of the first appellate Court should be upheld. In this connection, reliance is placed upon the decision reported in (2008) 4 SCC 594 (Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by Lrs and others). Considering the above facts, when there is stiff resistance to the case of the plaintiffs both as regards the existence of the suit cart track and the entitlement of the plaintiffs to the same as projected in the plaint and as rightly argued by the defendants, the plaintiffs should have sought the relief of declaration of their alleged right in respect of the cart track. Despite the above position, the plaintiffs have not amended the plaint for seeking the relief of declaration. It is thus found that on the above ground itself, the plaintiffs suit should fail.

10. The defendants have disputed the existence of the suit cart track and also the alleged entitlement of the plaintiffs right to use the suit cart track. Other than marking the three kist receipts, there is no document projected by the plaintiffs in support of their case. It is seen from the evidence adduced by the parties that there is no dispute that a partition had taken place in the family of the respective parties about 25 years ago and it is seen that the shares have been allotted to the four sons of Ayyadurai gounder. Now, according to the plaintiffs, the suit cart track branches from the highways road towards the west and runs on the southern side of the defendants land and reaches upto the plaintiffs land and the same is the only access for the plaintiffs to their lands. In this connection, reliance is placed upon the Commissioner's report and plan marked as Ex.C1 and Ex.C2. However, as seen from the report and plan of the Advocate Commissioner, it is found that there is no specific ridge or division, diving the land of the defendants and the alleged cart track and therefore, it is seen that the cart track portion is continuous and forms part of the defendants property and if really, the same had been in use as the cart track for more than 25 years as put forth by the plaintiffs, definitely traces of the same would have been reflected and noted by the Advocate Commissioner. However, as seen from the Advocate Commissioner's report and plan and as

rightly determined by the first appellate Court, it is found that there is no clear demarcation or ridge as such dividing the alleged cart track from the lands of the defendants and thus, it is found that the case of the plaintiffs that the cart track portion had been separately earmarked at the time of the partition for the common usage of the sharers cannot be readily countenanced.

11. As above seen, the plaintiffs claim right in respect of the alleged cart track by way of easement of necessity. However, as seen from the Advocate Commissioner's report and plan and as rightly noted and determined by the first appellate Court, it is found that on the northern portion to the properties belonging to the parties, it is found that a cart track is in existence and the same branches further towards the west and north, one leading to elementary high school and also thus, it is found that the parties have access to their lands through the track available on the northern side of their lands and in such view of the matter, the claim of the plaintiffs that they are entitled to use the alleged suit cart track by way of easement of necessity falls to the ground. With reference to the existence of the cart track on the northern side, it is the case of the plaintiffs that it is only an odai and therefore, the same cannot be construed or declared to be the cart track left for the usage of the parties. In this connection, reliance is placed upon the bushes and small rocks found in existence in the said cart track. However, as rightly found by the first appellate Court, the existence of a few thorny bushes and small rocks in the said cart track available on the northern side of the properties belonging to the parties by itself would not lead to the conclusion that the same cannot be used as the cart track for gaining access to the lands of the respective parties. As found by the first appellate Court, if the same is only an odai as claimed by the plaintiffs, there would not have been branching of the same furthers towards northern and western side. However, as noted by the Advocate Commissioner and as determined by the first appellate Court, the abovesaid track portion available on the northern side branches further to the north and the western side, leading to the school as well as the burial ground and it is thus found that inasmuch as the same had been in existence and used as the cart track, it proceeds further and therefore, the contention of the plaintiffs that the area available on the northern side has been used only as an odai portion and not as the cart track as such cannot be readily accepted and rightly disbelieved by the first appellate Court.

12. The mere fact that the track available on the northern side is 5 feet lower than the national highways road by itself would not lead to the conclusion that the same could not have been used as an access as the cart track by the respective

parties and in such view of the matter, it is found that the existence of the cart track on the northern side, merely because it is at a lower level, as contended by the plaintiffs, that by itself would not be a ground for holding that other than the suit cart track, the plaintiffs have no other access to reach their lands. At the foremost, as above seen, the plaintiffs have not established the existence of the suit cart track as such. On ground, as seen from the Commissioner's report and plan, there is no separation of the alleged cart track portion from the lands of the defendants. In such view of the matter, if the same had been in use by the respective parties as an access over a period of time, permanent ridges would have been available dividing the alleged cart track from the rest of the portion of the defendants land and the absence of the same would only lead to the conclusion that the said alleged cart track portion had been all along used by the defendants as their properties as allotted to them in the oral partition. In this connection, reliance is placed upon the evidence of DW2, one of the brothers. DW2 in his evidence has clearly deposed that no such cart track has been left on the southern side in the defendants share for having access to the shares of the other parties. According to the DW2, the portion/track on the northern side of the lands had been the source of access of the sharers to their respective lands and the first appellate Court cannot be faulted for placing reliance upon DW2 also to uphold the defendants version.

13. Merely because the properties belonging to the respective parties originally belonged to the common ancestor and the defendants have been granted slightly a larger extent cannot be a ground for holding that the cart track as alleged by the plaintiffs would have been set apart for the access of the lands of the other sharers. Considering the defence version and further noting that the cart track portion as projected in the plaint has not shown to be in existence as such and the usage of the same by the plaintiffs for several years as claimed in the plaint not having been proved and further, when it is seen that the parties are having access to their respective lands through the cart track available on the northern side, it is found that the first appellate Court is justified in negating the suit preferred by the plaintiffs by setting aside the judgment and decree of the trial Court. In that process, it is found that the first appellate Court has analysed the materials placed on record including the Commissioner's report and plan in the proper perspective and accordingly, for the reasons adduced, set-aside the judgment and decree of the trial Court by giving acceptable reasons and in such view of the matter, I do not find any ground to interfere with the reasonings and conclusions of the first appellate Court for dismissing the plaintiffs suit. The substantial questions of law formulated in the second appeal

are accordingly answered in favour of the defendants and against the plaintiffs.

14. The counsel for the appellant in support of his contentions placed reliance upon the decision reported in (2010) 2 SCC 689 (Sree swayam prakash ashramam and another Vs. G.Anandavally amma and others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

15. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Court, Sankari
2. The District Munsif Court, Sankari.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.37717

+1cc to Mr.P.Jagadeesan, Advocate, S.R.No.37999

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S. A.No.1533 of 2004

MP (CO)

GSP (09/08/2018)

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