

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.01.2019

PRONOUNCED ON : 28.01.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal Nos.1815 and 1968 of 2004

1.Gopal
2.Manickam
3.Govindaraj
4.Raja
5.Ramalingam

...Appellants in both S.As

Vs

1.Kamaleshkumari
2.Sundaram
3.Mathaiyan

.... Respondents in S.A.No.1815 of 2004

1.Kamaleshkumari
2.Sundaram

... Respondents in S.A.No.1968 of 2004

Prayer in S.A.No.1815 of 2004:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 29.04.2003 in A.S.No.36 of 2002 on the file of the learned Subordinate Judge, Dharmapuri reversing the judgment and decree dated 28.02.2002 in O.S.No.266 of 1995 on the file of the learned District Munsif, Dharmapuri.

Prayer in S.A.No.1968 of 2004:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 29.04.2003 in A.S.No.11 of 2003 on the file of the learned Subordinate Judge, Dharmapuri reversing the judgment and decree dated 28.02.2002 in O.S.No.372 of 1997 on the file of the learned District Munsif, Dharmapuri.

For Appellants
in both S.As : Mrs.AL.Gandhimathi

For Respondents: Mr.V.Anilkumar for
in both S.As Mr.S.R.Raghunathan

COMMON JUDGMENT

The above two Second Appeals are directed against the common judgment passed by the First Appellate Court in A.S.Nos.36 of 2002 and 11 of 2003 dated 29.04.2003. The appellants herein are the plaintiffs in O.S.No.372 of 1997 on the file of the learned District Munsif, Dharmapuri and respondents in A.S.No.11 of 2003 on the file of the learned Subordinate Judge, Dharmapuri. The respondents herein are the plaintiffs in O.S.No.266 of 1995 on the file of the learned

District Munsif, Dharmapuri and appellants in A.S.No.36 of 2002 on the file of the learned Subordinate Judge, Dharmapuri.

2.Before the trial Court, the appellants herein succeeded in their suit in O.S.No.266 of 1995 which was reversed by the First Appellate Court in A.S.No.36 of 2002. Whereas, before the trial Court, the respondents herein lost their suit in O.S.No.372 of 1997 but succeeded in their appeal in A.S.No.11 of 2003.

3.The case of the appellants/plaintiffs in O.S.No.266 of 1995, the suit property which is described as a cart track is situated in S.No.37/5 and S.No.38/4 measuring roughly 360 feet length and 10 feet breadth marked as 'ABCD', in the rough plan attached to the plaint. According to the appellants, they are the absolute owners of the said cart track. The father of the appellants inherited the suit property from his ancestors and enjoyed the same till his death in the year 1970. As his legal heirs, the plaintiffs/appellants have succeeded to his estate and enjoying the suit property. In the year 1985, the appellants dug a well in their property. The mud excavated in the well was used to lay cart track in their own land, for their own use exclusively.

4.The first respondent herein who purchased the land adjacent to the suit cart track from one Ramalingam. He also wanted to purchase the appellants' land, to establish a Mill. When the appellants refused to sell their property, as a short cut method, to grab the suit property, the first respondent, claiming imaginary right over the suit property and causing trouble to the appellants' peaceful possession and enjoyment.

5.On 29.08.1995, the respondents herein made an attempt with the help of rowdy elements to destroy the suit property and annexed it with their property. The said attempt was prevented by the appellants with the help of others. The vendor of the first respondent never claimed right over the suit property till be alienated to the first respondent the first respondent making a imaginary claim over the suit property, as if, she has a right in the cart track. Even, for any reason, if the Court come to the conclusion that the first respondent is entitled for the suit property, the appellants, having perfected their title to the suit property by way of adverse possession, by their continuous enjoyment for more than 100 years to the knowledge of the first respondent and his predecessor in title, they are entitled for the declaration of title and permanent injunction restraining the defendants.

6.The case of the respondents herein as defendants in the suit, O.S.No.266 of 1995:

In the written statement filed by the first respondent, she resists the claim of the appellants. While admitting that the land in S.Nos.37/5 and 38/4, of Pagalahalli Pannai Village, belongs to the appellants, the respondents denied the claim of the appellants that the suit cart track belongs to the appellants'. The suit property which is a cart track marked as 'ABCD' in the plaint rough sketch, does not fall within the appellants land.

