

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.04.2019

PRONOUNCED ON : 25.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1259 of 2005

1.Paramasivam

2.Selvakumari

...Appellants/Defendants

Vs.

1.Rengasamy

2.Govindan

...Respondents/Plaintiffs

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Principal subordinate judge's court at Vridhachalam dated 17.01.2005 in A.S.No.32 of 2004 and cross appeal partly confirming and modifying the judgment and decree of the District Munsif cum Judicial Magistrate court at Neyveli dated 12.12.2003 in O.S.No.151 of 1995.

For Appellants : Mrs.Mythili Suresh
for M/s. Sarvabhauman Associates

For Respondents : Mr.R.Agilesh

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 17.01.2005 passed in A.S.No.32 of 2004 and Cross Appeal on the file of the Principal Subordinate Court, Vridhachalam confirming / modifying the judgment and decree dated 12.12.2003 passed in O.S.No.151 of 1995 on the file of the District Munsif cum Judicial Magistrate court, Neyveli.

2. The second appeal has been admitted on the following substantial questions of law.

"1. When the respondents had not acquired any right of easement as envisaged under Section 12 of the Easements Act, 1882, whether they are entitled to decree for declaration and injunction?

2. When the respondents had not established their alleged use of the suit pathway by credible evidence, whether the courts below

are justified in law in decreeing the suit in contravention of Sections 101 to 103 of the Evidence Act, 1872?

3. Whether the Lower Appellate court is correct in law in dismissing the Appeal and partly allowing the Cross Appeal, especially when the respondents had failed to establish the width of the suit pathway as alleged by them?

4. When the vendor of the respondents under Ex.A1 sale Deed, does not have any right over the suit pathway, whether the respondents are entitled to claim right over the suit pathway, particularly when the plea of estoppel enumerated under Section 115 of the Evidence Act, 1872 would operate against them?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. Suffice to state that the suit has been laid by the plaintiffs for declaration and permanent injunction or in the alternative for the recovery of the possession.

6. The suit has been laid by the plaintiff for claiming the right of way /cart-track in the suit property in R.S.No.490/7. It is not in dispute that the extent of 15 cents in R.S.No.490/7 of the suit village originally belonged to Thoppula Padayachi. Thoppula Padayachi had two sons, namely, Veerasamy and Rajamanickam. The first plaintiff and his brother Illayaperumal are the sons of Veerasamy and the first defendant is the son of Rajamanickam. As could be seen from the materials placed on record, in respect of the 15 cents in R.S.No.490/7, by way of Ex.A2 partition deed dated 19.07.1976, the first plaintiff and the first defendant had partitioned the same and by way of the said partition, the northern 7 ½ cents had been allotted to the share of the first plaintiff and the southern 7 ½ cents had been allotted to the share of the first defendant. The abovesaid partition deed Ex.A2 further recites that the first defendant should leave a pathway on the eastern side of the share allotted to him lying in the southern side as a pathway for enabling the plaintiff to have access to his portion on the northern side from

the road which is admittedly lying to the south of R.S.No.490/7. That such a recital is available for carving out the pathway in the share allotted to the first defendant in Ex.A2 partition deed is not disputed by the defendants as such. In fact, as could be seen from the sale deed executed by the first defendant's wife in favour of Visalakshiammal by way of Ex.A4 sale deed dated 23.10.1991, it is found that the first defendant's wife had only alienated 5 cents out of 7½ cents lying in the southern portion in R.S.No.490/7 and in clear terms had left out the 2½ cents of land towards the cart track. It is thus found that inasmuch as the cart track had been earmarked for the first plaintiff to have access in respect of the said portion, accordingly it is found that while conveying the property under Ex.A4, the first defendant's wife had also clearly left out 2½ cents earmarked for the cart track portion and only alienated the remaining 5 cents of land to Visalakshiammal. In such view of the matter, the case projected by the defendants that the plaintiffs had given up their right of easement in respect of the suit property, as such, cannot be believed and accepted. When the right of the way had been given to the plaintiffs under Ex.A2 partition deed, the said right cannot be held to have been ceased or given up by the plaintiff merely on the footing that they had acquired some other property lying to the east of R.S.No.490/7.

7. The existence of the cart track available in R.S.No.490/7 could also be gathered from the commissioner's report and plan marked as Exs.C1 and C2 in the proceedings. As rightly determined by the first appellate court, from Exs.C1 and C2, on an average, it is found that the cart track portion is running of a width of 3.8 meters throughout from the road portion to the northern share belonging to the plaintiffs in the abovesaid survey number.

