

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.02.2018

PRONOUNCED ON : 07.03.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.613 of 2003

1.K.Selvamani
2.V.Subbarayan (Deceased)
3.Karuppayee
4.N.Lakshmi ... Appellants/Plaintiffs

(Appellants 3 & 4 brought on record
as Lrs of the deceased 2nd appellant
vide order of Court dt.08.01.2018
made in CMP.No.1594 of 2010
in S.A.No.613 of 2003)

Vs.

Palani Ammal ... Respondent/Defendant

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 30.09.2002 passed in A.S.No.43 of 2002 on the file of the Additional District and Sessions Judge cum Chief Judicial Magistrate Court, Namakkal, reversing the Judgment and Decree dated 30.01.1996 passed in O.S.No.435 of 1993 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.C.Jagadish

For Respondent : Mr.S.Sounthar
for Mr.K.Kuppusamy

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 30.09.2002 passed in A.S.No.43 of 2002 on the file of the Additional District and Sessions Judge cum Chief Judicial Magistrate Court, Namakkal, reversing the Judgment and Decree dated 30.01.1996 passed in O.S.No.435 of 1993 on the file of the Principal District Munsif Court, Namakkal.

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 lands shown as "P" in the plaint plan belonged to the second plaintiff and the same had been taken on lease by the first plaintiff by way of a registered lease deed dated 18.09.1992 and the above said property and the other lands, situated on the the eastern and southern side, originally belonged to one Karuppanna Pillai and the total extent measuring 6 acres and 85 cents and the lands originally called as Mookan Punja lands and accordingly, it is stated that the lands belonging to the second plaintiff, after passing several hands, had come to be purchased by the second plaintiff's father Vangili gounder on 27.04.1938 and accordingly, it is stated that pursuant to the family partition effected on 04.05.1971, the plaint "B" schedule property was allotted to the second plaintiff and the lands comprised in survey No.60/3 was allotted to the plaintiff's brother Ramasamy and after the death of Ramasamy, his son, the defendant acquired the lands allotted to his father, which are shown as D, D1 and D2 in the plaint plan and according to the plaintiffs, the lands shown as "P" were allotted to him under the above mentioned partition deed and on the eastern side of the above said lands, common Ettari is running and it is stated that the plaintiffs and their predecessors in interest had been taking their cattle, tractor, Cart etc., through the suit Cart track shown as "AB" in the plaint plan for more than 35 years for reaching their lands described as P in the plaint plan continuously and thereby, acquired easementary right over the same by way of prescription and further, it is stated that other then the said suit cart track, the plaintiffs have no other access to reach their lands and while so, the defendant developing enmity on account of the refusal of the plaintiffs to alienate their lands, is attempting to interfere with the possession and enjoyment of the suit cart track by the plaintiff and hence, according to the plaintiffs, they have been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that it is true that the defendant has been enjoying the lands shown as D, D1 and D2 in the plaint plan by way of inheritance from his father and it is for the plaintiffs to establish their claim of title to the lands shown as P in the plaint plan and it is true that the common Ettari runs on the eastern side of the land belonging to the parties. However, it is false to state that the plaintiffs and their predecessors in interest had been using the suit cart track shown as "AB" in the plaint plan for taking cattle, cart, lorry, tractor etc., to reach their lands and thereby, prescribed easementary right over the same on account of their long and continuous enjoyment by way of prescription

and it is false to state that other than the suit cart track, there is no other cart track for enabling the plaintiffs to reach their lands and it is false to state that the defendant is attempting to interfere with the enjoyment of the suit cart track by the plaintiffs and on the other hand, the plaintiffs or their predecessors in interest, at no point of time, enjoyed the suit cart track as claimed and there is no opening at the point "A" at any point of time for the plaintiffs to have access and enjoyment of any cart track shown as "AB" plaint plan and taking advantage of the exparte order of injunction, the plaintiffs attempted to lay a new cart track and accordingly, took the advocate commissioner for establishing the alleged existence of the suit cart track and the plaintiffs are thus not entitled to claim the reliefs sought for and the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PWS1 to 3 were examined and Exs.A1 to A4 were marked. On the side of the defendant, Dws1 to 3 were examined and no document has been marked. Exs.C1 & C2 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 judgement and decree of the trial Court and by way of allowing the appeal preferred by the defendant, dismissed the suit laid by the plaintiffs. 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 erred in misconstruing the report of the Commissioner for holding that the appellant has not established the prescriptive right to the use of the suit cart track?

