

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 06.06.2019

DELIVERED ON: 17.06.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.No.1247 of 2011 and
M.P.No.1 of 2011

Manoharan ... Appellant/Plaintiff

Vs.

1. Elaya Gounder
2. E.Chinnusamy
3. E.Ponnusamy

... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 21.02.2011 passed in A.S.No.87 of 2010 by the Principal Subordinate Judge, Erode reversing the decree and judgment dated 13.09.2010 passed in O.S.No.147 of 2009 by the Principal District Munsif, Erode.

For Appellant : Mr.R.Thiagarajan, Senior Counsel
for Mr.K.Vijayakumar

For Respondents : Mr.S.Mukunth
for M/s Sarvabhauman Associates

JUDGMENT

The appellant is the plaintiff in O.S.No.147 of 2009 on the file of the Principal District Munsif, Erode. He filed the above suit for a bare injunction against the defendants. The suit properties are described under two heads. The suit item No.1 is described as appellant/plaintiff's property in R.S.No.644/1B while the suit item No.2 is described as 20 feet wide common pathway in R.S.No.644/1C, running through the land of the respondents/ defendants.

2. The case of the appellant/plaintiff in nutshell is as follows. The appellant/plaintiff purchased the suit item No.1 through a sale deed dated 23.08.2007 (registration copy of

which is marked as Ex.A1). In the said sale deed, the plaintiff was given a right to use 20 feet wide pathway (suit item No.2), which branches out from Erode-Chennimalai road. According to the appellant/plaintiff, he as well as his predecessors in title were using the said pathway and that there is no other pathway to reach his land (suit item No.1). His further contention is that the said 20 feet wide pathway is on the northern side of the respondents'/ defendants' property and that the respondents with an ulterior motive to make the plaintiff to part away with his property for a low price, are attempting to put up permanent structure in item No.2 of the suit property. He has therefore, filed the suit for a permanent injunction restraining the respondents/defendants either from encroaching upon the item No.2 of the suit properties or in any other manner interfering with the usage of item No.2 of the suit properties to reach item No.1 of the suit properties by the plaintiff.

3. The suit was resisted by the respondents/defendants on the following grounds:

(a) There is no pathway/cart track in R.S.No.644/1C, as claimed by the plaintiff.

(b) Neither the plaintiff nor his vendor used the alleged cart track and therefore, even if there is a grant of such a right through the sale deeds dated 19.04.1962, 18.08.1982 and 23.08.2007, it got extinguished by efflux of time.

(c) The plaintiff has an alternative pathway on the southern side of item No.1 of the suit property and this is also indicated in the plaintiff's sale deed dated 23.08.2007 (Ex.A1) and the plaintiff has suppressed the same.

(d) The suit filed by the plaintiff for a bare injunction, without seeking for a relief of declaration is not maintainable.

4. The trial court framed the following issues.

(1) Whether the cart track is in existence or not?

(2) Whether the plaintiff is entitled for a permanent injunction as prayed for?

(3) To what relief is the plaintiff entitled?

5. In the trial court, the plaintiff examined himself and one another witness and marked Ex.A1 to Ex.A7. On the side of the defendants, the 2nd defendant was examined and no documents were marked.

6. After full contest, the learned Principal District Munsif, Erode decreed the suit in favour of the plaintiff vide her decree and judgment dated 13.09.2010. Aggrieved over the same, the respondents/defendants filed an appeal in A.S.No.87 of 2010 before the Principal Subordinate Judge, Erode. The learned Principal Subordinate Judge, Erode, after analysing the entire

evidence on record, allowed the appeal and dismissed the suit filed by the plaintiff. Now, the plaintiff has filed this second appeal.

7. In the second appeal, the following substantial questions law were framed at the time of admission.

(i). Whether the lower appellate court is correct in law in holding that the suit for bare injunction is not maintainable, overlooking the fact that the title is not in dispute and the cause of action stated in the plaint?

(ii). When the appellant had traced his right to use the cart track in suit item No.2, by virtue of registered sale deeds, viz., Ex.A1 to Ex.A3, whether the lower appellate court is correct in law in non suiting the appellant?

(iii). Whether the lower appellate court is correct in law in ignoring the admission made by DW1, which clearly proves the falsity in the defence and in eschewing the Ex.A4 to Ex.A6 material documents?

8. When the appellant/plaintiff claimed that he and his predecessors were using 20 feet wide pathway in R.S.No.644/1C, the respondents/ defendants have denied the very existence of the said pathway. The appellant/ plaintiff mainly relies on Ex.A1 to Ex.A3 which are sale deeds dated 23.08.2007, 19.04.1982 and 18.08.1982 respectively to show that he and his predecessors in title were granted a right to use the pathway in S.No.644/1B.

