

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2019

PRONOUNCED ON : 26.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.883 of 2005 and
C.M.P.No.12398 of 2005

1. Perumal gounder

2. Guruvaiyan ...Appellants / Defendants

Vs.

Kali gounder @ Kaliappan ...Respondent / Plaintiff

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 31.12.2003 in A.S.No.101 of 2003 on the file of the Additional District Court (FTC No.IV) Erode at Bhavani, confirming the judgment and decree dated 30.06.2003 in O.S.No.205 of 2002 on the file of the II Additional District Munsif Court, Bhavani.

For Appellants : Mr.N.Damoderan

For Respondent : Mr.I.C.Vasudevan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 31.12.2003 passed in A.S.No.101 of 2003 on the file of the Additional District Court (FTC No.IV) Erode at Bhavani, confirming the judgment and decree dated 30.06.2003 passed in O.S.No.205 of 2002 on the file of the II Additional District Munsif Court, Bhavani.

2. The parties are referred to as per their rankings in the trial court for the sake of convenience.

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

"(a) Whether Registration of a document would itself dispense with the need of proving the execution which is required by

law to be proved in the manner provided under Section 68 of Evidence act, if so the findings of the Courts below are correct in law in accepting the case of the plaintiff in the absence of examination of the available witnesses when the execution of Ex.A3 was denied by the defendants?

(b) Whether the present suit is hit by the principle of res judicata in view of the findings in the earlier suit between the same parties in O.S.No.729 of 198, especially, when no permission had been sought for in the form a petition under Order 23 Rule 1 of CPC to file a separate suit for declaration on the basis of the original cause of action?

(c) Whether the Courts below are correct in law in accepting the report and plan submitted by the Advocate Commissioner in the earlier suit between the same parties as evidence on records in the subsequent suit without examining the Commissioner as witness in the present case?

(d) Whether mere production and marking of a document as Ex.A3 by the trial Court can be held to be a due proof of its contents in the absence of any admissible evidence to prove its due execution particularly when the Court is entitled to draw an adverse inference under Section 114 (g) of the Indian Evidence Act against the plaintiff for non examination of the Principal person involved in Ex.A3?"

5. 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.

6. The suit has been laid by the plaintiff against the defendants seeking the relief of declaration that he is entitled to enjoy the second item of the suit properties namely the cart track shown as "ABCD" in the plaint, by way of easement by grant and also by way of easement by necessity and also for the relief of permanent injunction restraining the defendants, their men and agents in any way interfering with the plaintiff's free use and enjoyment of the abovesaid suit cart track.

7. The case of the plaintiff in brief is that the Item-I of the suit properties was acquired by the plaintiff from one K.P.Karuppagounder by way of a registered sale deed dated

14.09.1987 and it is pleaded that the first item of the suit properties had been allotted to his vendor K.P.Karuppagounder in the family partition effected between him, his brother Marasamy and his father Ponnusamy gounder by way of a partition deed dated 07.12.1981 and accordingly, it is pleaded by the plaintiff that he has been enjoying the suit cart track since then and as dispute arose between the plaintiff and his brother Marasamy, with reference to the same, a panchayat was convened on 05.07.1989 in the presence of local panchayatdars and therein it was agreed that the plaintiff is entitled to use the suit cart track. It is stated that with reference to the same, a panchayat muchalika was executed and thereby, it is contended that Marasamy had accepted the right of the plaintiff in using the suit cart track for reaching his properties and it is further pleaded that the first defendant after purchasing certain properties from Marasamy, due to misunderstanding, attempted to interfere with the plaintiff's right and enjoyment of the suit cart track, by obliterating the same and to annex the same with his properties without any authority and hence according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

