

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 06.08.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.No.163 of 2010 and

M.P.No.1 of 2010

1. Chinna Vellingiri Gounder
2. Kanagaraj
3. Rangammal

... Appellants/Respondents/Defendants

Vs.

P.Natarajan

... Respondent/Appellant/Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 13.10.2009 passed in A.S.No.56 of 2008 by the III Additional subordinate Judge, Coimbatore reversing the decree and judgment dated 27.03.2007 passed in O.S.No.161 of 2005 by the II Additional District Munsif, Coimbatore.

For Appellants : Mr. G.Ponnambalathiagarajan
For Respondent : Mr. SU. Srinivasan

JUDGMENT

The appellants are the defendants in O.S.No.161 of 2005 on the file of the II Additional District Munsif, Coimbatore and respondent in A.S.No.56 of 2008 on the file of the III Additional Subordinate Judge, Coimbatore,

2. The respondent/plaintiff filed the suit in O.S.No.161 of 2005 for a permanent injunction restraining the appellants/defendants from interfering with their right of usage of the cart track which runs through the S.No.251/2B and 251/3B of Myleripalayam Village, Coimbatore South Taluk.

3. The parties are referred to as per their ranking in the original suit and at appropriate places, their ranks in the present appeal would also be indicated, if necessary.

4. The case of the plaintiff in nutshell.

The plaintiff is the absolute owner of agricultural lands in S.No.251/1, 251/2A and 251/4A in Myleripalayam Village, Coimbatore South Taluk. The plaintiff and his wife are also

having agricultural lands in S.No.251/1. The plaintiff acquired his lands through a gift deed dated 04.10.1994 executed by his paternal grandfather and through a registered sale deed dated 31.03.2003. The suit cart track is situate in S.No.251/2B and 251/3B and runs east to west and it is separately sub divided as stated above. In fact the northern portion of the cart track is sub divided as S.No.251/2B and the southern portion is sub divided as S.No.251/3B. The plaintiff's land in S.No.251/2A, 251/1 and 251/4A can be reached only through the said cart track. Therefore, the plaintiff has got an easmentry right over the suit cart track. The plaintiff and his wife and their predecessors in title have been using the said cart tract. The cart track is also separately demarcated and sub divided in the field map sketch. On the west of the cart track, the lands belonging to the defendants and one Mayilsamy Subbaiyan are situated. Due to failure of monsoon, the plaintiff had no occasion to take his carts through the disputed cart track frequently. The defendants while ploughing their lands, had also ploughed a portion of the cart track and damaged the same by loosening the soil. They are also attempting to annex a part of the suit cart track with their land. The defendants cannot interfere with the right of the plaintiff in enjoying the cart track. On 29.01.2003, the defendants attempted to annex the suit cart track with their property with the help of their henchmen and the same was prevented by the plaintiff with great difficult. The plaintiff approached the local police, who advised him to file a civil suit. Hence, the plaintiff has filed the suit for a permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit cart track.

5. The suit was resisted by the defendants on the following grounds.

(i) The sub division for the cart track in Survey No.251/2B, 251/3B were made by the revenue officials without enquiring the defendants and an appeal filed by the defendants is pending before the Revenue Divisional Officer.

(ii) The Advocate Commissioner who was appointed by the trial court had found only a narrow pathway on the eastern side of the defendants' property

(iii) The plaintiff is having a cart track on the northern side of his garden land and therefore, the contention of the plaintiff that the suit cart track is only the cart track to reach his property is false.

(iv) In fact, the plaintiff alone attempted to create a cart track with the help of his men on 29.01.2003.

(v) Since there is no cart track on ground as alleged in the plaint, the suit filed by the plaintiff is liable to be dismissed.

6. The trial court after framing necessary issues, dismissed the suit filed by the plaintiff vide his decree and judgment dated 27.03.2007. Aggrieved over the same, the defendants preferred an appeal in A.S.No.56 of 2008 before the III Additional Subordinate Judge, Coimbatore. The first appellate court after analysing the evidence on record, allowed the appeal and decreed the suit in favour of the plaintiff. Aggrieved over the same, the defendants in O.S.No.161 of 2005 have filed the present second appeal.

7. At the time of admission of the second appeal, notice regarding admission was issued to the respondent. Thereafter, the matter was listed before this court.

8. The appellants have raised the following substantial questions of law in the memorandum of appeal grounds.

(i) Whether the judgment of the lower appellate court is vitiated because of its failure to point out the mistake committed by the trial court.

(ii) Can the appellate court reverse the findings of the trial court without giving reasons for its disagreement with the findings of the trial court?

(iii) Whether the second commissioner's report can be taken as conclusive report for the existence cart track on the date of filing of the suit without considering the first commissioner's report, parent documents and evidence.

