

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:25.10.2019	Delivered on: 06.03.2020
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1470 of 1996
and
CMP.No.14586 of 199

1.Krishnasami Gounder

2.Ramasami Gounder(Died)

3.Muthusami

4.Venkatachalam

5.Senniappan

6.Palaniammal(deceased)

7.V.R.Venkatachalam

...Appellants

(7th appellant brought on record as LR of the deceased 2nd appellant viz., Ramasami Gounder vide order of the Court dated 10.04.2019 made in CMP.Nos.9157, 9158 and 9161 of 2019. Appellants 1 to 5 recorded as LRs of the deceased 6th appellant vide order of the Court dated 09.06.2007 made in a memo in S.A.No.1470 of 1996. But, subsequently it appears that forgetting the earlier order, the appellants have mistakenly filed CMP.No.9166 of 2019 to record the 1st appellant alone as L.R of the 6th appellant and the same has been allowed. Since already appellants 1 to 5 were recorded as L.Rs of the 6th appellant, the order passed in CMP.No.9166 of 2019 will not have any effect)

Vs.

1.Chinnayya Gounder (died)

2.Karuppa Gounder (died)

3.Ramasami Gounder

(R3 are recorded as LR of the
deceased R1 viz., Chinnaya Gounder
vide order of Court dated 10.04.2019
made in CMP.No.9164/2019 in
S.A.No.1470/1996.)

4.Marappa Gounder (died)

5.Chellappan

6.Ramasami

(RR5 and 6 are recorded as LRs of the
deceased R4 viz., Marappa Gounder
vide order of Court dated 10.04.2019
made in CMP.No.9168/2019 in
S.A.No.1470/1996)

7.Ramakkal (died)

8.Subbathal

9.Sellammal

10.Chinnammal

11.Murugathal

(RR8 to R11 brought on record as LRs
of the deceased R7 viz., Ramakkal vide
order of Court dated 05.06.2014 made
in CMP.No.168 to 170/2008 in
S.A.No.1470/1996)

12.Narayanamurthy

13.Kuzhandayal

...Respondents

(RR12 and 13 brought on record as LR
of the deceased R2 viz., Karuppa Gounder
order of Court dated 10.04.2019 made in
CMP.No.9156, 9162 & 9165/2019
in S.A.No.1470/1996)

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the common judgment and decrees dated 02.02.1996 in A.S.Nos.37 and 58 of 1993 before the Sub-Court, Gobichettipalayam preferred against the Judgement and decree dated 07.04.1993 in O.S.No.482 of 1989 on the file of the District Munsif Court, Gobichettipalayam.

For Appellants : M/s.R.Meenal

For Respondents : Mr.Narayanasamy for R3, R5 & R6
: R8 to R13 - set exparte

JUDGMENT

This Second Appeal has been filed by the plaintiffs against the common judgment and decree passed by the Sub-Judge, Gobichettipalayam, Erode District, in A.S.Nos.37 and 58 of 1993 dated 02.02.1996 against the judgment and decree passed by the District Munsif, Gobichettipalayam, Erode District in O.S.No.482 of 1989 dated 07.04.1993.

2. The appellants herein had filed a suit in O.S.No.482 of 1989 on the file of the District Munsif, Gobichettipalayam, Erode District, to declare their easementary right over the suit cart-track which is shown as 'AB' in the plaint plan and for permanent injunction to restrain the defendants 1 to 6, their men from interfering with their rights of taking men and cattle through the said cart-track. The learned District Munsif, Gobichettipalayam, Erode District by the judgment dated 07.04.1993 had decreed the suit partly granting the relief of declaration and injunction only to the extent of the cart-track marked as 'ABC' in the Advocate Commissioner's plan (Ex.C2). He dismissed the suit in respect of the portion marked as 'GDEF' in Ex.C2. He also directed the parties to bear their respective costs.

3. Aggrieved by the dismissal of the suit in respect of the portion, marked as 'GDEF' in Ex.C2 plan, the plaintiffs had filed an appeal in A.S.No.37 of 1993 on the file of the Sub-Judge, Gobichettipalayam, Erode District. The defendants 1 to 6

also filed an appeal in A.S.No.58 of 1993 on the file of the same Court, aggrieved by granting of the decree in respect of the portion marked as 'ABC' in Ex.C2 plan. The learned Sub-Judge, Gobichettipalayam by the common judgment dated 02.02.1996 had dismissed the appeal in A.S.No.37 of 1993 and allowed the appeal in A.S.No.58 of 1993 and set aside the judgment and decree passed by the trial Court and finally dismissed the suit in toto. However, he directed the parties to bear their respective costs. Aggrieved by the same, the plaintiffs have filed the present Second Appeal.

