

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.166 of 2014

1. Kuppusamy
2. Sengottaiyan
3. Iyannan
Venkatachalam[Died on 2/8/2013]
4. Jeyamani
5. Kanimozhi
6. Shanthi
(Cause title accepted vide order
dated 29.01.2014 made in M.P.No.1 of
2013 in S.A.SR.No.96602 of 2013) ..Appellants

Vs.

1. Muthusamy
2. Chinnapapa
3. Kanagaraaj
4. Muthusamy ..Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 02.02.2013 in A.S.No.28 of 2011 on the file of the learned Subordinate Judge, Sankari, Salem District against the judgment and decree dated 18.10.2011 in O.S.No.48 of 2008 on the file of the learned District Munsif, Sankari, Salem District.

For Appellants : Mr.M.V.Karunakaran

For Respondents : Mr.N.Manokaran

J U D G M E N T

The defendants in O.S.No.48 of 2008 on the file of the learned District Munsif, Sankari are the appellants herein. The said suit was instituted by the plaintiffs seeking declaration of their title to the suit properties measuring about 3 acres and 6 cents in Survey No.152 /1, subject to the easementary right of the defendants as shown in the plaint plan and consequential injunction restraining the defendants from entering upon the property of the plaintiffs, situated on the eastern side of the cart track and forming a new cart track on the eastern side of the

plaintiffs' land.

2. According to the plaintiffs, the suit property originally belonged to one Sembayammal under a registered instrument of sale dated 24.02.1960. The plaintiffs are the grandchildren of the said Sembayammal.

3. The plaintiffs would contend that the right of way was conferred on the defendants under the Sale deed dated 24.02.1960 which was marked as Ex.A1. Since the defendants attempted to lay a new Cart track on the Eastern boundary of the land of the plaintiffs, as against the existing Cart track which starts on the Eastern extremity of the plaintiffs' property and run towards south to a distance of about 40 feet and thereafter, curves towards west and again runs towards south up to the land of Palani Gounder which is situated on the South, the plaintiffs were forced to come up with the present suit restraining the defendants from creating a new cart track on the eastern extremity.

4. The suit was resisted by the defendants contending that the lie of the cart tack is not as suggested by the plaintiffs. According to defendants, the cart track runs on the eastern extremity of the land through out. Claiming that the plaintiffs were attempting to alter the course of the cart track taking advantage of the Odai that is running across the plaintiffs' land, the defendants sought for dismissal of the suit.

5. Pending suit, a Commissioner was appointed, he visited the property and filed a report and a plan.

6. The trial Court taking note of the recitals in Exs.A1 and B1 Sale Deeds dated 24.02.1960, 04.03.1978 respectively, concluded that the suit cart track runs on the eastern side on the plaintiffs' property and the lie of the cart track is not as suggested by the plaintiffs in the plaint plan. The trial Court also relied upon the Commissioner's report and the plan filed by the Advocate Commissioner which is marked as Exs.C1 and C2 and concluded that the cart track referred in Exs.A1 and B1 lies on the eastern extremity of the plaintiffs land through out and it does not curve towards west as suggested by the plaintiffs. On the said conclusion, the trial Court decreed the suit with the clarification that the defendants would be entitled to use the said Cart track which is shown in red colour in the Commissioner's plan marked as Ex.C1.

7. Aggrieved, the plaintiffs preferred an appeal in A.S.No.28 of 2011. In the appellate Court, they sought to

produce an additional document namely the Commissioner's report filed in O.S.No.241 of 1995 in which the defendants father Karatturan @ Arumuga Gounder figures as the plaintiff in order to prove the lie of the cart track. The lower appellate Court received the said document in evidence and the same was marked as Ex.A18. No doubt an objection is raised regarding the receipt and the document on the ground that the Commissioner was not examined as a witness.

8. Mr.N.V.Karunakaran, learned counsel for the appellants would contend that in the absence of the examination of the Commissioner, the lower appellate Court was not right in admitting the plan and the report of the Commissioner as additional evidence.

9. Mr.N.Manokaran, learned counsel for the respondents would point out that the Commissioner in the said suit Mr.P.V.Dhanapal is the counsel for the defendants in the present proceedings and hence examination of the Commissioner cannot be insisted upon. Be that as it may, the question that arises is only with reference to the lie of the Cart track. The lower appellate Court had concluded that the Cart track runs in the manner suggested by the plaintiffs in the plaint plan on the basis of the certain observation made by the Commissioner in his report Ex.C2 wherein, he has stated that the red marked portion in his plan Ex.C1 appears to have been newly laid. The Commissioner report in the earlier suit in O.S.No.241 of 1995 which is marked as Ex.A18 was also taken into account by the lower appellate Court to conclude that the suit Cart track runs as suggested by the plaintiffs in the plaint plan.

