

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2019

PRONOUNCED ON : 01.02.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1443 of 2004

1.Sri.P.Thangavelu

2.Sridevi

...Appellants/Respondents/Plaintiffs

Vs

Chinnakutty @ Shanmugam

... Respondent/Appellant/Defendant

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 31.12.2003 and made in A.S.No.55 of 2003 on the file of the learned Subordinate Judge, Thiruppur in reversing the judgment and decree dated 26.06.2003 made in O.S.No.63 of 2000 on the file of the learned District Munsif, Avanashi.

For Appellants : Mr.T.R.Rajaraman

For Respondent : Mr.N.Ishliag Ahmed

JUDGMENT

The plaintiffs are the appellants herein. The dispute is in respect of the use of cart track to have access to the plaintiffs' land through the defendant property. The suit is laid for permanent injunction, restraining the defendant from interfering with the plaintiffs use and enjoyment of the suit 'B' schedule cart track and in alternate, to pass a decree for mandatory injunction directing the defendant to form a cart track as described in suit 'C' schedule property, as per the recitals in the partition deed dated 09.09.1957.

2.The trial Court granted the relief of permanent injunction restraining the defendant from interfering the plaintiffs use and enjoyment of the suit 'B' schedule cart track. But, declined to give the alternate relief of mandatory injunction directing the defendant to form a cart track as described in the suit 'C' schedule property, as per the recitals in the partition deed dated 09.09.1957.

3. On appeal filed by the defendant, the First Appellate Court reversed the relief by setting aside the decree passed by the trial Court. The First Appellate Court declined the relief of permanent injunction of enjoying the 'B' schedule property as cart track however, granted the alternate relief of mandatory injunction directing the defendant to form a new cart track in suit 'C' schedule as per the recitals in the partition deed dated 09.09.1957.

4. Aggrieved by this, the plaintiffs have preferred the Second Appeal. At the time of admission, this Court has formulated the following substantial questions of law:-

"1. Whether the report and plan of the Commissioner establish the existence of only pathway on the western side (B-schedule) as pleaded by the plaintiffs, still is the learned Subordinate Judge right in granting a decree only for marking as if the cart track referred as 'C' schedule is in existence ?

2. Is the learned Subordinate Judge right in negating relief of permanent injunction and granting mandatory injunction when admittedly the portion where 'C' schedule cart track situate belong to DW-2 and an application to implead him has been dismissed ?

3. Is the decree for mandatory injunction granted in favour of the plaintiffs be executed in the absence of DW-2 being made a party, especially an application to implead has been dismissed by the trial Court?"

5. The case of the plaintiffs/appellants, as pleaded in their plaint, is as under:-

One Nanjappa Gounder had vast extent of agriculture lands in Annur Village as his ancestor property. He had three sons viz., Kaliappa Gounder, Palanisamy Gounder and Devanna Gounder. After the demise of Nanjappa Gounder, his three sons partitioned their ancestor property and joint family property, under a registered partition deed dated 09.09.1957. Under the partition deed, 'A' schedule property was allotted to Kaliappa Gounder; B schedule property was allotted to Palanisamy Gounder and C Schedule property was allotted to Devanna Gounder. To reach the

properties allotted to Palanisamy Gounder and Devanna Gounder, a cart track was provided through the land of Kaliappa Gounder.

6.The first plaintiff is the son of Palanisamy Gounder and the second plaintiff is his wife. The defendant is son of Kaliappa Gounder. As per the partition deed, the cart track was in existence and the same was enjoyed by all the three brothers. The said cart track as provided under the partition deed is identified as 'C' schedule property marked in Green in sketch annexed to the plaint. The defendant who inherited the property from his father Kaliappa Gounder and enjoying the field in S.No.459. As per the mutual, oral understanding between the parties, 30 years ago, the location of the cart track was changed. The cart track as per partition deed which was running North South in the Eastern end of S.F.No.456/2 and then turned towards West running East West till the property of Palanisamy Gounder, the father of the first plaintiff. As per the change, the new cart track starts in the Western portion of S.No.456/2 from East West Annur Avinashi main road. This new cart track runs North South from Annur Avinashi High Road and then turned towards West running East West turn towards South running North South, till the end of S.No.457/2. The new cart track starts on the Western portion of S.No.456/2, from the East West Annur Avinashi main Highways Road, run through S.F.No.456 and S.F.No.459. It runs North South in S.No.456 owned by Palanisamy Gounder. On reaching S.No.459 turn towards West and thereafter, runs towards South in the property allotted to Kaliappa Gounder.