8. The defendants resisted the plaintiff's suit denying all the averments contained in the plaint and according to the defendant by way of partition deed dated 07.12.1981, his vendor was allotted the property described as 'B' schedule therein and the plaintiff's vendor was allotted the property described as 'A' schedule therein and in the abovesaid partition deed, there is no reference about the suit cart track as described as Item-II of the suit properties in the present plaint and therefore, according to the defendants, the sale deed dated 14.09.1987 executed in favour of the plaintiff by his vendor would not in any manner bind the defendants and the plaintiff by way of the abovesaid sale transaction has created a new right of cart track by fabricating the panchayat muchalika, a self serving document and come forward with the false suit for creating suit cart track in the property belonging to the defendant which the plaintiff is not entitled to and the permission granted by the defendant at times to use his land would not enable the plaintiff to create or form the suit cart track for claiming access to his properties and furthermore according to the defendants, the suit cart track as described in the plaint is not in existence and furthermore, it is stated that the plaintiff's earlier suit in respect of the suit property in O.S.No.729 of 1998 has been already dismissed and therefore, he is estopped from filing the present suit and the present suit is barred by res judicata and the suit has no cause of action and the suit is liable to be dismissed.

9. In support of the plaintiff's case, PW1 was examined and Exs.A1 to A7 were marked. On the side of the defendants DW1 and DW2 were examined and Exs.B1 to B4 were marked.

10. The Courts below on the appreciation of the materials placed on record, both oral and documentary, were pleased to decree the suit in favour of the plaintiff. Aggrieved over the same, the present second appeal has been laid.

11. The dispute between the parties is only regards the Item-2 of the suit properties which is described as a cart track shown as "ABCD" in the rough plan running North-South in R.S.No.1243/4 from Item-I of the suit properties towards Anthiyur-Malaikaruppusamy Koil Main road in Anthiyur Village, Bhavani Taluk. The plaintiff claims easementary right over the suit cart track by way of grant as well as easementary right over the same as of necessity and alleged that the defendants had attempted to interfere with his right of the suit cart track by obliterating the same and annexing the same with his lands, putting forth that thereby he has necessitated to lay the suit against the defendants for appropriate reliefs. The existence of the suit cart track as described in the Item-II of the suit properties is disputed by the defendants. According to the defendants, the plaintiff cannot take advantage of the recitals contained in the sale deed dated 14.09.1987 executed by his vendor for claiming the right to the suit cart track as described in the plaint and further according to the defendants, the panchayat muchalika projected by the plaintiff is a fabricated record and by way of the same, no right would accrue to the plaintiff to the suit cart track and it is also put forth by the defendant that the partition deed dated 07.12.1981 does not convey or describe the existence of the suit cart track as given in the plaint and therefore it is put forth that the suit cart track is not in existence as claimed by the plaintiff and in such view of the matter, the plaintiff cannot be allowed to claim easementary right by way of grant and easement right by way of necessity over the non-existent suit cart track and hence, the plaintiff's suit should fail.

12. Both parties agree that their vendors, their father divided the properties belonging to them by way of a partition deed dated 07.12.1981, which document has come to be marked as Ex-A1. On a perusal of the said document, it is found that 'A' schedule property described therein had been allotted to the plaintiff's vendor K.P.Karuppagounder and 'B' schedule property described therein had been allotted to the defendants' vendor Marasamy. As regards the cart track, the partition deed only recites that the parties thereto are entitled to use the cart track in existence as on date and other than that there is nothing more described in the said document with reference to,

as to where the said cart track lies, in what direction and through which land the same passes and upto which point the said cart track runs and therefore, the cart track that has been averred in the said partition deed, without any description of the same in the said document in a clear manner, merely by way of Ex-A1 partition deed, we cannot safely conclude that the cart track referred to therein only denotes the suit cart track as described in Item-II of the suit properties. Item-II of the suit properties describe the suit cart track as running North-South in R.S.No.1243/4 from Item-I of the suit properties towards Anthiyur-Malaikaruppusamy Koil Main road in Anthiyur Village, Bhavani Taluk and the same is running as shown as "ABCD" in the rough plan. However, no such description is found in Ex-A1 partition deed as regards the same and in such view of the matter, by way of Ex-A1 partition deed, we cannot safely conclude that the suit cart track as described in Item-II of the suit properties was existing on ground at the time of Ex-A1 partition deed dated 07.12.1981. As rightly putforth by the defendants' counsel, if the suit cart track had been in existence as described in Item-II of the suit properties as depicted in the plan, necessary recitals would have been incorporated in the abovesaid partition deed and therefore, no safe reliance could be attached to the recitals in Ex-A1 partition deed for upholding the case of the plaintiff that the suit cart track as described in item-II of the suit properties has been in existence on the date of the abovesaid partition deed and the same had been earmarked to be enjoyed by the parties to the abovesaid partition deed.

