

IN THE HIGH COURT OF JUDICATUE AT MADRAS

DATED : 10.01.2019

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.Nos.403 and 404 of 2008
and
M.P.No.1 of 2008

Appachi

... Appellant in both Appeals/
3rd Defendant in SA.403/2008
1st Defendant in SA.404/2008

versus

1.N.K.Ramasamy Gounder
2. Venkatachalam
3. Ramalingam
4. State of Tamil Nadu,
Represented by
The District Collector,
Erode District.

(Respondents 2 to 4 herein
given up as un-necessary parties)

... Respondents 1 to 4 in
S.A.No.403 of 2008/Plaintiff/
Defendants, 1, 2 & 4

1. K.V.Rajamanickam
2.K.V.Ramakrishnan
3. Ramalingam
4. Krishnaveni
5. Radhamani
6. Parimala Devi

(Respondents 3 to 6 herein
given up as un-necessary parties)

... Respondents 1 to 6 in
S.A.No.404 of 2008/
Plaintiffs 1 & 2
Defendants 3 to 6

Prayer in S.A.No.403 of 2008 : This Second Appeal is filed under Section 100 of code of Civil Procedure against the judgment and decree dated 31.07.2007 made in A.S.No.66 of 2004 on the file of the Sub-Court, Bhavani, confirming the judgment and decree dated 07.11.2001 made in O.S.No.584 of 1994 on the file of the I Additional District Munsif Court, Bhavani.

Prayer in S.A.No.404 of 2008: This Second Appeal is filed under

Section 100 of code of Civil Procedure against the judgment and decree dated 31.07.2007 made in A.S.No.78 of 2004 on the file of the Sub-Court, Bhavani, Erode reversing the judgment and decree dated 28.10.2004 made in O.S.No.563 of 1996 on the file of the II Additional District Munsif Court, Bhavani.

For Appellant
(in both S.As.) : Mr.A.Sundaravadhanan

For first Respondent : Mr.P.M.Duraiswamy
(in both S.As) in SA.403 of 2008

For Respondents 1 & 3 : Mr.G.Vivekanand

JUDGMENT

These twin appeals arise from two separate suits into two separate First Appeals but are now consolidated since dealt with identical issues over identical subject matter.

S.A.No.403 of 2008:

2.1 This suit was laid on a representative capacity by the plaintiff for declaring the right of the residents of the Pudunallagoundenpudur over a suit cart track said to be situated in the middle of R.S.No.170, and for a consequential injunction not to disturb the pathway by the defendants, since the defendants 1 and 2 have damaged a portion of pathway and for a direction to restore the cart track to its original position in the plaint-B schedule property.

2.2 This suit was decreed by the trial court, and in an appeal preferred by the 3rd defendant in A.S.No.66 of 2004, the First Appellate Court confirmed the decree of the trial court and dismissed the First Appeal. Challenging the same, the present Second Appeal is laid.

S.A.No.404 of 2008:

3. This suit arises from O.S.No.563 of 1996 on the file of the I Additional District Munsif Court, Bhavani for a decree of prohibitory injunction for the plaintiffs' right of pathway over the suit property not to be disturbed and for granting a mandatory injunction to restore the suit cart track to its original position. The subject matter of R.S.No.170 is the same as in the earlier suit, which gives a description to include R.S.No.154 which runs to the south of S.No.170 and almost perpendicular to it towards its east. The plaintiffs in this suit are related to the plaintiff in the earlier mentioned suit. This suit came to be dismissed at the first instance by the trial court. Challenging which, the plaintiffs had preferred the First Appeal and the First Appellate Court at the first

instance, had set aside the said decree of the trial court and remanded the matter back to the trial court. Post remand, the trial court dismissed the suit and in an appeal filed by the plaintiffs in A.S.No.78 of 2004, the First Appellate Court allowed the appeal.

4. To understand the factual conflict between the parties, the properties that are broadly cart track, may be stated briefly as follows:-

Bhavani - Mettupalayam road runs east-west and is comprised in R.S.No.169. To its south is situated S.No.170. Adjacent to S.No.170 on the east lies S.No.168. The plaintiffs in O.S.No.563 of 1996 from which S.A.No.404 of 2008 arises are stated to have title to portion of the property in S.No.166 that lie on the adjacent east of S.Nos.165 and 168. About the middle of R.S.No.170, there runs a cart track and this cart track is shown in Villager Plan in Ext.B5 in O.S.No.584 of 1994 and as Ext.B13 in O.S.No.563 of 1996 (from which S.A.No.403 of 2008 arise) and it commences from the main road on the north and proceed till the end of R.S.No.170 in the south, then takes a turn towards east and moves to adjacent Survey Numbers. Presently, S.No.170 is divided into 8 sub-divisions. Of them, S.No.170/1 is on the western part and to its immediate south lies S.No.170/4. About the middle of S.No.170/1 and almost touching its eastern boundary, there situate is a temple.