7.The new changed cart track being in existence for more than 30 years and the same is described as 'B' schedule property in the suit. After providing new cart track in 'B' schedule property, the old cart track in 'C' schedule was destroyed by the defendant and his father Kaliappa Gounder and got it annexed to their property.

8.The specific case of the plaintiffs/appellants is that, the old cart track as per the partition deed is no more in existence and taken away by the defendant and his father and the only cart track now available for the plaintiffs to reach their land through Annur Avinashi road is the cart track described in 'B' schedule and mentioned as 'ABCD' marked in red, in the plaint annexed to the plaint. The further case of the plaintiffs is that, the family members of Palanisamy Gounder partitioned the property under the registered partition deed dated 20.11.1980. Under the said partition deed, 'A' schedule property has been allotted to the share of the first plaintiff and a settlement deed has been executed by the first plaintiff in favour of his wife, the second plaintiff in respect of a portion

of the suit 'A' schedule property. Being the successor in interest of Palanisamy Gounder, the plaintiffs are the absolute owner of the 'A' schedule property.

9. Similarly, the property allotted to the shares of Kaliappa Gounder under the partition deed dated 09.09.1957, was subsequently partitioned between the legal heirs of Kaliappa Gounder. The defendant being one of the sons of Kaliappa Gounder has got the property situated in S.F.No.459 and he has become the successor in interest of the Kaliappa Gounder. Alleging that the defendant taking advantage of the proximity of the suit 'B' schedule cart track with his property in S.No.459, has made temporary encroachment in the portion of cart track and had reduced the width of the cart track which was originally 15 feet.

10. The defendant with an intention to annex the suit 'B' schedule cart track with his own property, making all attempts to encroach upon the 'B' schedule cart track. The 'B' schedule cart track is the only way for the plaintiffs to reach their property, so it is an easement of necessity for ingress and egress. It is an easement by grant, since, the right of cart track has been originally provided under the partition deed. It is also an easement by prescription since, the plaintiffs and the predecessor in title are using the cart track for about 30 years.

11. The above contention of the plaintiffs is opposed and denied by the defendant is the written statement. Admitting their relationship between the parties and tracing the title over the properties through Nanjappa Gounder and the partition deed dated 09.09.1957 entered between the sons of Nanjappa Gounder, the defendant claims that the cart track provided under the partition deed of the year 1957 is on the Eastern side from North South and East to West extending up to the property described as 'B' and 'C' schedules in the partition deed.

12. The lands of the defendant in S.Nos.456/2 and 460 are located West of their elder brother's land. The cart track claimed by the plaintiffs is found on the Eastern side of the properties in 'A' Schedule i.e., S.No.456/2. While so, the plaintiffs make a false claim over the cart track on the Western side of the land of the defendant. The claim of the plaintiffs is contrary to the fact and records.

13. The alleged mutual oral agreement to change the cart track from the Eastern side of S.No.456/2 to the Western side is denied. Taking advantage of the cart track available on the

Western side of the land which is owned by the defendant for his personal use, the plaintiffs claim right over that cart track, as if, the cart track allotted during the partition deed has been destroyed and by mutual agreement, new contract was laid. The plaintiffs were never in use and enjoyment of the 'B' schedule cart track running in the land of the defendant. No right of easement what so ever accrued upon the plaintiffs in respect of 'B; schedule cart track.

14. Based on the rival submissions, the trial Court has framed the following issues:-

"(i) Whether the plaintiffs are enjoying the suit cart track first Item of schedule 'ABCD' as in plaint for more than 30 years as an easement of necessity ?

(ii) Whether the plaintiffs are enjoying second item of schedule suit cart track ?

(iii) Whether the plaintiffs are entitled for injunction as prayed for ?

(iv) To any other relief ?"

15. The trial Court, after considering the evidence both oral as well as document has held that as per the partition deed, all the three sons of Nanjappa Gounder have agreed to have cart track running from the portion allotted to Kaliappa Gounder to reach the land of Palanisamy Gounder and Devanna Gounder. Accepting the contention of the plaintiffs that the cart track earmarked under the partition deed has been obliterated and new cart track has been laid running West of S.No.456/2 owned by the defendant, granted injunction recognising the right of the plaintiffs to use the cart track as described in 'B' schedule property.