13. Inasmuch as the suit cart track as described in Item-II of the suit properties has not been in existence on the date of Ex-A1 partition deed and following the sale deed dated 14.09.1987 executed in favour of the plaintiff by his vendor K.P.Karuppagounder, inasmuch as the plaintiff had attempted to form and use the so-called cart track and the same had been resisted by the defendants' vendor Marasamy, even as per the case of the plaintiff, a panchayat was convened with reference to the same and according to the plaintiff, he had been allowed to use the suit cart track as described in the plaint in the said panchayat by way of a panchayat muchalika with reference to the same, which document has come to be marked as Ex-A3. The defendant has put forth the defence that no such panchayat muchalika had been entered between the plaintiff and his vendor Marasamy and according to him abovesaid document has been fabricated by him for creating the suit cart track in question without any authority whatsoever with the sole aim of forming the cart track in the property belonging to the defendants. As could be seen from the materials placed on record and the defence putforth by the defendant, Marasamy has conveyed his

properties in favour of the defendant on 10.06.1993, which sale deed has come to be marked as Ex-B3. On a perusal of Ex-B3, if really the suit cart track had been in existence on the date of Ex-A1 partition deed and the parties thereto had been in enjoyment of the same, if really Marasamy had acceded to the said suit cart track and also given his consent in the enjoyment of the suit cart track by the plaintiff by way of the muchalika marked as Ex-A3, Ex-B3 having come into existence much subsequent thereto, necessary recitals would have been incorporated in Ex-B3 sale deed executed in favour of the defendants with reference to the same. However, on a perusal of Ex-B3 sale deed, no recital whatsoever has been mentioned therein as regards the cart track in the property conveyed to the defendants by way of the same and therefore, it is seen that inasmuch as no such cart track had been in existence in the property comprised therein at any point of time and never been enjoyed by the parties involved in the matter and no panchayat muchalika had been executed with reference to the same, no indication or reference as regards the same is noted or mentioned in Ex-B3 sale deed.

14. As abovenoted, the defendants have challenged the panchayat muchalika marked as Ex-A3 by the plaintiff for claiming the existence of the suit cart track and his right to enjoy the same as putforth in the plaint. Despite the above position, the plaintiff has not endeavoured to examine any person associated with the panchayat convened with reference to the same and not endeavoured to examine Marasamy, the defendants vendor or the panchayatdars concerned and in such view of the matter, the endeavour of the Courts below to consider and rely upon the muchalika without there being any material to uphold its truth and validity as per law, in my considered opinion, the judgment and decree of the Courts below upholding the plaintiff's case based upon Ex-A3 muchalika on the sole and interest testimony of the plaintiff, particularly, when the defence has been raised that the same is a fabricated record on the part of the plaintiff cannot at all be countenanced. As abovenoted in Ex-A1 partition deed other than the vague reference about the alleged right to use the cart track in existence as on that date, there is no indication that the said cart track relates to the suit cart track as described in the item-II of the suit properties Ex-A3 muchalika is not found to have been established by the plaintiff as per law. Therefore, no safe reliance could be attached to the same to uphold the plaintiff's case seeking the reliefs of declaration and permanent injunction against the defendants in using the cart track.

