

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :31.01.2018

PRONOUNCED ON:16.02.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.1596 of 2003

Karunakaran

...Appellant/2nd Respondent/
2nd Defendant

Vs.

M.P.Nallathambi

...1st Respondent/Appellant/
Plaintiff

2.P.Selvaraj

...2nd Respondent/1st Respondent/
Ist defendant

[The second respondent given up
in this second appeal, since he
remained exparte in the suit
and in the first appeal] ... Respondents

Prayer: Second Appeal filed under Section 100 of C.P.C.,
against the judgment and Decree dated 06.08.2003 in A.S.No.7 of
2002 on the file of the Principal Sub Court, Gobichettipalayam,
reversing the judgment and decree dated 24.09.2001 in O.S.No.22
of 1999 on the file of the District Munsif Court,
Gobichettipalayam.

For Appellant : Mr.N.Narayanasamy

For Respondents : Mr.R.T.Duraisamy for R1

R2 Given up

J U D G M E N T

Challenge in this second appeal is made to the judgment
and decree dated 06.08.2003 passed in A.S.No.7 of 2002 on the
file of the Principal Subordinate Court, Gobichettipalayam
reversing the judgment and decree dated 24.09.2001 passed in
O.S.No.22 of 1999 on the file of the District Munsif Court,
Gobichettipalayam.

2. The parties are referred to as per the rankings in the
trial court.

3. Suit for declaration, permanent injunction and mandatory
injunction.

4.The case of the plaintiff in brief is that the suit property is a cart track measuring 10 feet in width and the suit property belongs to the plaintiff and defendants in common. The plaintiff has filed a plan along with the plaint and the suit property is shown as AGBHCIDJEK in the plaint plan and the plaintiff, his brothers namely the first defendant and one M.P.Velumani and their father Ponnusamy nadar partitioned their common family properties by way of a partition deed dated 24.12.1986 and under the said partition deed, the plaintiff was allotted the "C" schedule properties described there in and accordingly, the plaintiff was also granted common right in the suit cart track and subsequently, the plaintiff's father settled an extent of 0.20 cents in survey number 112A in favour of the plaintiff and further the plaintiff had also purchased other extents of the property measuring 1.25.3/4 acres of the land from his father, the first defendant, M.P.Velumani and their children by way of a sale deed dated 13.04.1997 and accordingly the plaintiff had been enjoying the property acquired by him as above stated by putting up house and also obtaining electricity service connection, installing 3HP motor pump set and enjoying the suit cart track in common and the plaintiff's father died in the year 1998 and the plaintiff's brother M.P.Velumani did not raise any issue with the plaintiff in respect of the suit property and the first defendant had been allotted the portion situated to the west of the suit cart track shown as DJKE in the plaint plan and the first defendant sold his share to the second defendant and other parties and also the plaintiff by forming sites and accordingly he had also set apart 15 feet east-west road on the southern side of his property and accordingly an extent of 25 feet cart track is available on the southern side of the said property coupled with 10 feet extent of cart track already in existence and the suit cart track proceeding from north to south, join with Mariamman Koil street and except the suit cart track there is no other cart track for the plaintiff to have access to his property and the suit cart track is required as of necessity and neither the first defendant nor the other sharers are entitled to alienate the suit property and even if they alienate, the same is not binding on the plaintiff, while so, the second defendant attempted to put up constructions in the portions of the suit cart track shown as DEKJ in the plaint plan and claiming that he had been sold the said portion of the suit cart track by the first defendant, but the same had been prevented by the plaintiff, however, the second defendant denying the title of the plaintiff to the suit cart track, illegally put up the foundation up to the level of 1 ½ feet in the above said portion of the suit cart track and also attempted to put up further construction using his influence and hence the plaintiff had been necessitated to lay the suit for appropriate reliefs.

