

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :05.07.2019

Pronounced on : 18.07.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.57 of 2015
and
C.M.P.No.1 of 2015

1.Palanisamy

2.Subbanna gounder

3.Palanisamy

4.Govindaraj

Appellants

Vs

1.Muthyammal

2.P.Vadivel

3.P.Saminathan

4.Pongianna gounder

5.Thangavel

6.K.Parameswari

7.S.Kasthuri

8.V.Loganayaki

Respondents

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Principal Sub Court, Erode, in A.S.No.65 of 2013 dated 27.06.2014 modifying the judgment and decree of the District Munsif cum Judicial Magistrate, Kodumudi in O.S.No.268 of 2004 dated 19.09.2013.

For Appellants : Mr.N.Manokaran
For RR1 to 3 : Mr.T.Murugamanickam,
Senior Counsel
For M/s. Zeenath Begum
RR4 to 8 : AOS not filed.

JUDGMENT

The 2nd, 5th and 7th defendants in O.S.No.268 of 2004 on the file of the District Munsif -cum- Judicial Magistrate Kodumudi, are the Appellants herein. They, as appellants had filed A.S.No.65 of 2013 on the file of the Sub Court, Erode, along with the 6th defendant. O.S.No.268 of 2004 was decreed by judgment dated 19.09.2013. The said decree was modified in A.S.No.65 of 2013 by judgment dated 27.06.2014.

O.S.No.268 of 2004 (The District Munsif -cum- Judicial Magistrate Kodumudi):-

2. O.S.No.268 of 2004 had been filed by three plaintiffs, namely, Muthayammal, P.Vadivel and P.Saminathan. They were widow and sons of Palanisamy Gounder. They had filed the suit for a declaration with respect of right to use the cart track for reaching their lands, which was in the western side of the said cart track and for consequential injunction, restraining the defendants from using the cart track to reach their lands and for a declaration with respect of the defendants' right to extend the pipeline and use the water through the existing pipeline laid underground, and also for costs of the suit.

3. The suit property is a cart track measuring to a width of 25 ft., and running to a length of 500 ft. It was described as a common cart track in a partition deed, dated 04.09.1964. The 1st plaintiff was the purchaser of the property to the West of the cart track, measuring about 1.50 acres in R.S.No.868. It was stated that this property was adjacent to the property in R.S.No.867 already owned by the plaintiff. It was claimed that 1st and 2nd defendants were aggrieved by the purchase of the said property by the 1st plaintiff. They had filed O.S.No.51 of 2003 on the file of the District Munsif Kodumudi seeking an order of injunction restraining the plaintiffs therein from using the suit cart track for reaching their lands on the West of the suit

cart track.

4. However, the plaintiffs claimed that the property to the West of the suit cart track belonged to them. They had laid underground pipeline for a distance of about 400 ft. This pipeline was used for irrigating their agricultural lands. The plaintiffs wanted to extend the pipeline. The 1st and 2nd defendants objected to such extension. The 3rd to 7th defendants were co-parcenors of the suit property. Since, there was an objection by the 1st and 2nd defendants, the plaintiffs were constrained to file the suit seeking the relief of declaration of right and also for permanent injunction.

5. The 2nd defendant, Palanisamy filed written statement denying the averments made in the plaint. He admitted that the plaintiffs and defendants were the co-owners of the suit cart track. In the partition deed, dated 04.09.1964 and also in a later partition deed, dated 03.08.1968 the disputed property has been described as a common cart track. It was specifically stated that the plaintiffs are entitled to use the common suit cart track only for reaching their portions on the Western side in R.S.Nos. 884, 883, 863, 864 and 865. It was claimed that they are not entitled to use the cart track to reach any other property. It was claimed that the right to use the cart track had also been given to the defendants by partition deed dated 04.09.1964. The defendants claimed that the suit should be dismissed.

