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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.03.2019

CORAM

THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

S.A. 890 of 2018
and
C.M.P. 23604 of 2018

Vice@ Duraiswamy ... Appellant / Defendant

Vs.

1. Dr.Subbrathinam

2. M.Patcha Muthu ... Respondents / Plaintiffs

Prayer :- This Appeal has been filed under Section 100 of C.P.C. against the decree and judgment dated 01.02.2006 made in A.S. No.95 of 2004 on the file of Principal Subordinate Judge, Salem confirming the decree and judgment dated 26.02.2004 made in O.S.No.519 of 2000 on the file of Principal District Munsif, Salem.

For Appellant : Mr.R.Ezhilarasan

JUDGMENT

The defendant, who lost the Suit before both the courts below has filed the present Second Appeal.

2. The respondents/plaintiffs have filed the suit for declaration declaring the plaintiffs are entitled to use the suit cart track, and for permanent injunction restraining the defendants from preventing the plaintiffs' men cattle and cart from using the suit cart track and also for a mandatory injunction directing the defendants to restore the suit cart track. The Trial Court has decreed the suit, and the lower Appellate Court has confirmed the judgment and decree of the Trial Court. Being aggrieved with the concurrent finding, the present Second Appeal has been filed.

3. The case of the plaintiffs in brief is as follows :-

The properties in Survey Nos.99/2 and other lands originally belongs to one Kathiruma Udayar and his brother Perumal Udayar, and they were enjoying the properties along with cart track,



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which branches from Vazhapady to Thimmanaickenpatty Main Road, and again branching and running along odai in S.Nos.91 and 93 towards west measuring 15 ft. in breadth. The above said cart track was in existence for long number of years. The lands of Raju Pandaram was on the north of the suit cart track, and the lands of one Kandasamy Udayar was on the south of it. When the adjoining landowners disturbed the user of the cart track by Kathiruma udayar and Perumal Udayar, they have filed a suit in O.S.No.450 of 1974, on the file of District Munsif Court, Salem, the suit was subsequently transferred to District Munsif of Sankagiri, and the suit was decreed on 16.11.1976, declaring their right to the suit cart track, and also for mandatory injunction to restore the cart track to the original state, and granted permanent injunction restraining the defendant from interfering with the suit cart track. Thereafter, the suit cart track was restored and it is being used by the plaintiffs in the suit and their successors. Subsequent to the above judgment and decree, there was a oral partition between Kathiruma Udayar and Perumal Udayar, and the suit property including the cart track was allotted to Kathiruma Udayar. Thereafter, his legal heirs sold the property on 17.02.1988, in favour of plaintiffs. Right from the purchase, the plaintiffs have been using the cart track. The land lying on the north of the cart track in S.No.44/3 and 94/4, belonged to one Raju Pandaram, the 1st defendant in O.S.No.450 of 1974, and the said Raju Pandaram sold the property to one Murugesan, who in turn sold the same to the defendant. Now, the defendant attempting to prevent the plaintiffs' from taking the carts to the plaintiffs house and using the suit cart track. Hence, they have filed the present suit for declaration and also for consequential injunction. Pending suit, alleging that the cart track has been obstructed, the prayer was amended for a mandatory injunction directing the defendant to remove the obstruction in the suit cart track.

4. The defendant has filed a written statement contending that the decree passed in O.S.No.450 of 1974 is not acted upon, and it is not binding upon the defendant, and no cart track is in existence as claimed by the plaintiffs, and the suit cart track was not restored in accordance with the decree passed in O.S.No.450/1974. He has also specifically denied the obstruction in the suit cart track.

5. Considering the materials and the evidences available on record, the Trial Court has decreed the suit holding that the earlier decree passed in O.S.No.450/1974 is binding on the defendant. That apart, the decree has been executed, and the obstruction has been removed, and the parties are using the cart track continuously. The Trial Court also held that even though the defendant claimed that the cart track is not available to the plaintiffs, they have failed to establish the



same. Challenging the judgment and decree, the defendant has filed an appeal in A.S.No. 95 of 2004, on the file of Subordinate Judge, Salem and the lower Appellate Court has also after considering the materials available on record has concurred with the findings of the Trial Court and dismissed the appeal. Challenging the concurrent findings of both the courts below, the present Second Appeal has been filed.

6. I have heard Mr.R.Ezhilarasan, learned counsel appearing for the appellant and perused the materials available on record carefully.

7. The learned counsel appearing for the appellant would contend that the decree was passed in the year 1974, but the decree was not acted upon, and it was not enforced. Hence, now the plaintiffs cannot claim any right based on the earlier decree. That apart, there is no evidence to show that the suit cart track has been restored in pursuant to the earlier decree, and the parties are using the same.

8. On careful consideration of the entire materials available on record, and the evidences both oral and documentary available on record, it could be seen that the earlier decree has been acted upon, and the obstruction has been removed, and the parties are using the same. In the report filed by the Advocate Commissioner also, it is seen that the suit cart track has been obliterated by the defendant. In so far as the enforcement of earlier decree is concerned, both the courts below have concurrently held that the earlier decree has been enforced and the obstruction has been removed, and the parties are using the cart track continuously, and only the defendant has obliterated the suit cart track. I find no infirmity and perversity in the judgment and decree passed by both the courts below, and there is no substantial question of law arises for entertaining the present Second Appeal. Accordingly, the present Second Appeal stands dismissed. No costs. Consequently, the connected Civil Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

rpp



To

- 1) The Subordinate Judge,
Salem.
- 2) The Principal District Munsif,
Salem.

+1 cc to M/s.R.Ezhilarasan, Advocate, S.R.No.27960

S.A. 890 of 2018
and
C.M.P. 23604 of 2018

CNR(CO)
SSM(17/10/2019) .