5.The case of the second defendant in brief is that the second defendant after denying all the averments contained in the plaint, according to the second defendant, the plaintiff has not come forward with the suit with clean hands and on the other hand, laid the suit suppressing the material facts and it is stated by him that, it is false to state that common right had been conferred on the sharers in respect of the suit cart track by the partition deed dated 24.12.1986 and in the said partition deed, the sharers are directed to enjoy the cart track running south-north on the eastern side in common and accordingly, it is the case of the second defendant that the above said cart track is in existence only as shown in the plan filed by the second defendant along with the written statement in the ABCD portion and same proceeds from north to south and turns to the eastern side joining Sankaran street and the said portion is shown as CDEFG in the plan filed along with the written statement and the said cart track alone had been used by the plaintiff and his predecessors in title, however the plaintiff had not used the suit cart track for a long period of time and the plaintiff has put his entire property under cultivation and accordingly the plaintiff has planted trees in his property where the cart track had been earmarked and accordingly the same had also been noted by the Advocate Commissioner while inspecting the properties of the parties concerned, the second defendant had erected fence on the north side of the property and thereafter removed the fence and put up the compound wall of a height of 10 feet and the plaintiff objected to the same claiming that he has title to the alleged cart track and there is no cart track in existence as depicted in the plaint plan and said cart track was not in existence for a long period of time, particularly, on the date of suit as alleged in the plaint and the first defendant was allotted 65 cents of land in survey number 112 under the partition deed and he had sold his property by laying out sites to the second defendant and the other parties and accordingly, the second defendant had been enjoying the property purchased by him by putting up the compound wall and other constructions and there is not suit cart tract in existence as projected in the plaint and it is false to state that the second defendant had encroached the DEKJ portion of the suit cart track as depicted in the plaint plan and put up the foundation against the protests of the plaintiff up to the level of 10 feet and when the cart track as alleged in the plaint was not in existence at any point of time, the above case of the plaintiff is false and the plaintiff has come forward with the suit suppressing the true materials without any cause of action and hence the suit is liable to be dismissed.

6.In support of the plaintiff's case, P.Ws.1 and 2 were examined. Ex.A1 was marked. On the side of the second defendant,

D.Ws.1 to 5 were examined. Exs.B1 to B16 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 dismiss the suit laid by the plaintiff. On appeal, the first appellate court, on an appreciation of the materials placed for consideration, set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Impugning the same, the present second appeal has been laid.

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

(i) Whether the lower appellate court is correct in reversing the judgment and decree of the trial court, without giving any finding with regard to the findings of the trial court?

(ii) Whether the lower appellate court is correct in reversing the judgment and decree of the trial court, when there was no acceptable evidence on the side of the plaintiff in support of his case?

(iii) Whether the lower appellate court completely misconstrued the Advocate Commissioner's reports, Exs.C1 and C3?

(iv) Whether the lower appellate court is correct in reversing the judgment and decree of the trial court when P.W.1 himself admitted the boundaries mentioned in partition deed ('B' schedule) as correct? and

(v) Whether the lower appellate court is correct in rejecting the evidence of D.W.4 (first defendant) who was examined on the side of the second defendant as per the order of this Court in C.R.P.No.1678 of 2001, dated 20-06-2001?

9. The suit has been laid by the plaintiff in respect of the cart track and according to the plaintiff, he and the defendants have common right in the suit cart track and further according to the plaintiff, the suit cart track is in existence as depicted in the plaint plan shown as AGBHCIDJEK and it is the

further case of the plaintiff that the suit cart track is the only access for reaching his property and hence, at the time of the partition effected amongst the plaintiff, the first defendant and the other family members, by way of a partition deed dated 24.12.1986 marked as Ex.A1, it is the case of the plaintiff that the said cart track depicted in the plaint plan has been left in common to be enjoyed by all the sharers and hence according to the plaintiff, the suit cart track is not alienable by any of the sharers and even if alienated, the same is not binding on the plaintiff and further according to the plaintiff, the first defendant had sold his share to the second defendant and the other parties by forming layouts and according to the case of the plaintiff, the second defendant after purchasing the property from the first defendant put up the foundation illegally on the suit cart track in the portion shown as DJEK without any authority, and despite the protests of the plaintiff, he had raised the foundation and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

10.Per contra, it is contended by the second defendant that though cart track of 10 feet had been earmarked to be used in common by all the sharers situated on the eastern side running north to south under the partition deed dated 24.10.1986, it is stated that the said cart track has not been put in use by the plaintiff and the plaintiff is having other access to reach his property and according to the second defendant, after his purchase of the property from the first defendant, he had been using the said property by putting up compound wall and other constructions and therefore, the case of the plaintiff that he had put up the foundation in the cart track portion shown as DJEK of the plaint plan is false and there is no cart track in the above said portion as claimed by the plaintiff and the plaint plan is incorrect and hence the plaintiff is not entitled to obtain the reliefs sought for.

11.On a perusal of Ex.A1, the partition deed, it is found that the parties thereto had left a common cart track for the use of the sharers on the eastern side of their properties measuring 10 feet width running north to south. This is the only recital found in the partition deed as regards the above said cart track. That apart, it has not been clearly spelt out in the said partition deed as to from what point to what point the said cart track runs and there is no further mention as to how the said cart track proceeds north to south and therefore, it is seen that very ambiguously and vaguely and it has been spelt out in Ex.A1 that the cart track had been left in common for the use of the sharers measuring 10 feet on the eastern side running north to south. Now, according to the plaintiff, the said cart track lies in the property as depicted in the plaint plan filed by him along with the plaint.