6. By judgment dated 19.09.2013, the learned District Munsif -cum- Judicial Magistrate, Kodumudi, held as a fact that both the plaintiffs and the defendants have been using the cart track and that it was nearly 25 ft., in width and since it was used as a common cart track, there cannot be any injunction in favour of one party as against the other. It was also held that the cart track has to be used in common. Holding as above, the learned District Munsif -cum- Judicial Magistrate, Kodumudi, decreed the suit.

A.S.No.65 of 2013 (The Principal Sub Court Erode):-

7. Challenging that decree, the 2nd, 5th, 6th and 7th defendants, then filed an appeal in A.S.No.65 of 2013 before the Principal Sub Court, Erode. By judgment dated 27.06.2014, the learned Principal Sub Judge, after examining the evidence adduced and the arguments advanced, had thought it fit to modify the decree of the learned District Munsif -cum- Judicial Magistrate, Kodumudi, in O.S.No.268 of 2004 dated 19.09.2013.

However, with respect to the decree for permanent injunction, the First Appellate Court had interfered with the findings of the Trial Court and held that the plaintiffs were entitled for an order of permanent injunction, however with conditions for usage of the cart track.

8. Heard Mr.N. Manokaran learned counsel for the appellants / defendants 2, 5, 6 and 7 and Mr.T. Murugamanickam learned Senior Counsel for the respondents 1, 2 & 3 / plaintiffs.

S.A.No.57 of 2015:

9. The Second Appeal had been admitted on 24.02.2015 on the following two Substantial Questions of Law.

"1.Whether the Courts below were right in granting the decree ignoring the fact that the plaintiffs are trying to use the suit cart track to reach a different land which is not covered under Ex.A1.?"

2.Whether the Courts below were right in granting decree for laying pipeline, when there is no such easementary right granted at all under the partition deed to any of the parties?"

10. It is the contention of Mr.N.Manokaran learned counsel for the appellants that in the earlier partition deed dated 04.09.1964, marked as Ex.A1 during trial, the suit cart track had been mentioned and it was stated that it can be used to reach the lands covered in the said partition deed. There was a later partition deed dated 03.08.1968 marked as Ex.A2 during trial wherein also the cart track had been mentioned. The learned counsel pointed out that the plaintiffs had purchased another piece of land and are attempting to use the cart track to reach the said land. The learned counsel stated that the plaintiffs also had no easementary right to lay a pipeline beneath the cart track.

11. These contentions were refuted by Mr.T. Murugamanickam learned Senior counsel who stated that the cart track was a common cart track used by all the persons who own lands on either side and consequently, the defendants / appellants

cannot claim exclusivity over usage or even lay down conditions for each usage. The learned Senior counsel was emphatic in his submission that the Second Appeal should be dismissed.