7.It is averred in their written statement that the cart track is in the first respondent's land and it belongs to the first respondent who purchased it from the lawful owner. To reach his house, the first respondent has put up the cart track in her land. Earlier, the appellants were having their own cart track in their land and the suit cart track marked as ABCD is in the first respondent's land. Later the appellants ploughed the land and annexed their cart track with their land and claiming right over the cart track owned by the first respondent. Without measuring the land but only based on a rough plan, showing the cart track is in the land, the appellants had filed the suit with false averment.

8.The first respondent herein has further contended that the cart track on the field is not 10 feet breadth as alleged in the plaint. The appellants were never been in enjoyment of the suit property for more than 10 decades as claimed. In fact, the patta of the suit cart track stands in the name of the first respondent.

9.The respondents had never attempted to destroy the suit property on 29.08.1995 as alleged. The ABCD cart track is located in the first respondent land. She along with the other respondents using the said cart track to reach their house. So, there is no need to destroy the suit cart track. Taking advantage of the exparte injunction order, the appellants herein using the ABCD cart track and trying to put up live fence along with the Southern side of the ABCD cart track. The appellants are not in possession and enjoyment of the suit cart track for more than 10 years.

10.The suit property, being part and parcel of the first respondent land, there is no necessity for them to destroy the suit cart track, as alleged. If at all the appellants can claim only a right of passage in the first respondent's land but, cannot claim exclusive right over the said suit cart track. Having disputed their cart track and annexed the portion with their land, they cannot make a claim over the cart track of the first respondent.

11.O.S.No.372 of 1997:-

Pending trial of this suit in O.S.No.266 of 1995, the respondents herein have filed O.S.No.372 of 1997 on the file of the learned District Munsif, Dharmapuri. In the said suit, the respondents herein as plaintiffs sought for declaration of title in favour of the first respondent and for mandatory injunction to remove the live fence put on the Southern side of the cart track and for other reliefs. The suit property described therein is running 276 feet East West with 6 feet 5 inches breadth on the Eastern side and 5 feet on the Western side in S.No.35/4.

12.They claim that they have purchased it from one Ramalingam vide sale deed dated 01.07.1992 for a consideration of Rs.45,000/- and from the date of purchase, the respondents are enjoying the suit property. The patta for the suit property has been transferred in the name of the first respondent M.Kamleshkumari. Since, the first respondent's property was taken care by the second respondent, he was shown as formal party and arrayed as second plaintiff. The appellants have land through the suit land on the Northern side of the suit property. Alleging right of passage to reach their land, they had filed O.S.No.266 of 1995 though the respondents and the appellants had separate and exclusive cart track to reach their respective land.

13.The appellants herein had destroyed their cart track and annexed it with their land. Now they are illegally making claim over the cart track of the respondents. After getting an exparte injunction in the suit in O.S.No.266 of 1995, making false averment, the appellants have also put up a live fencing South of cart track thereby preventing the respondents from use and enjoyment of the cart track. Therefore, the suit for declaration in favour of the respondents in respect of the suit property, recovery of possession of the suit property and mandatory injunction directing the appellants herein to remove the live fence put up by the appellants illegally in the land of the respondents. Failing which the right to remove the live fence through order of Court.

14.In the said suit in O.S.No.372 of 1997, the appellants herein as defendants had filed their written statement wherein, they have denied all the averments made by the respondents herein in their plaint. They denied the right of the respondents herein tracing title through the sale deed dated 01.07.1992 executed by Ramalingam. The alleged sale deed executed by Ramalingam on 01.07.1992 does not convey any title to the respondents herein over the suit land and it will not bind the appellants herein. Admitting on the North of the suit property, the appellants have land, it is specifically pleaded that the

suit cart track also belongs to the appellants herein. Since, their enjoyment of the said cart track was attempted to be disturbed, they have filed a suit in O.S.No.266 of 1995 seeking declaration and permanent injunction against the appellants. There was no cart track conveyed to the respondents through their title deed. The allegation that after getting an exparte injunction, the appellants put up a live fence on the Southern side of the disputed suit cart track and they have also denied the allegation that the respondents are prevented from having access to their land and house through the cart track due to live fence put by the appellants.