15. The plaintiff is found to have laid the suit in O.S.No.729 of 1998 and therein also, the defendants had disputed the claim of right of the plaintiff over the alleged suit cart track. The plaintiff knowing very well that he has no right over the suit cart track, as such, did not prosecute the abovesaid suit as per law, particularly, he having failed to describe the existence of the suit cart track in a clear manner by giving particulars with reference to the same. Accordingly, it is found that the abovesaid suit, after contest, was dismissed by the Courts concerned. The plaint copy in O.S.No.729 of 1998 has been marked as Ex-B2 and the judgment dated 14.03.2001 passed in the abovesaid suit has been marked as Ex-A5. On a perusal of the judgment marked as Ex-A5, it is seen that the Court concerned, after holding that the plaintiff has failed to establish the existence of the suit cart track clearly and also the nature of the right which he seeks to enforce with reference to the same, on that determination, chose to dismiss the plaintiff's suit. The judgment in the abovesaid suit had been passed on 14.03.2001. If really the plaintiff's vendor and the defendants' vendor had enjoyed the suit cart track as described in the plaint by way of Ex-A1 partition deed dated 07.12.1981 and if really by way of panchayat muchalika dated 05.07.1989, the defendants' vendor Marasamy had accepted the right of the plaintiff over the said suit cart track as claimed by the plaintiff and if really the suit cart track as described in the plaint has been conveyed to the plaintiff by way of the sale deed dated 14.09.1987 by his vendor under Ex-A2 sale transaction, the plaintiff would have endeavoured to describe the suit cart track in question in the earlier suit lodged by him in O.S.No.729 of 1998 clearly for claiming the relief of permanent injunction as prayed for in the suit. However, despite the abovesaid position, the plaintiff has not chosen to come forward with the clear description of the suit cart track in the abovesaid suit and also nature of the right he seeks to enforce with reference to the same and very particularly not claiming that he has the right over the suit cart track by way of declaration, has preferred the above suit only claiming the relief of permanent injunction simplicitor against the defendants. Accordingly, the Court concerned while determining the abovesaid suit, noted that the plaintiff had failed to establish the nature of the right he seeks to enforce with reference to the said suit cart track and the plaintiff having not come forward with the clear particulars of the same for enabling him to obtain the relief of permanent injunction also as regards the same, finally dismissed his suit. No doubt while dismissing the suit, the Court concerned is found to have granted the plaintiff the permission to lay another suit with reference to his right over the cart track in question and on that basis, it is found that the plaintiff had come forward with the present suit. As against the abovesaid determination of the

Court concerned in O.S.No.729 of 1998 granting the plaintiff the liberty to file a fresh suit for enforcing his right over the suit cart track, the defendants have not chosen to challenge the same in the manner known to law. Be that as it may, when the plaintiff is found to have been granted such a right by the Court concerned in the abovesaid proceedings, in such view of the matter, when the nature of the right with reference to the suit cart track in question has not been determined in such proceedings by the Court one way or the other, in such view of the matter, the contention projected by the defendants that the present suit laid by the plaintiff is barred by res judicata, as such, cannot be countenanced. Though no separate application had been preferred by the plaintiff in the abovesaid suit seeking permission to lay a fresh suit on the same course of action under Order 23 Rule 1 of CPC, even otherwise, the Court having granted such permission to the plaintiff in the abovesaid suit, the present suit laid by the plaintiff cannot be held to be barred by the principles of res judicata, particularly the right of the plaintiff in respect of the suit cart track has not been determined in the said suit one way or the other by the Court concerned. The second substantial question of law formulated in the second appeal is accordingly answered.

16. In this matter, the existence of the suit as described in the plaint has been disputed by the defendant vehemently. Despite the same, the plaintiff has not endeavoured to take out a commission in the suit to know about the existence of the suit cart track for establishing his right over the same as claimed in the plaint. On the other hand, it is seen that the plaintiff is found to have placed reliance upon the Commissioner's report and plan in the earlier suit laid by him in O.S.No.729 of 1998 marked as Exs.A6/B4. No reason has been averred by the plaintiff as to why he has not taken out a commission in the present suit. Furthermore, the plaintiff also has not endeavoured to examine the Advocate Commissioner as regards the report and plan filed by him in O.S.No.729 of 1998. Other than marking the Commissioner's report and plan, the plaintiff has not placed other materials to substantiate the contents thereof one way or the other. On a perusal of the Commissioner's report and plan marked as Exs-A6/B4 filed in O.S.No.729 of 1998, it is seen that the Commissioner had noted only the existence of a foot pathway as described in his report and plan and according to the Commissioner, the foot pathway measures 1 feet in breadth and the remaining portion is found to be covered fully with shrubs and plants, the total extent measured about 7 feet and therefore when as could be seen from Exs-A6/B4, the existence of 1 feet foot pathway alone could be ascertained, the remaining area covered by shrubs and plants and no existence of any cart track has been noted by the Advocate Commissioner in the area and