(iv) Whether the existence of pathway can be presumed merely based on the survey records, without looking into title deeds and existence of cart track on the date of filing of the suit.

9. The trial court observed that when an appeal is pending before the Revenue Divisional Officer with regard to the sub division of the cart track as 251/2B and 251/3B and the existence of cart track is mainly based on the plaintiff's title

deed, the plaintiff is not entitled for a relief of permanent injunction and therefore, dismissed the suit filed by the plaintiff. However, the first appellate court observed that mere pendency of the appeal before the Revenue Divisional officer with regard to the sub division of the cart track, the suit filed by the plaintiff cannot be dismissed and that since on the date of filing of the suit, there was a cart track as per the evidence available on record, the plaintiff is entitled to a decree of permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit cart track.

10. At the out set, it may be observed that there is no dispute as to the ownership of the plaintiff's property comprised in S.No.251/1, 251/2A. In fact, the plaintiff has adduced documentary evidence in the form of Ex.A1 and Ex.A2 to show that the property in S.No.251/1 and 251/2A absolutely belongs to him. Similarly, the property in S.No.251/3A belongs to the defendant, which is situate on the southern side of the plaintiff's property in S.No.251/2A and on the further southern of the defendants property, a property belonging to a third party namely Mayilsamy Subbaiyan in S.No.251/3C is situated. The disputed cart track runs north to south on the eastern side of the plaintiff, defendant and some third parties and reaches east-west road running on the further south of the property in S.No.251/3C. This is clear from the field map sketch of the entire S.No.251, which is marked as Ex.A3 by the plaintiff.

11. A perusal of the written statement filed by the defendants shows that the defendants have taken two different stands. One is that the cart track does not exist on the ground as alleged by the plaintiff and another is that the sub division of the cart track as S.No.251/2B and 251/3B was made without his knowledge and therefore, they have preferred an appeal before the Revenue Divisional Officer. A perusal of field map sketch (Ex.A3) shows the entire land in survey number 251 with its sub divisions, in which the disputed cart track is also clearly shown. The northern portion of the cart track is sub divided as S.No.251/2B and the southern portion of the cart track is sub divided as S.No.251/3B. The Advocate Commissioner had measured the suit cart track with the help of a Taluk Surveyor and filed his report and plan (Ex.C4 and Ex.C5), which shows the existence of the suit cart track. Therefore, the existence of cart track is proved through Ex.A3 and the Commissioner's report and plan Ex.C4 and Ex.C5.

12. The first appellate court had observed that when the existence of the cart track on the date of suit is proved, it is absolutely unnecessary to go into the question as to whether the sub division was properly effected or not etc., as all these aspects are absolutely irrelevant to the fact in issue in the instant case and that when the revenue records clearly shows the existence of the cart track as detailed in the field map sketch Ex.A3, the plaintiff is entitled to use and enjoy the cart track with the same right as that of the defendants.

13. The defendants though had alleged that they have filed an appeal before the Revenue Divisional Officer questioning the sub division of the cart track as S.No.251/2B and 251/3B, no documentary evidence was adduced to substantiate the same.

14. In any event, this is a suit filed by the plaintiff seeking for a permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit cart track. When the plaintiff is able to show the existence of the cart track by adducing sufficient evidence, the defendants must be enjoined from interfering with the plaintiff's right to use the cart track. More over, the Advocate Commissioner has measured the cart track with the help of Taluk Surveyor and his reports clearly show that the defendants have no exclusive right over the S.No.251/2B and 251/3B through which the cart track runs. Admittedly, the property of the defendant is situated in S.No.251/3A. In fact, the first appellate court had taken a pain of calculating the total extent of the defendants' lands as per the sale deeds Ex.B1 and Ex.B2 and in paragraph No.12 of its judgment has observed thus:

" The plaintiff has taken out an application for appointment of advocate commissioner before this court for the purpose of measuring the suit cart track, plaintiff property and the defendants' property separately to ascertain and to clear the doubt as to whether any part of the defendants' property is included in the suit cart track or not and this court also appointed advocate commissioner for the above said purpose and the advocate commissioner has also inspected the properties with the help of taluk surveyor as per the field map sketch in the presence of both parties and their counsels and submitted his report. The advocate commissioner has stated in his report that the properties of