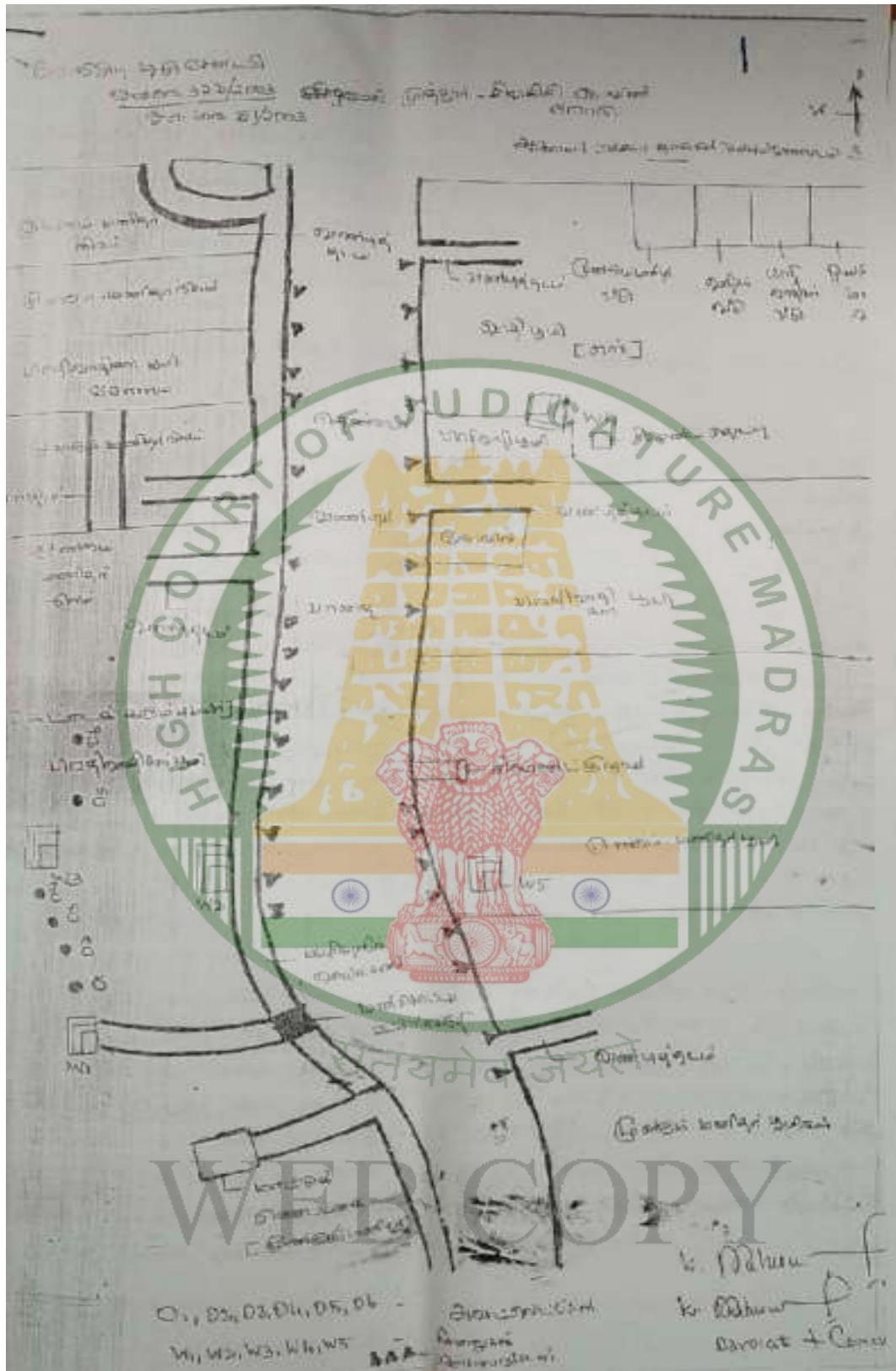
12. I have carefully considered the arguments advanced.

13. The parties are referred as plaintiffs and defendants for the sake of convenience.

14. The 2nd defendant Palanisamy, 5th defendant Subbana Gounder, 6th defendant Palanisamy and 7th defendant Govindaraj are the appellants herein. The 1st plaintiff Muthayammal, 2nd plaintiff P.Vadivel and 3rd plaintiff P.Saminathan are the contesting respondents. The schedule of the property in the plaint is a cart track with a width of 25 ft., and a length of 500 ft., in R.S.No.865/1, 864/1,4, 861/4, 863/1 and 883/2,4 in Old.S.F.Nos.388, 389 in Sivagiri Village, Erode District. There is also an underground pipeline running beneath the cart track. The plaintiffs admitted that they along with the defendants are co-owners of the cart track. It had been described as a common cart track in the partition deed dated 04.09.1964 which was marked as Ex.A1 during trial. It was also described as a common cart track in the subsequent partition deed 03.08.1968 which had been marked as Ex.A2 during trial.

15. The plaintiffs and the defendants and their predecessors owned lands both to the West and East of the cart track. During the course of trial, an Advocate Commissioner had been appointed and his report had been marked as Ex.C1 and the rough plan prepared has been marked as Ex.C2. To morefully understand the layout of the cart track and the properties to the West and East of the same, the Ex.C2, the rough plan prepared by the Commissioner which is part of the Court records is exhibited below for better appreciation.