The cart track has been shown as AGBHCIDJEK in the plaint plan. The second defendant is contesting the above case of the plaintiff and according to the second defendant, there is no cart track in existence as depicted in the plaint plan as above stated and on the other hand, according to the defendant, the cart track is in existence only as shown in the plan filed by him along with the written statement and further according to the second defendant, there is no cart track in the portion shown as DJEK in the plaint plan and therefore the case of the plaintiff that the second defendant had illegally put up the foundation in the above said portion of the cart track is false and further according to the second defendant, the suit has been laid by the plaintiff without any cause of action and the suit is liable to be dismissed.

12. In the light of the above pleadings set out by the respective parties, it is evident that the plaintiff, being the suitor, should establish that the cart track is in existence on ground as depicted in the plaint plan and on the other hand, on a perusal of the report and plan of the Advocate Commissioner, who had been nominated to inspect the properties of the parties concerned marked as Exs.C1 to C3, it is found that there is no cart track in existence as projected in the plaint plan by the plaintiff and on other hand, it is found that there is a cart track on ground put up recently as almost similarly depicted in the plan filed by the defendant along with the written statement. It is accordingly seen from Exs.C1 to C3, that the cart track found by the Advocate Commissioner is of recent origin and has been shown in red colour by the Commissioner running north to south from the plaintiff's house and at point "CC1" and "CB" the cart track turns to the eastern direction and joint with Sankaran street. Further, as seen by the Advocate Commissioner, in the red colour portion of the cart track seen by him during inspection, there is a water tap connection located mid way on the said portion and the Commissioner has also noted iron fencing on the eastern side of the said red colour portion and further noted that the plantain and coconut trees had been cut and heaped on the western reach of the cart track and the said red colour portion is found to be of new origin containing red sand mixed with water and further from the above said reports and plan of the Advocate Commissioner, it is noted that there is no cart track as shown in the plaint plan and the cart track on ground lies only as depicted in Ex.C2 which nearly corresponds to the plan filed by the defendant along with the written statement. However, it is found that the plaintiff had insisted during the inspection of the Commissioner that the cart track was in existence in the yellow colour portion shown in Ex.C2 and accordingly, the Commissioner had rightly, distinctly shown the said portion in yellow colour, however the features noted by the Commissioner on the above said portion belies the case of the plaintiff that the suit cart

track had been in existence in the said yellow colour portion. As seen from the physical features noted by the Advocate Commissioner in the yellow colour portion, it is found that the same is located on the eastern side of the second defendant's house and vacant site and also to the west of the vacant site of the second defendant and a tank is found to be located thereon and also a temporary shed has been put up thereon and further there is also a stone structure above the salai portion "S" and above the stone structure, the Commissioner had also noted two septic tanks marked as S1 and S2 in the yellow portion and further the Commissioner had noted that the second defendant had put up the compound wall along with ABCDEFG line and the compound wall put up along with the EFG line is an old one and the compound wall put up along ABCDE line seems to be of a recent construction without plastering and further the Commissioner had also noted a pit shown as "K" in the vacant site of the second defendant and also sand heaps in the vacant portion of the second defendant's property marked as M1M2 and accordingly, as rightly determined by the trial court, the above said features found obtaining on the yellow colour portion shown in Ex.C2 would only lead to the conclusion that at no point of time, the said portion had been used as a cart track as claimed by the plaintiff. Therefore, the case of the plaintiff that the cart track earmarked under Ex.A1 partition deed also covers the portion shown in yellow colour by the Advocate Commissioner Ex.C2 cannot be countenanced, particularly, in the light of the abovesaid permanent constructions found thereon and therefore, resultantly, it is seen that as rightly determined by the trial court, the suit cart track as depicted in the plaint plan is not in existence on ground at any point of time as claimed by the plaintiff.

13. In addition to that, even the cart track shown in red colour by the Advocate Commissioner is found to be not in use by the parties concerned and according to the Commissioner, no traces of the use of the said red colour portion as cart track was noted by him during the time of his inspection and as per the Advocate Commissioner's report, the said red colour portion seems to be of a new origin and such being the position available on ground, the case of the plaintiff that the second defendant had put up illegal foundation on the so called cart track portion shown as DJEK portion of the plaint plan cannot at all to be accepted in any manner.