10. Mr.M.V.Karunakaran, learned counsel for the appellants would vehemently contend that the lower appellate Court committed an error in the interpretation of the documents particularly Exs.A1 and B1.

11. The following substantial question of law was framed at the time of admission:

a) Whether the First Appellate Court is incorrect in interpreting Exs.A-1 and B-1 relating to the 'cart track'?

12. Elaborating on the question of law, Mr.M.V.Karunakaran, learned counsel for the appellants would contend that both Exs.A1 and B1 clearly recite that the said Cart Track runs on the eastern side of the

plaintiffs property. However, in the plaint plan, the plaintiffs would depict a curve towards west in the Cart track which commences from the north eastern corner at a distance of about 40 feet from northern boundary of the plaintiffs property. It thereafter turns towards west and runs towards south. This lie of the Cart track is denied by the defendants and they claimed that the Cart track runs from the north eastern extremity in a straight line towards south and turns towards west only in the property of Palani Gounder that is situated on the south.

13. According to Mr.M.V.Karunakaran, learned counsel for the appellants, the lower appellate Court was not right in interpreting Exs.A1 and B1 in the manner in which it has been done, he would submit that once the document of title referred to a particular Cart track on the eastern side, the lower appellate Court was not right in concluding that a different Cart track was available. He would also point out that Ex.A18 itself shows that the lie of the Cart track as pleaded by the plaintiffs is not correct.

14. Contending contra, Mr.N.Manokaran, learned counsel for the respondents would submit that the lower appellate Court has taken into account, the observation of the Commissioner's report that the Cart track shown as red colour in plan C1 appears to be a newly laid one and the fact that the earlier Commissioner's report shows that there was only one Cart track and there is no Cart track as suggested by the defendants.

15. I have considered the rival submissions.

16. There is no dispute regarding the recitals in Exs.A1 and B1. Both of them would clearly spell out that the Cart track runs on the eastern side of the plaintiffs' property. The plaintiffs would contend that the Cart track runs towards west up to certain distance and again proceeds towards south. The Commissioner appointed in this suit in his plan, Ex.C1 had stated that the red marked portion is newly laid Cart track. In the report which is marked as Ex.C2, the Commissioner has stated as follows:

“மேற்படி வண்டித் தடத்தின் இருபுறமும் மாதிரி வரைபடத்தில் மரக்கலரில் காட்டியுள்ள பகுதியிலிருந்து மண் எடுத்து தாவா வண்டித் தடத்தை சீரமைத்துள்ளனர்.”

17. He would further state that the yellow coloured portion is an Odai and it cuts across the Cart track and joints the Cart track at 'C' point on the southern side. The report of the Commissioner does not support the finding

of the lower appellate Court that the red coloured portion in his plan, C1 is newly created pathway. Even in Ex.A18 filed by the respondents before the lower appellate Court, the pathway is shown to be running from the north eastern corner of the plaintiff's property in, almost, a straight line towards south. It does not curve towards west as suggested in the plaint plan. The plan annexed to Ex.A18 filed by the Commissioner in the earlier suit, shows that the 'D' portion is the land that belongs to the present plaintiffs in which they had cultivated sugarcane and the C portion situated immediately on the east of the Cart track is cultivated with groundnuts. There is no physical feature available in the earlier plan and the report of the Commissioner which would suggest that the land of the plaintiffs is situated on the both west and the east of the Cart track shown by him. In fact, in the earlier report, the Commissioner specifically states that the Cart track runs on the eastern side of Sembayammal's land. The present plaintiffs claim title under Sembayammal. The above physical features found by the trial Court were totally overlooked by the lower appellate Court, and the lower appellate Court, in my considered opinion, has misinterpreted the Commissioner's report filed in O.S.No.241 of 1995 as well as misunderstood the recitals in Exs.A1 and B1. The result of such misinterpretation or misunderstanding of the recitals in the document had led the lower appellate Court reaching a wrong conclusion with regard to the lie of the suit Cart track. I have no hesitation in concluding that the said misunderstanding has resulted the lower appellate Court rendering the findings which are perverse and against the evidence on record.

18. Therefore, the question of law is answered in favour of the appellants to the effect that the lower appellate Court misconstrued the recitals in Exs.A1 and B1 which had resulted in its reversing the well considered judgment of the trial Court. Hence, the appeal is allowed. The judgment and decree of the lower appellate Court is set aside and that of the trial Court are restored. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vum

To

1. The Subordinate Judge,
Sankari,
Salem District.
2. The District Munsif,
Sankari,
Salem District.
3. The Section Officer,
VR Section,
Madras High Court,
Chennai.

+1cc to Mr.M.V.Karunakaran, Advocate, S.R.No.90865

+1cc to Mr.N.Manokaran, Advocate, S.R.No.90897

S.A.No.166 of 2014

RSI(CO)
CB(28/07/2020)