4. For the sake of convenience, the parties are referred to as described before the trial Court.

5. The averments made in the amended plaint are, in brief, as follows:-

a) The defendants 2 and 3 are the sons of the first defendant. The defendants 4 and 5 are the sons of the third defendant. The plaintiffs 2 and 3 are the sons of the first plaintiff. The plaintiffs 4 to 6 are brothers and sons of one Lingappa Goundan. The suit cart-track branching from the Karattupalayam Road runs towards north as shown in the plaint plan. The width of the said cart-track is 10 feet. The said cart-track is running in Old S.F.No.762 of Vellalapalayam Village. The plaintiffs and the seventh defendant are the owners of the lands to the east of the suit cart-track and the defendants 1 to 6 are the owners of the lands which are situated on the west of the said cart-track. The suit cart-track was formed about 100 years ago by the then owners of S.F.No.762 of Vellalapalayam Village. Eversince, the then owners of S.F.No.762 of were using the cart-track continuously and without any interruption by taking carts, men and cattle etc., through the said cart-track. Since the plaintiffs and the seventh defendant had purchased the properties from the original owners, they got the right of easement i.e., right to use the suit cart-track as easement by grant. There is no other cart-track to reach the land of the plaintiffs and the seventh defendant, except the suit cart-track and hence, they are entitled to use the same pathway by way of easement of necessity also.

b) The defendants 1 to 6 who own the lands in S.F.No.763 B which is situated on the west of the suit cart-track are also entitled to use the said cart-track. The plaintiffs are not objecting for the defendants to use the said cart-track. Since the defendant was not willing to join the plaintiffs for filing the suit, she has been added as seventh defendant. Recently, the plaintiffs 4 to 6 had purchased a portion of a land in S.F.No.762 and aggrieved by the same, the defendants 1 to 6

obstructed the plaintiffs from using the suit cart-track and also attempted to obliterate the said cart-track. Hence the plaintiffs were constrained to file the above suit for the relief of declaration and permanent injunction.

6. The averments made in the written statement filed by the 4th defendant and adopted by the defendants 1 to 3, 5 and 6 are in brief as follows:-

a) The description of property is not correct. There is no 'AB' cart track as described. The plaintiffs are bound to prove that the alleged cart track runs in Old SF.No.762 of Vellalapalayam village. Unless they locate the cart-track in S.F.No.762, they cannot plead anything further. The allegation that the said cart-track starts from Karattupalayam Road and runs upto the point 'B'. The plaintiffs have omitted to give north-south length of 'AB' i.e., the distance from the point 'A' to the point 'B'. South of the shares of the plaintiffs 1 to 3, there is an East-West Kodikal, through which carts are taken to the various shares of the plaintiffs. The said Kodaikal has not been shown in the plaint plan.

b) The defendants 1 to 6 are absolute owners of the lands situated in old SF.No.763 A and 763 B in which the plaintiffs are not having any kind of right, much less easementary right. The plaintiffs have not come to the court with clean hands. After obtaining an exparte order of injunction behind the back of the defendants, they have demolished ridges and crops, tampered with physical features and attempted to create new cart-tracks. The plaintiffs are attempting to claim new rights in Old SF.No.763. The defendants 1 to 6 are taking carts within old SF.No.763 to their respective shares from the East-West road.

c) It is false to say that 'AB' cart track was formed 100 years ago by the then owners of SF.No.762 and they were using the same continuously and they sold the land with the right of using the said cart track and hence the plaintiffs got the right of easement by grant. It is also false to say that the plaintiffs got right to use the said cart track by easement of necessity also. In the partition deed entered between the first plaintiff and his brothers, it is clearly stated that the plaintiffs got right to take cart only on the eastern end of old SF.No.762 and therefore the defendants 1 to 6 prayed to dismiss the suit.