5.1 The 3rd defendant in O.S.No.584 of 1994, the appellant herein claims title over R.S.No.170/1 temple, S.Nos.170/2, 170/3 which lie to the east of S.No.170/1. The defendants 1 and 2 claim title to S.No.170/4 that lie to the immediate south of S.No.170/1 and to the west of S.No.170/3. The defendants admitted the existence of suit cart track which as said earlier runs from the main road on the north and pass along the temple in S.No.170/2 and proceeds to the south of S.No.170/4 and towards east culminates and ends at S.No.170/8. These aspects are disputed on either side.

5.2 The only dispute here is while according to the plaintiffs in the representative suit, the said cart track is used by all the villagers of the area for several centuries, the plaintiffs in O.S.No.563 of 1996 would plea that it is a pathway cum cart track and claims right by easement of prescription and by necessity.

6. If the cart track in question is one, over which, all the villagers of the locality have a right of way, then it is necessary for the plaintiffs in O.S.No.563 of 1996 to prove their title to use the cart track as of right. Therefore, this Court takes up for consideration primarily representative suit in O.S.No.584 of 1994 (the one from which S.A.No.403 of 2008

arises).

7. The point that was argued before the trial court was that the defendants have admitted the existence of the cart track, the trial court has recorded that while the 3rd defendant had denied the existence of the very suit cart track and has pleaded an alternative way for the villagers to the west and south of the property in S.No.170, and has relied on the Commissioner's report under Exts.C1 to C4, where the Commissioner has referred the suit cart track running through the 3rd defendant's property on the north, as well into the property of the defendants 1 and 2 in S.No.170/4, as well as Exts.A22 to 24 to arrive at a conclusion that the suit cart track exists. Exts.A22 to 24 are sale deeds dealing with the properties of the 3rd defendant in R.S.No.170/1. Ext.A22 dated 10.05.1949 is regarding a portion of the property in favour of the 3rd defendant's father. Exts.A23 and A24 respectively are purchased by the 3rd defendant and as regards certain other portions of property in S.No.170, of them, Ext.A23 sale deed is executed by the plaintiff in the representative suit. All sale deeds refer to suit cart track in S.No.170 before its sub-division and has restricted the purchasers under these documents from obstructing the use of the suit cart track. Before the trial court, the 3rd defendant contended that this condition in Exts.A22 to 24 must be construed as binding only parties to the sale deeds, but it cannot be stretched to include all the villagers. Here, the trial court has rejected this aspect and has concluded that the said cart track exists for the benefit of all the villagers. This was confirmed by the First Appellate Court.

8. Both the appeals are admitted on the following substantial questions of law:

S.A.No.403 of 2008:

'a) Whether the mere existence of a cart track in a village can be presumed to be for public benefit, in the absence of any documents to prove use by the public?'

S.A.No.404 of 2008:

'a) Whether the mere existence of a cart track in a village can be presumed to be for public benefit, in the absence of any documents to prove use by the public?

b) When there has been no request for joint trial of two suits whether judicial notice can be taken of the judgment pronounced in one suit for decreeing the other suit?'

9. The learned counsel for the appellant would argue:

- That a mere denoting a portion of the property as cart track or 'Nilaviyal padhail' in a plan would not

automatically imply that it has become a public road. In this context, he submitted that according to the pleading in representative suit, the cart track was dedicated to the Panchayat by all those who owns property in the suit property in S.No.170, some time in January 1974, under Ext.A3. However, these documents written in a stamp paper of the year 1966 bears no date, and is also bereft of any specific details as to the specific property regarding, which it was so executed. This was denied by the 3rd defendant as fabricated but the same has not been proved. The trial court however has relied on this document.

- The next aspect of the matter is whenever sale deeds are executed, it binds only on the parties to the document and therefore, it is not correct on the part of the trial court to conclude that Exts.A22 to A24 itself would show that whatever restriction imposed on the 3rd defendant/appellant and his father, as the case may be, will enure to the benefit of all the villagers contrary to the rule of construction of a written document.
- The cause of action for the suit lies on the basis of easement of necessity and prescription. The 3rd defendant has actually defended the suit resisting plaintiff's right to claim any one of these categories of easement over S.No.170/1. The courts below have ignored this aspect of plaintiffs' pleading and has travelled beyond the pleadings to recognise the right of the villagers while decreeing the suit.

10. Per contra, the learned counsel for the respondents would submit that the construction of documents based on the evidence, is a finding of fact and unless any perversity is demonstrated in the judgment of the Courts below, this Court may not interfere with the finding on facts. Continuing the argument, the learned counsel for the respondents would submit that the plaintiffs have categorically argued that the suit cart track has been used by them for centuries or for time immemorial and therefore, the right asserted by the plaintiff is not just, which is limited to one falling under easement of necessity or that of easement by prescription.