(ii) Whether the lower appellate Court's conclusion is contrary to the evidence in the case regarding the existence and use of the suit cart track by the plaintiffs?

(iii) Whether the lower appellate Court erred in not giving the reasons for differing from the conclusions of the trial Court?"

9. From the materials placed, it is found that the lands shown as "P" in the plaint plan belong to the second plaintiff and the lands shown as D, D1 and D2 in the plaint plan belong to the defendant. It is also not in dispute that a common Ettari runs on the eastern side to the above said lands belonging to the parties. The dispute between the parties is only as regards the suit cart track shown as "AB" in the plaint plan. Now, according to the plaintiffs, they and their predecessors in interest had been using the suit cart track from the common Ettari for having access to their lands and thereby, on account of their long use and enjoyment of the suit cart track for several years, it is stated that they had prescribed right over the suit cart track by way of easement by prescription and inasmuch as the defendant attempted to interfere with their possession and enjoyment of their suit cart track, it is stated that they had been necessitated to lay the suit for appropriate reliefs.

10. Per contra, it is the case of the defendant that no such cart track is in existence on the ground shown as "AB" in the plaint plan and neither the plaintiffs nor their predecessors in interest had used the alleged cart track at any point of time as cart track and on the other hand, it is the case of the defendant that the plaintiffs are having other access to reach their lands and hence, it is stated that the plaintiffs have no cause of action to institute the suit against the defendant.

11. Though, at the inception, the plaintiffs have laid a claim of right over the suit cart track both by way of easement of necessity and easement by prescription, during the course of evidence, opted to elect the right over the suit cart track only by way of easement by prescription. It is thus found that the plaintiffs having chosen to elect the said right, it is for the plaintiffs to establish, at the foremost, that such a suit cart track is in existence on ground as claimed by them and that they had been using the said cart track for over the period stipulated by law for sustaining their right of easement by prescription in respect of the same.

12. On the materials placed, as rightly determined by the first appellate Court, in none of the documents of title projected by the plaintiffs marked as Exs.A1 to 3, there is any reference about the suit cart track. Therefore, it is seen that as rightly determined by the first appellate Court, if really, the suit cart track had been in existence on ground and been in possession and enjoyment of the plaintiffs and their predecessors in interest for several years as claimed in the plaint, reference about the same would have been incorporated in the title deeds marked as Exs.A1 to 3. On the other hand, it

is found that only in the lease deed executed by the second plaintiff in favour of the first plaintiff dated 18.09.1992 marked as Ex.A4, for the first time, a reference about the suit cart track has come to be incorporated. It is thus found that just a few months prior to the institution of the suit, Ex.A4 having come into existence, as rightly determined by the first appellate Court, in the light of the above position, merely on the above said recitals of the existence of a cart track depicted in Ex.A4, we cannot safely come to the conclusion that the suit cart track had been in existence on ground for more than 35 years prior to the institution of the suit as claimed by the plaintiff and that, they had been in possession and enjoyment of the same for acquiring the right over the same by easement by prescription. It is thus found that no acceptable document as such has been placed by the plaintiffs to establish that the suit cart track has been in existence over a long period of time as claimed by them.

13. The advocate commissioner, who has been nominated to inspect the physical features of the locality, has filed his report and plan and from the report and plan of the advocate commissioner marked as Exs.C1 & C2, it is found that even though the advocate commissioner has noted about some traces of tyres in the portion shown as Cart track, he has opined that the said traces are not found to be of a permanent feature and on the other hand, the said traces are found to be of recent origin, thereby pointing that only recently the vehicle had been run over the said portion and further, the advocate commissioner had also noted that a tree had been cut and lying on the said portion, which is also found to be recently cut and therefore, it is found that as per the above said features noted by the advocate commissioner in the alleged cart track portion, it is seen that no permanent feature of the existence of the suit cart track as such has been noted by the advocate commissioner. Therefore, in my considered opinion, the first appellate Court has rightly appreciated the commissioner's report and plan in the right perspective and come to the conclusion that the suit cart track has not been in existence for several years as claimed by the plaintiffs.