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16. A perusal of the suit cart track shows that it is a wide cart track measuring about 25 ft., and both to the East and West, lands of both the plaintiffs and the defendants and also of third parties are located.

17. The 1st plaintiff had purchased a land to an extent of 1.50 acres in R.S.No.868. This is adjacent to the existing lands of the plaintiffs. The defendants have objected to usage by the plaintiff of the cart track to reach the newly purchased land in R.S.No.868. The plaintiff also wanted to extend the existing pipeline to reach the newly purchased lands at R.S.No.868. Both usage of the cart track to access the newly purchased land and extending the existing pipeline beneath the cart track to reach the newly purchased land have been challenged by the defendants which necessitated instituting a suit seeking reliefs of declaration of right and consequential injunction. Both the Courts below, on the basis of oral and documentary evidence have returned a finding that the cart track was a common cart track, that both the plaintiffs and the defendants had lands to the East and West of the common cart track and that there were other third parties who were also using the common cart track to access their lands. It is seen that the physical features which confirm to these findings have also been established through the report and rough sketch produced by the Advocate Commissioner, Exs.C1 and C2.

18. It is also found as a fact that reliance was placed by the defendants on Exs.A1 and A2, partition deed of the year 04.09.1964 and 03.08.1968 are misconceived since subsequent to the partition deed, third parties have also purchased lands on either side of the cart track and are using the very same cart track to reach their lands. Since the partition deeds have given a legally recognized right to both the plaintiffs and the defendants to use the cart track there cannot be a restriction of such right claiming easementary right.

19. The learned counsel for the appellants relied on 2014-4-L.W.540, Balusamy Vs. Sengoda Gounder & another. In that case, it had been observed that right to use the pathway can be available only to the properties covered under earlier partition deed. However, it had been established that as a fact, in that case, at the time of the partition deed, the pathway was not in existence and among the covenants in the partition deed, the parties had agreed to form a pathway, at a later point of time. In the present case, the pathway or cart track was already in existence at the time of the partition deed and right to use the cart track was granted to both the plaintiffs and the defendants under two partition deeds, Exs.A1 and A2. Consequently, this judgement which was relied on by the learned counsel for the appellants is clearly distinguishable on facts.

20. The learned counsel for the appellants then relied on (2012) 7 MLJ 813, Natesa Gounder Vs. Raja Gounder and Others. It was observed in the said judgement, that when no evidence had been brought that the suit property belonged exclusively either to the plaintiffs and the defendants, but that "the plaintiff is having the facility of ingress and egress to his property through the iteri (pathway) situated to the North of property. In such a case, his inclination or desire to use the suit property as his pathway from the Southern side would not attract the concept easement by necessity or easement of necessity by implied grant". Again, the facts in the present case are totally different. As repeatedly pointed out, the right to use the cart track was granted by way of a partition deed Exs.A1 and A2, and the right to exercise that the right granted under the said partition deeds cannot be restricted.

21. In (1985) 1 MLJ 36 (S.C.) Ayyaswami Gounder and others. Vs. Munnuswamy Gounder and others, the Hon'ble Supreme Court as held as follows:

"11. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment"

22. In AIR 1973 Madras 42, Subbiah Goundan Vs. Ramaswamy Goundan and others, the learned Single Judge of this Court had on similar facts to the issue in lis in the present Second Appeal, held as follows:

"4. When co-owners, at the time of partition, set apart a portion of the common property to be used as common for the beneficial enjoyment of their respective shares, that involves a dedication by each of them of a portion of the property, which, but for such dedication, would become his exclusive property. Each of such co-owners of the common property is entitled to use the property in the was most advantageous and beneficial to him without, at the same time, causing any injury or detriment to the other co-owners. It is for such a co-owners to decide in what way he could so use the common property to his maximum advantage. It is not for the other co-owners to dictate in what manner the other co-owner should enjoy the common property so long as the user of the common property by one co-owner does not

materially interfere with the use of the property by the other co-owners or affect their rights or in any way weaken, damage or injure the common property. Such co-owners are not entitled to prevent the other co-owner from using the common property in the way most beneficial to him. When co-owners of lands divide the lands, sometimes they set apart a common pathway for the beneficial enjoyment of their respective shares. Each co-owner is entitled to use the common pathway in a way most beneficial to him. If he happens to acquire a new land adjacent to his share and if that land can be approached through the common pathway, he cannot be prevented from using the common pathway provided his use of the common pathway does not interfere with the rights of the other co-owner in the common pathway."