14. The plaintiff claims common right in the suit cart track based on the partition deed marked as Ex.A1. No doubt, a cart track of 10 feet width had been earmarked in the said partition deed running north to south for the common enjoyment of all the parties thereto. However, when the lie of the said cart track has not been clearly spelt out in the said partition deed particularly the point from which and the point upto which the

same runs and the course through which the same runs having not been clearly detailed, it is found that in the light of the Commissioner's report and plan marked as Exs.C1 to C3, we cannot safely conclude that the suit cart track as depicted in the plaint plan was in existence at the time of the partition deed Ex.A1 or at the time of the institution of the suit by the plaintiff.

15.The crux of the plaintiff's case is that to the west of the common cart track the properties had been allotted to the first defendant under the partition deed. However, as rightly found by the trial court and also as seen from the recitals found in Ex.A1, particularly the B schedule properties allotted to the first defendant, it is found that the first defendant had been allotted the properties only situated to the west of Mariamman koil street and the houses belonging to Raju and others. If really, the first defendant had been allotted the properties situated to the west of the common suit cart track as claimed by the plaintiff, the eastern boundary of the said portion would have been only shown as the common cart track measuring 10 feet and on the other hand the eastern boundary is only shown as Mariamman koil street and the houses belonging to Raju and others and when it is further seen that the plaintiff has not disputed the boundaries given for the B schedule properties allotted to the first defendant and also admitted that the parties had been enjoying the properties as allotted under the said partition deed as rightly determined by the trial court, the suit cart track had not been in existence on ground as projected in the plaint plan of the plaintiff and on the other hand, it was lying elsewhere and accordingly also not put up in use by the parties concerned and accordingly it is seen that permanent features have been noted by the Advocate Commissioner in the properties belonging to the second defendant as above discussed and as the original cart track left in common under the partition deed has not been put in use by the sharers concerned and the same was also not noted by the Advocate Commissioner and only the cart track put up recently has been noted by the Advocate Commissioner as shown in red colour portion and accordingly, the Advocate Commissioner has also noted that there are no symptoms of the red colour portion been used as a cart track at the time of his inspection and so the materials placed on record, seen in toto, would only lead to the conclusion that the suit cart track is not in existence as claimed by the plaintiff and as projected by the plaintiff in the plaint plan.

16.Accordingly, it is found that the trial court has also considered the evidence of the witness examined on behalf of the second defendant namely D.Ws.2 to 5 and it is found that the second defendant also examined the first defendant as D.W4 and the above said witness have clearly deposed that the suit cart

track was not in existence as claimed by the plaintiff and as projected in the plaint plan and on the other hand as per their testimony, it is found that the cart track has been in existence only as shown by the Advocate Commissioner in the plan marked as Ex.C2 and as detailed by him in Exs.C1 to C3 and it is found that as rightly determined by the trial court, nothing has been elucidated from D.Ws.2 to 4 to discredit their testimony with reference to the above said facts. It is found that the trial court has rightly placed reliance upon their evidence to uphold the defence version and reject the plaintiff's case. Equally the trial court has also appreciated the evidence of P.W.2 examined on behalf of the plaintiff and found him to be not a reliable witness as he is unable to throw any clear picture as to the lie of the properties belonging to the parties the existence of the suit cart track on ground and as also the cart track defined or allotted under the partition deed Ex.A1. It is thus found that the trial court has rightly disbelieved the evidence of P.W.2 and discarded his evidence accordingly.

17.Per contra, on a perusal of the judgment and decree of the first appellate court, it is found that no discussion at all has been made by the first appellate court on the materials placed on record, both oral and documentary, particularly the Commissioner's report and plan marked as Exs.C1 to C3 and without giving reasons as to how and in what aspects it had found that the judgment and decree of the trial court erroneous or unacceptable, simply, bereft of reasons, accepted the plaintiff's case ipsofacto on the footing that inasmuch as the first defendant had remained exparte in the proceedings, his evidence cannot be accepted who has been examined as D.W.4 and also erroneously held that by remaining exparte, he had accepted the plaintiff's case and thereby the plaintiff has established his claim. However, the first appellate court being the final court of facts, should have assessed and analyzed the evidence adduced by the respective parties, both oral and documentary, in the correct perceptive to hold one way or the other, for accepting the case of the respective parties. However, without any discussion of the same, the first appellate court has simply decreed the plaintiff's suit without discussion on the merits of the case on any aspect particularly, when there is no evidence at all on the part of the plaintiff to hold that the suit cart track has been in existence as shown in the plaint plan. It is further seen that the first appellate court has failed to consider the order of this Court dated 20.06.2001 passed in CRP.No.1678 of 2001 where under the first defendant had been granted the permission to examine his vendor the first defendant in support of his case. The first appellate court has failed to note that the plaintiff has no cause of action to institute the present suit against the defendants. Such being the approach of the first appellate court, it is seen that as rightly put forth by the second defendant's counsel, the reasonings and