11. The rival submissions are carefully weighed for their respective merits. As already indicated, the suit cart track commences from north to eastern boundary. S.No.170/1 proceeds southwards and go across S.No.170/4 belonging to the defendants 1 and 2 and then it proceeds further south and passes through S.No.170/8. The defendants 1 and 2 who resisted the plaintiffs' right of using the cart track for the benefit of the entire villagers though suffered a decree against him, has chosen not to prefer any appeal challenging it. This would imply that the

villagers have the right over the cart track in S.No.170/4 from its north tip to its south tip. The cart-track in S.No.170/1 proceeds from the very point and it ends in S.No.170/4 and proceeds northwards to reach the main road. The current dispute is all about right over the first length of the cart track in S.No.170/1. In this context, as this Court reads the entire plaint in its totality though it is repeated few times that the right claimed is one of easement of necessity or easement by prescription of right of user over the said cart track. In the opinion of this Court, the aspect which the cause of action for the suit has been adequately conveyed to the defendants, no matter it is wrongly or mistakenly taken as easement of necessity or easement of prescription. Secondly, the defendants have also participated in the trial knowing fully well what they are contesting. This is evident from the line of arguments they have adopted before the trial court for constructing Exts.A22 to A24 sale deeds.

12. From all these three sale deeds, Ext.A-23 is critical. This is executed by the plaintiff in the representative suit, who later examined himself as P.W.1. These documents were brought only during cross-examination of the 3rd defendant (D.W.2). Inasmuch as this is a document of title, the present appellant cannot deny them. Admittedly, these documents contain a covenant restraining the purchasers thereof from obstructing the use of the cart track. It does not however specify for whose benefit such covenant was made in these documents. Here, first of all the document Ext.A22 dated 10.05.1949 was obtained by appellant's father, which refers both to the cart track and carries the covenant as stated above. The trial court has rightly found that the cart track has been in existence even prior to 1949. Second document is Ext.A23 dated 26.11.1974. If the appellant has come to the Court to construct the document in the manner in which he wants, then he ought to have cross-examined P.W.1 on it pointedly. This was not done. Therefore, taking the totality of the facts and circumstances, and considering the assertion made by the plaintiffs from the executant of Ext.A23 needs to be accepted. After all civil suits are decided on preponderance of probability and Exts.A22 to A24 taken along with absence of pointed cross-examination of the appellant preponderates the probability that the villagers are using the cart track.

13. One additional fact that this Court could now gather on perusing Ext.B1, Survey plan of FMB of R.S.No.170 is concerned, a separate Survey Number is assigned for the temple in S.No.170/2 and it is in the middle of S.No.170/1 and touching its eastern boundary. According to the appellant, as per his pleading in the other suit in O.S.No.563/96, he has permitted the villager to use the temple here. However, no such pleading is available in the representative suit. The cart track in

question runs to 81 metres from the main road to the temple. There is nothing on record to establish that this appellant has actually granted any permission to the villagers to use the cart track up to the temple. (This is available in D.W.2's cross examination in representative suit). If the villagers have go to the temple in S.No.170/2 in the same cart track, it is inconceivable that the cart-track for about 35 feet to the south of the temple would be a private pathway.

14. Looking from every angle, this Court does not find any merit in the contention of the appellant. Secondly, this Court does not find any real substantial questions of law to decide which is more than on finding of facts. On this aspect this Court cannot find fault on the appreciation of evidence by the trial court. Since, this appeal is dismissed which arise from O.S.No.563 of 1996 is likely concludes and consequently the same is dismissed. However, it may be stated that the plaintiff in the representative suit as deposed in its cross-examination for reviewing of pathway to a convenient place, if the same is done by the Tahsildar, accordingly, the plaintiffs appear to be have instituted pathway to reach the property in the south. The appellant may move the Tahsildar, if he so desires for reviewing of the pathway. S.No.170/3 belongs to the plaintiffs in O.S.No.563 of 1996 and S.No.170/4 belongs to the defendants 1 and 2. In the eventuality, the Tahsildar may consider all the parties concern and do the same.

15. Accordingly, both the appeals are dismissed and the judgment and decree dated 31.07.2007 made in A.S.No.66 of 2004 and A.S.No.78 of 2004 on the file of the Sub-Court, Bhavani, are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

ssn

To

1. The Sub-Court,
Bhavani.

2. II Additional District Munsif Court,
Bhavani.

3. I Additional District Munsif Court,
Bhavani.

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

+lcc to Mr.A.Sundaravadanan, Advocate, S.R.No. 3341

+lcc to Mr.P.M.Duraiswamy, Advocate, S.R.No. 3408

S.A.Nos.403 and 404 of 2008
and
M.P.No.1 of 2008

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