furthermore, the Commissioner has also in the said report stated that no tyre marks has been seen and no trace of the said portion as having been used as a cart track in any manner other than the existence of the foot pathway, in such view of the matter, it does not stand to reason as to how the Courts below had endeavoured to place reliance upon Exs-A6/B4 for holding that the suit cart track as described in the plaint, is in existence and the same had been used by the plaintiff as claimed in the plaint. When at the most from Exs.A6/B4, we can only gather the existence of the foot pathway and even remotely we could not determine the existence of any cart track as such, particularly in the absence of any trace of tyre marks or the area being used as a cart track as found by the Advocate Commissioner, the endeavour of the Courts below in placing reliance upon Exs.A6/B4 for upholding the plaintiff's case of the existence of the suit cart track and the claim of easementary right over the same are found to be totally unacceptable and without any acceptable reasonings whatsoever and therefore, it is seen that the determination of the issues involved, in favour of the plaintiff based upon Exs.A6/B4 is found to be totally not tenable in the eyes of law.

17. To establish that his vendor K.P.Karuppagounder has been using the suit cart track as described in the plaint and accordingly, he had conveyed the same in his favour by way of Ex.A2 sale transaction, the plaintiff has not endeavoured to examine his vendor or any other person who has knowledge about the same to buttress his case. Furthermore, the plaintiff has not chosen to examine the neighbouring land owners to, at least, fix the existence of the suit cart track as available on ground as described in the plaint and when the materials placed on record by the plaintiff marked as Exs.A6/B4 would only go to disclose the existence of foot pathway of 1 feet width and not any cart track as such and when the plaintiff has failed to establish the truth and validity of the muchalika marked as Ex-A3, when the plaintiff has failed to establish the nature of the features of the area concerned by examining the concerned Advocate Commissioner as a witness in the present case, the Courts below are found to be totally not justified in accepting the plaintiff's case based on his sole interested testimony and his sale transaction marked as Ex.A2, particularly, forgetting for a moment that neither the defendants' vendor nor the defendants are the parties to the abovesaid sale transaction. Therefore, any recital contained in Ex.A2 sale transaction conveying the right of the suit cart track in favour of the plaintiff by his vendor would not enable the plaintiff to claim any right over the same as per law and in such view of the matter, as rightly put forth by the defendants' counsel, the

judgment and decree of the Courts below are found to be not on the basis of the proper appreciation of the materials placed on record, both oral and documentary, in the right perspective and on the other hand, the Courts below are found to have relied upon the documents placed by the plaintiff without any proof on the part of the plaintiff with reference to the same qua the truth and validity of the same and seem to have blindly accepted the plaintiff's case without considering the said materials as per the provisions of law in the correct perspective and therefore the reasonings, findings and conclusions of the Courts below for upholding the plaintiff's case, as regards the existence of the suit cart track in question and the alleged right of the plaintiff over the same, are found to be totally unsustainable in the eyes of law. Merely because the same parties are involved in O.S.No.729 of 1998, the same would not entitle the plaintiff to rely upon the Commissioner's report and plan marked as Exs.A6/B4, particularly, when the said report and plan does not show the existence of the suit cart track as such and on the other hand, it denotes only the foot pathway, the other area covered by shrubs and plants totally and showing no traces of the cart track, as such, in the area.

18. In the light of the abovesaid discussions, the substantial questions of law 1, 3 and 4 formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

19. For the reasons aforesaid, the judgment and decree dated 31.12.2003 in A.S.No.101 of 2003 on the file of the Additional District Court (FTC No.IV) Erode at Bhavani, confirming the judgment and decree dated 30.06.2003 in O.S.No.205 of 2002 on the file of the II Additional District Munsif Court, Bhavani are set aside and resultantly the suit laid by the plaintiff in O.S.No.205 of 2002 is dismissed with costs and accordingly, the second appeal is allowed with costs. Connected, miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

nsd

To

1. The Additional District Judge,
FTC No.IV, Erode at Bhavani.
2. The II Additional District Munsif Judge,
Bhavani.

Copy to

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

+1 cc to Mr.I.C.Vasudevan, Advocate, S.R.No.29039

S.A.No.883 of 2005

SR(CO)
SSM(10/10/2019).



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