15.Considering the averments made by the parties and the nature of the suit property the trial Court has conducted joint trial of both suits. It allowed O.S.No.266 of 1995, granted declaration and permanent injunction in favour of the appellants herein. Dismissed the suit in O.S.No.372 of 1997 filed by the respondents herein.

16.The respondents herein filed appeals in A.S.No.362 of 2002 and A.S.No.11 of 2003 on the file of the learned Subordinate Judge, Dharmapuri, as against the the judgments and decrees passed in O.S.No.266 of 1995 and O.S.No.372 of 1997 on the file of the learned District Munsif, Dharmapuri.

17.The First Appellate Court has allowed both the appeals. As a result, decrees have been passed in favour of the respondents herein to the effect declaring the title of the suit cart track in favour of the first respondent herein and mandatory injunction directing the appellants herein to hand over the possession of the suit cart track to the respondents herein within a period of three months and also a mandatory injunction directing the appellants herein to remove the live fence put up by them in the land of the respondents.

18.In the above circumstances, the present two Second Appeals have been filed by the appellants herein against the common judgment of the First Appellate Court in A.S.Nos.362 of 2002 and 11 of 2003.

19.At the time of admission of these two Second Appeals, this Court has formulated the following common substantial questions of law:-

"1. Whether the Court below is correct in reversing the decree of trial Court without any reasons and on assumptions and presumptions? And

2.Whether the Court below is correct in finding that the suit pathway has been sold

to the respondents herein ? ”

20.The learned counsel for the appellants would submit that the First Appellate Court has failed to properly appreciate the facts as well as law. Without considering the reasons given by the trial Court, the appellate Court reversed the same on presumption and assumption. The First Appellate Court has erred in granting declaration of title, recovery of possession and mandatory injunction without any proof as to the title of possession of the respondents herein.

21.When the sale deed relied by the respondents does not convey them any right in the pathway and the extent of the property also not specified in the sale deed, the pathway which is in existence time-immemorial and enjoyed by the appellants herein ought not to have disturbed. The First Appellate Court ought not to have granted decree of declaration recovery of possession and mandatory injunction.

22.The presumption of the First Appellate Court that the parties had separate pathway in their respective land and the appellants have annexed their pathway with their land and claiming right over the pathway exclusively owned by the respondents is baseless. When the commissioner's report and sketch as well as the documentary evidence does not lend any support to such presumption, the First Appellate Court ought not to have reversed the trial court finding. Except the recital in the sale deed referring the pathway without any description there is no iota of evidence to show the respondents own a cart track in the suit property. The Court has appointed Commissioners in both the suits and there are two commissioner reports with sketch. The report of the Commissioners proves the existence of only one pathway and same in possession and enjoyment of the appellants. The presence of live fence as boundary between two parties also have been observed and noted in the commissioner report.

23.When the commissioner has categorically mentioned that the cart track is not made recently, the allegation of the respondents that the appellants have encroached upon their land recently and new cart track was formed without any basis.

24.Per contra, the learned counsel for the respondents would submit that the appellants herein have not come with clean hands or consistent plea. Though they claim that the cart track running 10/360 feet was in existence for more than 100 years, in their own pleadings, they defer the claim and say it was only in the year 1985, when they dug for well, they have formed the cart track road. This cart track is not in their

land but by encroaching upon the land of the respondents. It is clearly pointed out by the trial Court that the Commissioner report filed in the suit of the appellant is based on the inspection made without the help of a Surveyor and the revenue official and so not reliable.

25. Contrarily, the Commissioner appointed in the suit filed by the respondents, the inspection was conducted with the assistance of Surveyor and revenue official. The report and the sketch filed in their suit clearly indicates that there is an encroachment by the appellants and live fence has been put by the appellants in order to prevent the respondents from enjoying the cart track and have an access to their land and house through the cart track.

26. Pointing out that the appellants in their plaint beside claiming title over the property to a document has also made an alternate plea contending that they are enjoying the cart track for more than 100 years. Therefore, they have perfected the title by adverse possession.