14. In this connection, the second plaintiff examined as PW1, during the course of his evidence, has clearly admitted that there is no reference about the suit cart track in Exs.A1 to 3 and further, according to him, in Ex.A3 reference about the pathway only for having access to his house had been incorporated and however he would also claim that based on Ex.A3, the lease deed has come to be written and further, there is no live fencing at the point "A" shown in the plaint plan and only cactus used to be heaped at that place and after removing the same, they could have access and such being the evidence of

PW1, it is found that on the basis of the above said evidence of PW1, we cannot safely conclude that the suit cart track has been in existence over a long period of time as claimed by the plaintiffs and on the other hand, it is found that, as rightly put forth by the defendant's counsel, only for gaining access by the defendant to his lands, an opening has been made at the point "A" and the said opening is also used to closed by placing cactus and therefore, it is seen that there is no free passage through the suit cart track by one and all, particularly, the plaintiffs as claimed by them and in such view of the matter, the claim of the plaintiffs that they had been using the suit cart track for several years and thereby, they had prescribed easementary right over the same by way of prescription as such cannot be countenanced.

15. However, it is contended by the plaintiffs' counsel that the defendant, by way of his admission, has admitted the existence of the suit cart track and that the same had been used for several years and on that basis, the first appellate Court should have come to the conclusion that the plaintiffs have established the existence of the suit cart track. In this connection, he placed reliance upon the evidence of the defendant examined as DW1 adduced during the course of cross examination and during the course of cross examination, DW1 would state that fencing has been made in the lands belonging to the parties on the western, northern and southern side and tress are also grown in the said area and the fencing had been made to prevent the others from entering the lands and also to prevent the access of the concerned land owners approaching the lands belonging to others and there is access at point "A" and only through the point "A", they used to take cart and after the harvesting season, they used to close the same by placing dry thorns and dry thorns are placed to prevent the cattle from entering the lands and while having access, they used to remove the dry thorn and gain access and accordingly, been using the said portion from the date of purchase. From the above piece of evidence adduced by DW1, it is contended by the plaintiffs' counsel that considering the admission of the defendant that he had been using the portion shown as "AB" as pathway right from the date of Ex.A2 dated 26.04.1956, it is argued that the suit cart track has been established to be in existence for several years and accordingly, the defendant unable to conceal the same has admitted during the course of his evidence that they had been using the same for reaching their lands. However, as rightly put forth by the defendant's counsel, the above said piece of evidence tendered by the defendant as such cannot be construed that he has admitted the right of the plaintiffs to use the said cart track for gaining access to the plaintiffs' lands. As rightly put forth, the evidence of DW1 could only be construed that the point "A", had been used by the defendant

only for gaining access to his lands from the common Eтары and accordingly, it is found that after the harvest, the defendant used to close the said point by placing dry thorns and would gain access through the said point only after removing the dry thorns and this would only go to show that the defendant exercising full ownership over the said area, accordingly, for the purpose of gaining access to his lands, used that portion as cart track and at other times used to keep it closed by placing dry thorns and in such view of the matter, it is found that the said cart track is not a cart track intended used by one and all including the plaintiffs for having access to their lands and such being the position, by way of the above piece of evidence adduced by the defendant during the course of cross examination, we cannot conclude that the said cart track has been in use and enjoyment of the plaintiffs and their predecessors in interest for several years as claimed in the plaint. As rightly argued, the evidence of a party should be read harmoniously and as a whole and accordingly, the evidence of DW1 read conjointly, it is seen that nowhere, he has admitted that the suit cart track had been in use and enjoyment of the plaintiffs and their predecessors in interest for several years as projected in the plaint. The plaintiffs cannot be allowed to take advantage of the cart track intended for the use of the defendant to have access to his own lands and contend that the said cart track had also been in use and enjoyment of the plaintiffs and their predecessors in interest for several years for reaching their lands as claimed. Therefore, it is seen that the contention of the plaintiffs' counsel that the defendant has, by way of his admission, accepted the plaintiffs' right and use of the suit cart track by way of easement by prescription as such cannot be countenanced in any manner.