conclusions of the first appellate court for reversing the well considered findings of the trial court and thereby accepting the plaintiff's case, are nothing but perverse and illogical without any material to buttress or the same and the first appellate court has also completely ignored the features noted by the Advocate Commissioner during his inspection of the properties concerned shown in Exs.C1 to C3 without proper discussion on the same and in such view of the matter, it is seen that the judgment and decree of the first appellate court cannot be allowed to sustain any further and liable to be set aside. It is found that the trial court has properly appreciated the materials placed on record in the correct perceptive and giving acceptable reasonings, correctly determined the controversies involved in the matter and accordingly, rightly dismissed the plaintiff's suit. For the reasons aforestated, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the second defendant.

18.In support of his contentions the counsel appearing for the second defendant placed reliance upon the decisions reported in 2000(1)MLJ 431 [Periyanna Gounder (died) and another Vs. Komarasami], 1998 (3) MLJ page 577[V.Manakkan and others Vs. Veera Perumal], AIR 2008 Supreme Court 956[Abdul Raheem Vs. Karnataka Electricity Board and others], 2002(7) SCC 441[Rattan Dev Vs Pasam Devi], 1997(1)Law weekly 495[V.K.Ramasami Gounder and 3 others Vs. P.Ramasai Gounder and 2 others] and 1997 (1)MLJ 309[Krishnammal Vs. Periasamy]. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstance of the present case.

19.In conclusion, the judgment and decree dated 06.08.2003 passed in A.S.No.7 of 2002 on the file of the Principal Subordinate Court, Gobichettipalayam are set aside and the judgment and decree dated 24.09.2001 passed in O.S.No.22 of 1999 on the file of the District Munsif Court, Gobichettipalayam are restored. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
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Sub Assistant Registrar

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To

1. The Principal Subordinate Judge, Gobichettipalayam.

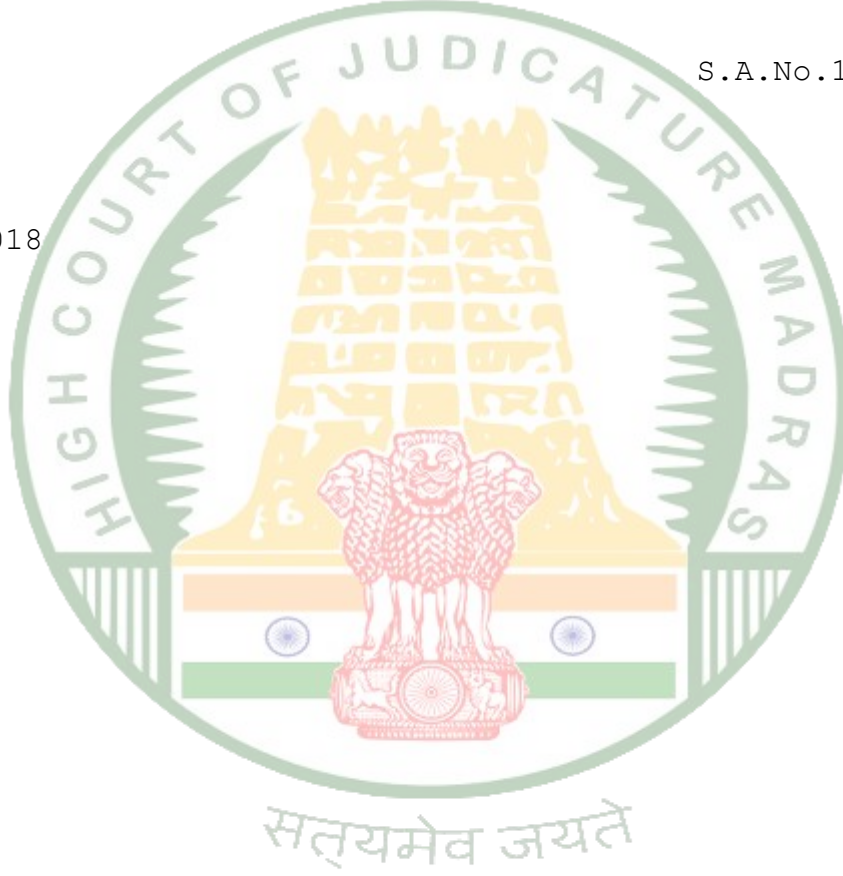
2.The District Munsif Gobichettipalayam.

+1 cc to M/s.M.Narayanaswamy Advocate sr 11894

+1 cc to M/s.R.P.Doraisamy Advocate sr 12304

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