the plaintiff and the defendants have been measured separately after fixing the boundary stones. The defendants property was measured as per their sale deed and demarcated and the same is shown in the survey or sketch in pale green colour and the cart track is shown as blue colour. The total extent of the defendants property comprised in SF No.251/3A without including the cart track running on the east of their property as measured and found to be in their possession is 32.5 ares as per the advocate commissioner's report. The total extent purchased by the defendants through registered sale deeds under Ex.B1 and Ex.B2 is only $40 + 38 = 78$ cents. Therefore, the defendants are in possession of the extent purchased by them and in fact they are in possession of the extent more than that of what they have actually purchased under Ex.B1 and Ex.B2, which means that they cannot claim any exclusive right over the suit cart track comprised in SF No.251/2B and 251/3B which are no way concerned with the defendants' property. The 2nd defendant who was examined as DW1 has also very clearly admitted in his cross examination that the defendants not claiming any right over any extent beyond 78 cents belongs to them as per their sale deed. Therefore the plaintiff has also proved that no part of the defendants' property is included in the cart track. More over, on perusal of the advocate commissioner's report and the lie of the property on the ground it seems that the plaintiff has no other way to reach his property and house situated in SF No.251/1 except the suit cart track from the east west road situated on the southern side of the SF No.251/3C. Therefore, the suit cart track is also a easement of necessity for the plaintiff. The defendants have no right to prevent the plaintiff from using the cart track. The cart track is not only running on the eastern side of the defendants' land but also running on the eastern side of the plaintiff's land and also on the eastern side of one third party. Therefore, the defendants have no exclusive right over the existing cart track and all the 3 persons through whose land the cart track is running are

having right to use the cart track. The attitude of the defendants in denying the very existence of the cart track itself shows the intention of the defendants to prevent the plaintiff from using the cart track and hence the apprehension of the plaintiff that the defendants may annex the suit cart track with their property at any time is seems to be reasonable and the plaintiff's right to use the cart track has to be protected by way of permanent injunction and accordingly I hold that the plaintiff is entitled for the relief of permanent injunction as prayed in the plaint in the interest of justice.

The above observation of the first appellate court is based on the facts and on appreciation of evidence adduced on both sides and hence, I do not see any reason to interfere with the findings recorded by the first appellant court. Thus, there is no substantial questions of law involved in the present second appeal and hence, the second appeal is liable to be dismissed.

15. In the result,

(i) The second appeal is dismissed. No costs. The connected miscellaneous petition is closed.

(ii) The decree and judgment passed in A.S.No.56 of 2008 dated 13.10.2009 by the III Additional Subordinate Judge, Coimbatore is upheld.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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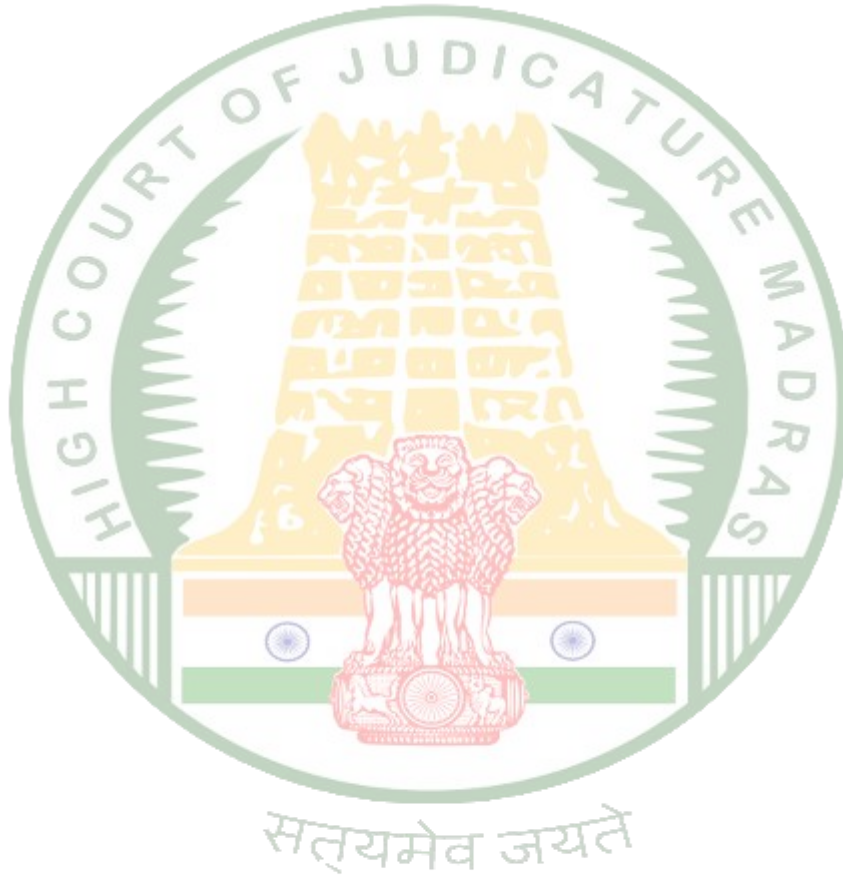
1.The III Additional Subordinate Judge,
Coimbatore.

2.The II Additional District Munsif,
Coimbatore.

+lcc to Mr. G.Ponnambalathiagarajan, Advocate sr.67377

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