16. As rightly contended by the defendant's counsel, the defendant has vehemently repudiated the existence of the suit cart track as depicted and projected by the plaintiff and also disputed the claim of the use and enjoyment of the said suit cart track by the plaintiffs and their predecessors in interest for several years as claimed in the plaint. Despite the same, the plaintiffs have not chosen to seek the relief of declaration with reference to their alleged right over the suit cart track. It is thus seen that the plaintiffs' suit as such is found to be not legally maintainable, particularly, when the plaintiffs have failed to establish that the suit cart track is in existence as claimed in the plaint and that, the same had been put in use and enjoyment by the plaintiffs and their predecessors in interest at any point of time or for several years as claimed in the plaint and particularly, when the plaintiffs have not placed any reliable material as such to hold that the defendant has admitted the existence of the suit cart track and the usage and enjoyment of the same by the plaintiffs and their predecessors

in interest over a long period of time. In the light of the position, the plaintiffs should have endeavoured to seek the relief of declaration and in such view of the matter, considering the decision of the apex Court reported in 2008 (6) CTC 237 (Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by LRs & others), despite the defence projected by the defendant, the plaintiffs having failed to seek the relief of declaration as regards their claim of right over the alleged suit cart track, the plaintiffs have to suffer the consequences thereof and on that ground, it is seen that the suit laid by the plaintiffs is not maintainable.

17. In the light of the above discussions, it is found that the first appellate Court has rightly appreciated the commissioner's report and plan marked as Exs.C1 and C2 in coming to the conclusion that the suit cart track has not been in existence for several years as claimed by the plaintiffs and thereby rightly not accepted their claim of right over the same by way of easement by prescription and the first appellate Court has rightly appreciated the materials placed on record in the correct perspective both factually as well as legally and accordingly, held that the plaintiffs have miserably failed to establish the existence of the suit cart track and the useage and enjoyment of the alleged suit cart track by the plaintiffs and their predecessors in interest for several years as claimed in the plaint and accordingly, rightly reversed the conclusion of the trial Court by giving plausible and acceptable reasons in accordance with law. The substantial questions of law formulated in the second appeal are accordingly answered.

18. Lastly, it is argued by the defendant's counsel that the suit laid by the plaintiffs claiming right over the suit cart track by way of easement by prescription as such is not maintainable in the light of the decision of the apex Court reported in (2014) 1 Supreme Court Cases 669 (Curdwara Sahib Vs. Gram Panchayat Village Sirthala and another). However, as rightly argued by the plaintiffs counsel, the above said decision being found to be as regards the plea of ownership, on the basis of the adverse possession, the same is not applicable to the facts and circumstances of the case at hand. Considering the facts and circumstances of the present case, particularly, the plaintiffs having not claimed the relief of declaration in respect of the suit cart track as such and even otherwise, sought the relief of permanent injunction only by claiming right over the suit cart track by way of easement by prescription and further when it is found that the establishment of the claim of title over the lands on the plea of adverse possession and the claim of a right by way of easement by prescription are not similar and operating in different fields as such, in my considered opinion, the above contention of the defendant's

counsel is not required to be addressed and determined in this case, particularly, when in the light of the above discussions, I have held that the plaintiffs had failed to establish the existence of the suit cart tract as such and their usage and enjoyment of the same for several years as projected for entitling them to acquire the right over the same by way of easement by prescription.

At the end, the second appeal fails and accordingly, is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-vii)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Additional District and Sessions Judge cum Chief Judicial Magistrate Court, Namakkal.
2. The Principal District Munsif Court, Namakkal.

+1cc to Mr.C.JAGADISH, Advocate, S.R.No.17536

+1cc to Mr.K.KUPPUSAMY, Advocate, S.R.No. 17835

Pre-Delivery Judgment made
in S.A.No.613 of 2003

MP (CO)
TR(24/04/2018)

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