9. While Ex.A1 is a registration copy of the sale deed in favour of the plaintiff executed by one Vivekanandan, the said Vivekanandan purchased the suit properties under two sale deeds, copies of which are marked as Ex.A2 and Ex.A3 from one Ramanna gounder, father of the 2nd and 3rd respondents/2nd and 3rd defendants. All the three sale deeds do indicate a 20 feet wide pathway in R.S.No.644/1B on the northern side of R.S.No.644/1C.

10. An advocate Commissioner was appointed by the trial court. The learned advocate commissioner in his report Ex.C1 has clearly stated that there is no pathway on the north-eastern portion of the defendants' property as mentioned in the plan appended to the plaint. Ex.C2 shows existence of a well on the extreme northern side of the defendants' property. In the rough plan appended to the plaint, the cart track is indicated on the northern end of S.No.644/1C. The advocate commissioner in his plan Ex.C2 had indicated a Well in this portion and the existence of the Well is not mentioned either in the plaint or in the plan appended to plaint. Interestingly, the advocate commissioner in his report has stated that the plaintiff informed him that the northern side of defendants' property in

R.S.No.644/1C is not the suit property. This is totally against the case put forth by the plaintiff. Infact, the plaint plan and Ex.C2 rough sketch are totally different from each other.

11. The learned advocate commissioner in Ex.C2 had indicated a 2 1/2 feet wide pathway in almost middle portion of the defendants property branching out from the main road, which as already observed is not the item No.2 of the suit properties. However, Mr.R.Thiyagarajan, learned Senior Counsel appearing for the appellant contended that the defendants blocked this pathway by putting up superstructures and also by putting up a gate during the pendency of the suit. He also drew the attention of this court to the report of the advocate commissioner appointed by this court.

12. Mr. Justice. N.Sathishkumar had appointed Mr.N.S.Suganthan as advocate commissioner on 15.03.2019 to inspect the suit properties and to note down the physical features of the property and also to find out whether there is any other alternative pathway available to reach the appellant's property. Mr.N.S.Suganthan accordingly visited the suit properties and filed his report and plan. According to Mr.N.S.Suganthan, the orange washed portion in the plan is the pathway indicated in Ex.A1 and the said pathway is not in existence. He has shown a house and a shed in the alleged pathway. Mr. R.Thiagarajan learned Senior Counsel contended that these constructions were put up only during the pendency of the suit.

13. Per contra, Mr. S.Mukunth, learned counsel appearing for the respondents raised the following points:

(a) When the plaintiff's case is that the suit pathway is on the northern side of S.No.644/1C branching out from Erode - Chennimalai road, he cannot claim a different pathway.

(b) On the northern extreme side of S.No.644/1C, there is a Well which is not indicated by the plaintiff in his plan appended to the plaint and the Well is in existence from the time immemorial.

(c) The very existence of well in suit item No.2 would clearly go to show there would not have been a pathway, as claimed by the plaintiff.

(d) Even if such a right is conferred through documents Ex.A1 to Ex.A3, it got extinguished by efflux of time. This is also clear from the superstructures put up by the defendants in their property long back.

(e) The appellant/plaintiff did not seek for declaration of his right over the pathway and the suit filed by him for bare injunction is not maintainable, as the very pathway is not in existence now.

(f) Mr.N.S.Suganthan, the learned advocate commissioner appointed by this court had shown a 10 1/2 feet concrete pathway in S.No.644/1C branching out from Erode-Chennimalai Road through

which the plaintiff can reach his property.

14. He also relied on the decision in Tiruvananthapuram Municipality, Tiruvannamalai, represented by its Commissioner Vs. A.K.M.Towers Private Limited, represented by its Managing Director K.Kasinatha Devar, rep. by its General Power of Attorney, and another reported in 2012(3) MWN (Civil) 698 and contended that the owner of the land adjoining the highway has a right of access to the highway from any part of his premises. His specific contention is that the plaintiff can reach his land from Erode-Chennimalai road through Anna Nagar Harijan Colony.

15. Mr.R.Thiyagarajan, learned Senior Counsel appearing for the appellant/plaintiff relied on the decision in Kuchibotha Kanakamma and another Vs. Tadepalli Ptanga Rao and others reported in 1957 AP 419 and contended that easementary right by grant through sale deeds would not be lost by subsequent encroachments made by the respondents/defendants and that when the plaintiff is granted a right of way through the defendants' land, he cannot be compelled to use another pathway to reach his land. He would further contend that construction of a house and a shed in the pathway would not amount to dispossession or ouster of appellant/ plaintiff for they themselves had no right of possession of the pathway. He also relied on the decision in Bharathamatha Desiya Sangam Madhavaram Vs. Roja Sundaram, reported in AIR 1987 Mad 183 and contended that the cause of action for institution of the suit also included the persisted squatting upon the portion trespassed and when the plaintiff's right to such access is completely obstructed by the defendants by putting up a wall, they are entitled for an order of injunction. Reliance was placed on the decision in K.V.K.Janardhanan Vs. State of Tamil Nadu and others reported in AIR 1995 Mad 179+ 1995 (1) L.W. 451. He would therefore contend that the suit filed by the plaintiff for a bare injunction is perfectly maintainable.