(Emphasis Supplied)

23. Taking advantage of the ratio laid above, I hold that no grounds have been raised to interfere with the findings of both the Courts below. As a matter of fact, the First Appellate Court had also imposed reasonable conditions for usage of the said cart track. I find no reason to interfere with the same. The Substantial Questions of Law framed are answered that both the Courts below were correct in granting a decree in favour of the plaintiffs to use the suit cart track, to access different lands not covered under Ex.A1 and also for laying of pipeline.

24. In view of the aforesaid discussion, the Second Appeal is dismissed. No costs. Consequently, connected civil miscellaneous petition is closed.

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Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

To

1.The Principal Sub Court, Erode.

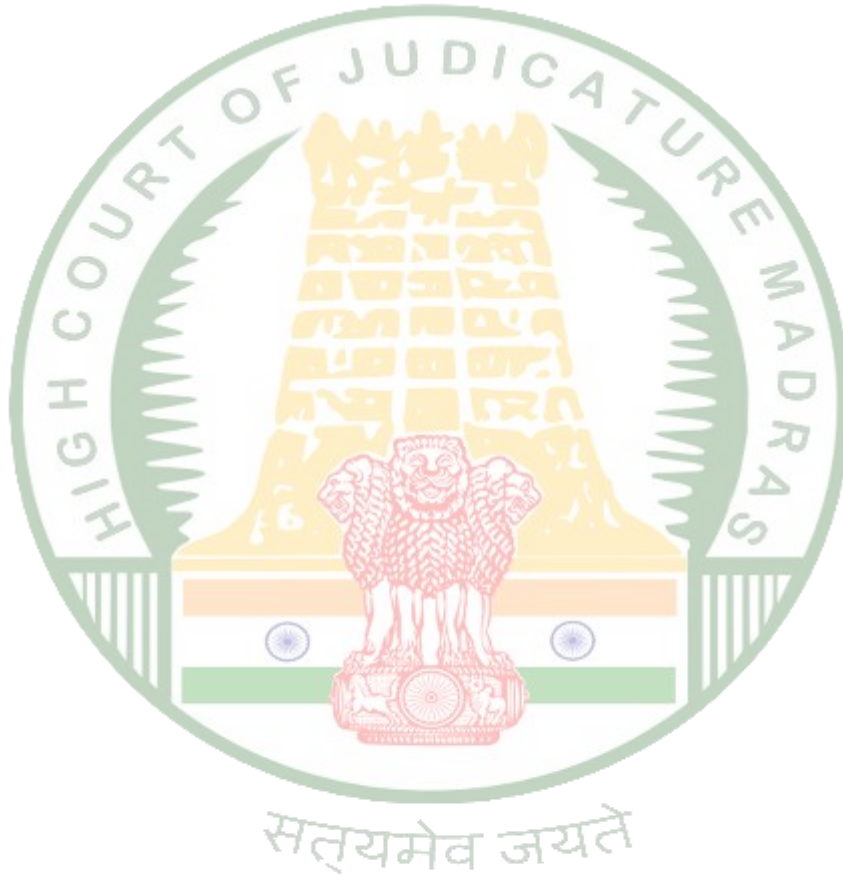
2.The District Munsif cum Judicial Magistrate, Kodumudi.

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

+1cc to Mr.N.Manokaran, Advocate sr.61572
+1cc to M/s.Zeenath Begum, Advocate sr.61572

S.A.No.57 of 2015

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