8. In the light of the abovesaid admitted position, when the right of easement had been conferred on the first plaintiff under Ex.A2 partition deed and when the same had not been established to have been given up or ceased to be in existence as such and on the other hand, when the cart track is found to be in existence on ground as could be seen and gathered from Exs.C1 and C2, and excluding the cart track portion only, the first defendant's wife is found to have alienated the extent of 5 cents of land by way of Ex.A4 sale deed and accordingly, the first appellate court had rightly rejected the other defence version projected by the defendants to stifle out the plaintiffs' case without any pleas on their part in the written statement with reference to the same. In such view of the matter, the only point which remains to be determined is the extent of cart track available to the plaintiffs in the suit survey number.

9. The plaintiffs have laid the suit claiming the right of way in the suit property of an extent of north-south 33 meters and east-west 38 meters. The trial court after holding that the plaintiff has got the right of cart track in the suit property, held that the right of cart track available to the plaintiff is only to a width of 8 feet in the suit survey number. However, the first appellate court considering the materials placed on record and the admission of the defendants that the cart track should be left to a width of 12 feet for enabling the plaintiffs to have access to their northern portion and also the availability of the cart track to a width of 3.8 meters in the suit survey number as depicted in Exs.C1 and C2 and noting that the cart track of an extent of 3.8 meters in width would be sufficient for enabling the plaintiffs to take their carts and tractors, etc., to their northern portion, accordingly held by determining that the plaintiffs are entitled to the cart track portion in the suit survey number to an extent of 3.8 meters east-west and 33.6 meters north-south and accordingly granted the reliefs in favour of the plaintiffs by modifying the judgment and decree of the trial court. The abovesaid determination of the first appellate court in granting the right of cart track / pathway to the plaintiffs is not shown to be unacceptable considering the materials available on record and the fact that the plaintiffs have, admittedly, the right of cart track through the suit property.

10. In view of the aforesaid reasons, the contentions of the defendants' counsel that the plaintiffs have not acquired the right of easement over the suit property and the courts below had not properly appreciated the materials placed on record for granting the reliefs in favour of the plaintiffs do not merit acceptance and on the other hand, it is found that the first appellate court, in particular, has appreciated the evidence placed on record, both oral and documentary and as well as the admission of the defendants and thereby rightly determined that the plaintiffs are having the right of cart track through the suit property of a width of 3.8 meters east-west and the length of 33.6 meters north-south and accordingly rightly confirmed / modified the judgment and decree of the trial court and the same does not warrant in interference. The substantial questions of law formulated are accordingly answered in favour of the plaintiffs and against the defendants.

11. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal Subordinate Judge,
Vridhachalam.

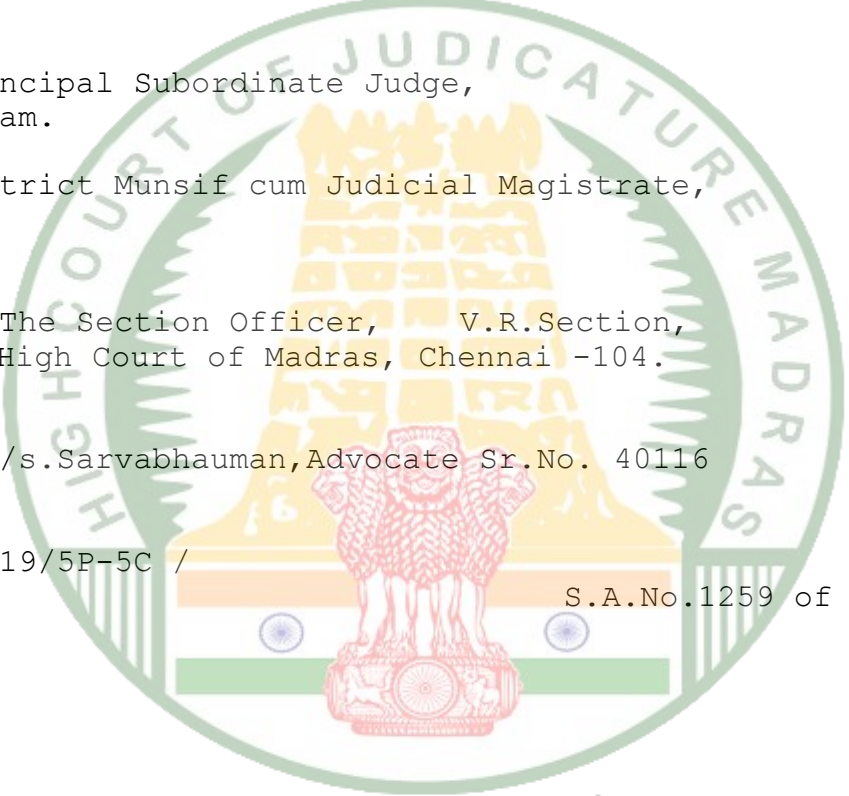
2. The District Munsif cum Judicial Magistrate,
Neyveli.

Copy to : The Section Officer, V.R.Section,
High Court of Madras, Chennai -104.

+1 cc to M/s.Sarvabhauman,Advocate Sr.No. 40116

AKM/07.11.19/5P-5C /

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