27. The contradictory plea by a plaintiffs one claiming title over the property and another accept the title of the other but claiming a right based on adverse possession is not maintainable. In a suit for declaration, based on title the plaintiffs cannot make an alternate plea for declaration of ownership based on adverse possession. In support of the submission, the learned counsel for the respondents would refer to the judgment of the Hon'ble Supreme Court in *Gurudwara Sahib v. Gram Panchayat Village Sirthala and another* (2014 (1) SCC 669) wherein, in paragraph No.8, it has been held as follows:-

"8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

28. Further, the learned counsel for the respondents would submit that the alternate plea for declaration beside being mutually destructive, even according to the case of the appellants, they have laid cart track from the soil dug from the well by them in the year 1985 whereas, the suit filed by them is of the year 1995 which itself shows that they were not in

continuous enjoyment for more than 12 years to claim any title by adverse possession.

29.Ex.B.1 is the sale deed dated 13.11.1987, executed by one Ramalingam and his sons in favour of the first respondent herein. Under the sale deed, three items of property in S.No.35/4 (2.21 acres) 36/6 (7 ½ cents) 36/3 (9 cents), totally 2 acres and 37 ½ cents has been sold in favour of the first respondent herein. The decree now passed by the First Appellate Court is in respect of the cart track which falls under S.No.35/4 as per the Commissioner's report, and sketch prepared with the help of Surveyor. AS pointed out by the First Appellate Court, in the suit filed by the appellants, they have not mentioned the survey number upon which the alleged pathway runs.

30.Further, the measurement of the suit pathway is stated as 10 feet by 360 feet. While the Commissioner report filed in the suit of the appellants (O.S.No.266 of 1995) does not indicate that it was measured to the scale by the commissioner. The Commissioner report filed in the suit of the respondents (O.S.No.372 of 1997) is drawn with the assistance of Surveyor and measured to the scale properly by the Commissioner.

31.The appellants herein is not certain either about his right over the suit land or the exact measurement of the land. Whereas, the respondents through their title deed as well as through the commissioner report and sketch has established the title over the disputed portion of the land.

32.While the cart track falls within the land of the respondents, the live fence put on the Southern side of the cart track prevents the respondents from having access to their house through the cart track. To have access to their house through the cart track, the live fence in their land is necessarily to be removed that is the reason why the First Appellate Court after appreciating the rival contentions allowed the suit filed by the respondents (O.S.No.372 of 1997) and dismissed the suit filed by the appellants (O.S.No.266 of 1995) herein.

33.It is incorrect to say that the First Appellate Court has arrived to the said conclusion based on assumption and presumption. His decision is based on documentary evidence and the oral evidence let in by the parties besides the commissioner report marked in O.S.No.372 of 1997 as Exs.C.3 and C.4.

34.When both the parties admit that there was separate cart tracks for them, running in their respective lands and the document Ex.B.1 also supports the case of the first respondent, there is no error in the findings of the First Appellate Court that the suit cart track was part and parcel of the land

purchased by the first respondent under Ex.B.1.

35. There is ample evidence before the Court to arrive at the conclusion that the live fence on the Southern side of the suit property has been put up by the appellants after encroaching upon the suit land of the first respondent. The appellants herein either as a plaintiff in O.S.No.266 of 1995 or as the defendants in O.S.No.372 of 1997 could establish that the suit property exclusively falls within their land.

36. While so, this Court finds that the finding of the First Appellate Court is based on the evidence both documentary as well as oral beside the report of the Advocate Commissioner appointed by the Court and the sketch prepared by the Commissioner with the help of the surveyor. Hence, this Court finds no reason to interfere with the judgment of the First Appellate Court.

37. In the result, the Second Appeals are dismissed thereby confirming the common judgment and decree passed by the First Appellate Court in A.S.Nos.36 of 2002 and 11 of 2003 dated 29.04.2003. There shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Jbm

To

1. The Subordinate Judge,
Dharmapuri.

2. The District Munsif,
Dharmapuri.

3. The Section Officer,
VR Section, Madras High Court,
Chennai.

+1cc to Mr.A.L.Gandhimathi, Advocate, S.R.No. 6805
+2cc to Mr. S.R.Rajagopal, Advocate, S.R.No. 6607

Second Appeal No.1815 & 1968 of 2004

CNR(CO)
GN(13/03/2019)