16. All the above decisions relied on by the learned Senior Counsel appearing for the appellant would not apply to the present case because (i) in all the above cases, the plaintiff had filed a suit for mandatory injunction to remove the obstruction, (ii) they were able to show the existence of pathway and (iii) the enjoyment of easementary right of way for an unbroken period of 20 years as contemplated under Section 47 of the Indian Easements Act, 1882.

17. In the instant case, the plaintiff in the plan appended to plaint has shown a different pathway and is now claiming a pathway which runs through a house and shed put up by the respondents/defendants. There is no 20 feet wide pathway in

the defendants' land as alleged by the plaintiff, as is seen from the report and plan of both the advocate commissioners, appointed by this court as well as by the trial court. The appellant/ plaintiff has not sought for a mandatory injunction to remove the obstruction put up by the respondents/defendants, when the constructions were made by the respondents/ defendants and to top it all, the appellant/plaintiff has not at all specified as to when these obstructions were made by the respondents/ defendants. The advocate commissioners' reports show that the land of the appellant/ plaintiff is kept vacant and he has not adduced any acceptable evidence to show that he has been using the pathway continuously for 20 years. As per Section 47 of the Indian Easements Act, a continuous easement is extinguished when it is totally ceased to be enjoyed as such for a period of 20 years. According to the respondents/defendants, all the constructions were made long back and the suit filed by the plaintiff cannot be sustained.

18. It is also pertinent to point out that the plaint plan is totally different from the advocate commissioners' reports and the plaintiff, who has claimed a right of way through a particular passage, cannot ask such a right through another passage in the defendants' land. The plaint is not properly framed and though a right of pathway is granted in favour of the plaintiff, the appellant/plaintiff has not shown by adducing acceptable evidence that he and his predecessors in title were enjoying the same for unbroken period of 20 years. In the said circumstances the substantial questions of law are answered against the appellant/plaintiff and the second appeal fails.

19. In the result,

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

(ii) The decree and judgment passed by the first appellate court is upheld.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

mst

To

1. The Principal Subordinate Judge, Erode.

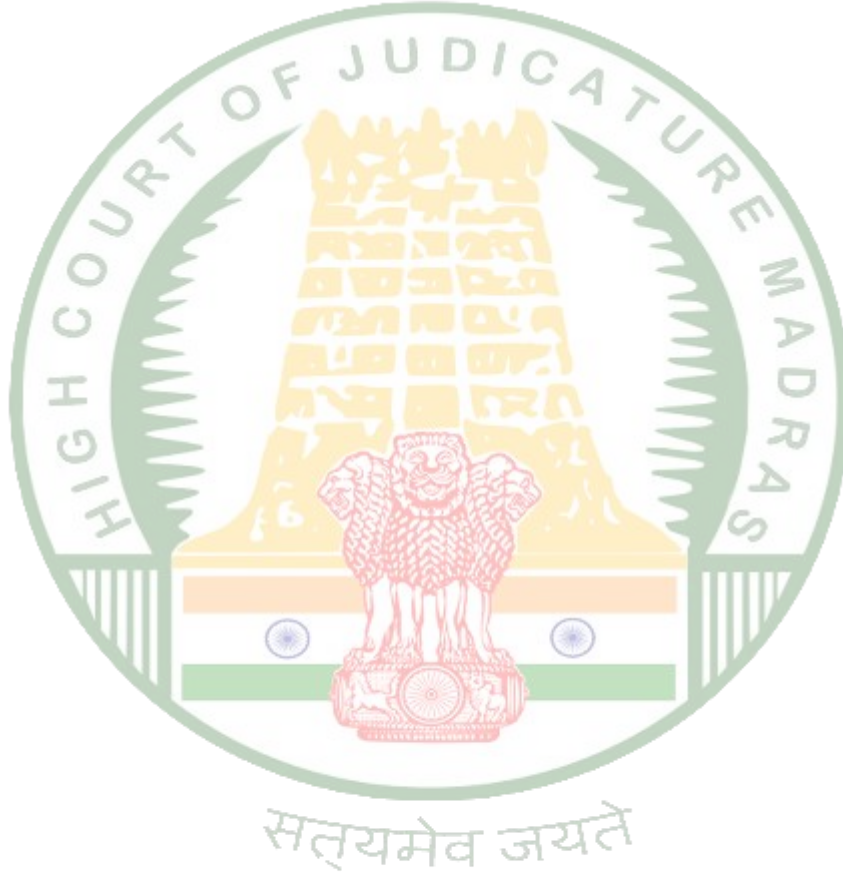
2. The Principal District Munsif, Erode.

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

+1cc to M/s Sarvabhauman Associates, Advocate SR.No.49225

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M.P.No.1 of 2011

RSI (CO)
GMY (04/09/2019)



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