16. On appeal, the First Appellate Court has deferred with the finding of the trial Court in respect of existence of cart track on the 'B' schedule property. According to the First Appellate Court, the Commissioner in his report has identified the cart track in 'C' schedule property which is in consonance with the partition deed of the year 1959. when there is findings to show that the plaintiffs have other alternate way to reach their land, easement of necessity to use cart track in 'B'

schedule property does not arise. The relief of injunction restraining the defendant from preventing the plaintiffs from using the 'B' schedule property cart track cannot be granted but, contrarily granted the alternate relief of mandatory injunction directing the defendant to form a cart track as described in the partition deed. The First Appellate Court found the cart track in 'C' schedule is in existence as per the Commissioner report so it could be restored for the use and enjoyment of the plaintiffs.

17. The learned counsel for the appellants/plaintiffs would contend that the Commissioner report and plan establishes existence of cart track only on the Western side of the defendant's land, which is identified as 'B' schedule property by the plaintiffs. The cart track referred by the First Appellate Court which is described in 'C' schedule runs through the third parties land and in fact, D.W.2 who is one of the land owner of the property in which the cart track mentioned in the 'C' schedule runs was sought to be impleaded. The petition was opposed by the defendant, so, the Court dismissed the impleading petition. The defendant has examined D.W.2 to defeat the right of the plaintiffs but, prevented the plaintiffs from impleading him as one of the party. Therefore, though the mandatory injunction has been granted in favour of the plaintiffs to form cart track through 'C' schedule property, the said decree cannot be executed without impleading D.W.2.

18. Per contra, the learned counsel for the defendant/respondent would submit that the cart track which is referred under the partition deed through which the plaintiffs claim right of access to their portion admittedly on the Eastern portion of S.No.456/2. The commissioner who inspected the field had identified the cart track in 'C' schedule and the same is in consonance with the description found in the partition deed. While so, the appellants herein have made an imaginary claim over the cart track on the western portion of the defendant land which was laid by the defendant for their personal use. The First Appellate Court has rightly granted the alternate prayer sought by the plaintiffs since, the grant of prayer for permanent injunction in respect of 'B' schedule property was not proved by the defendant by way of evidence. Therefore, the appellants cannot have any grievance in the decree passed by the First Appellate Court rejecting the case of the plaintiffs/appellants about the change in the cart track by virtue of oral agreement.

19. On perusing the pleadings, evidence and the deposition of

respective parties, this Court finds that the specific case of the plaintiffs was that, as per the partition deed, the cart track was in the 'C' schedule whereas, by oral agreement, they have changed the cart track as described under 'B' schedule property. The evidence adduced by the plaintiffs does not support the said plea. Further, the main prayer sought by the plaintiffs is contra to the documentary evidence and the physical feature, as found at the time of Commissioner's inspection. It may be convenient for the plaintiffs to access through the cart track which is on the Western portion of the defendant's land. But, when there is no right to use the said cart track, laid by the defendant, in his own land, for his exclusive use, the road of access for the plaintiffs can only be based on the document.

20. The trial Court has not properly considered the material placed before it but has carried away by the convenience of the plaintiffs to have access to the main road ignoring the documentary evidence and the existence of alternate cart track which was granted in the partition deed in the year 1957. Whereas, the First Appellate Court has rightly considered the documents which confer right of access to the plaintiffs land on the East and has rightly held that the plaintiffs are entitled for the alternate relief and not the main relief of injunction.

21. It is now contended by the learned counsel for the appellants that since, the cart track marked in green portion runs through the third parties property, it is difficult for him to execute the decree. First of all, the plaintiffs have not come with clean hands and clear case. The plaintiffs claim that the cart track as per the partition deed has been destroyed and the plaintiffs have no other access except the cart track on the 'B' schedule property. This claim has been disproved by the defendant through evidence and Commissioner's report. May be the plaintiffs attempt to implead D.W.2 as one of the parties to the proceedings, failed then it is for the plaintiffs to take further proceedings before the higher forum, which the plaintiffs have failed to do so. Hence, they cannot take advantage of their own fault and ask for a cart track in the 'B' schedule property just because it is more convenient for them to have access to the highways rather than using the cart track which is provided to them in the partition deed and also still in existence, as found by the Commissioner. Having claimed an alternate relief and it being granted, it is too late for the day to the plaintiffs to say that the alternate relief granted is not anexecutable decree.

22.For the said reasons, this Courts finds no merit in the Second Appeal and accordingly, the same is dismissed. The decree and judgment passed by the First Appellate Court in A.S.No.55 of 2003 dated 31.12.2003 is confirmed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge,
Thiruppur.

2.The District Munsif,
Avanashi.

Copy to

The Section Officer,
VR Section, High Court, Chennai-104.

+1cc to Mr.T.R.Rajaraman, Advocate Sr.9044

+1cc to Mr.N.Ishliag Ahmed, Advocate Sr.8722

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