7. The averments made in the written statement filed by the seventh defendant, are in brief, as follows:-

It is true that the suit cart-track is a very old one and it is in enjoyment for a very long time. Except the suit cart-track, there is no other cart-track to reach the land of the seventh defendant. Hence, the seventh defendant has been using the same by way of easement of necessity and by grant. She is an unnecessary party to the suit and therefore, she prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff was examined as PW1 and Exs.A1 to A5 were marked. On the side of the defendants, the fourth defendant was examined as DW1 and Exs.B1 to B9 were marked. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2 respectively. The additional report filed by the Advocate Commissioner has been marked as Ex.C3.

9. The learned District Munsif, Gobichettipalayam, after considering the materials placed before him, found that the plaintiffs failed to prove that the suit 'AB' cart-track has been in existence for more than 100 years. He further found that as per the commissioner's report and plan, the suit cart-track is in existence only upto the points 'ABC' as marked in Ex.C2 plan and accordingly, he decreed the suit only up to the said portion, however, he dismissed the suit in respect of the portion marked in Ex.C2 as 'GDEF'. Aggrieved by the dismissal of the suit in respect of the portion of the cart-track the plaintiffs had filed an appeal in A.S.No.37 of 1993 on the file of the Sub-Judge, Gobichettipalayam and the defendants 1 to 6 had filed an appeal in A.S.No.58 of 1993 on the file of the same Court against the granting of the decree in respect of the portion of the cart-track. The learned Sub-Judge, Gobichettipalayam by the common judgment dated 02.02.1996 had dismissed the appeal in A.S.No.37 of 1993. However, he allowed the appeal in AS.No.58 of 1993 and set aside the judgment and decree passed by the trial Court and finally he dismissed the suit in toto. He directed the parties to bear their respective costs. Aggrieved by the same, the plaintiffs have filed the present second appeal.

10. This Court, at the time of admitting the second appeal, has formulated the following substantial question of law:-

"Are the Courts below correct in holding that there may be an alternative cart track without

reference to any legal evidence, mainly on the basis of the commissioner's report."

11. Heard M/s.R.Meenal, the learned counsel for the appellants and Mr.B.Ramkumar, learned counsel for Mr.Narayanasamy, the learned counsel for respondents 3, 5 and 6.

12. Substantial Question of law :

The learned counsel for the appellants has submitted that the Courts below failed to consider that the appellants and their predecessors- in-title had been using suit cart track and thus, they had easementary right over the same. She further submitted that the Courts below failed to see that there is no evidence that the plaintiffs are having alternative pathway to reach their land. She further submitted that the Courts below failed to see that the defendants 1 to 6 in their written statement have not specifically denied the existence of the suit cart track. She further submitted that the Courts below have not considered the evidence in a proper prospective and therefore, she prayed to set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

13. Per contra, the learned counsel for respondents 3, 5 and 6 has submitted that in Ex.B1 partition deed which was executed between the first respondent and his brother dated 23.10.1950, it is clearly stated that on the southern side of the plaintiffs' property there is a pallavari and only through which they have to go to their other lands. He further submitted that in Ex.A1 also, it is not stated that the suit cart track runs in S.F.No.762, on the contrary, it is stated that the property mentioned in the said document is situated on the east of S.F.No.763-B. He further submitted that if really the suit cart track runs in S.F.No.762, that would have been mentioned in the said document. He further submitted that the trial Court without taking into consideration of the aforesaid facts has granted decree merely based on the commissioner's report and plan in respect of 'ABC' portion but, the first Appellate Court after taking into consideration of the oral and documentary evidence adduced by both sides has rightly held that the plaintiffs are having pathway only on the southern side of their land and accordingly, it has dismissed the plaintiffs' suit in toto and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeal.

14. The plaintiffs claimed the existence of the suit cart-track to a width of 10 feet from Karattupalayam Road up to the property of the defendants 4 to 6 and they have shown the said

cart-track in their plaint rough plan as 'AB'. In Ex.C2 plan, the Advocate Commissioner has shown the said suit cart-track as 'ABCDEFGH' but he has stated that the said cart-track has been in existence only up to the portion marked as 'ABC'. He further stated that the portion marked as 'DEFG' shows only recently a cart-track has been laid. So, it is clear that originally the cart track was in existence only for the portion marked as 'ABC' in Ex.C2.

15. It is true that in Ex.A1 the existence of the suit cart-track not mentioned, on the contrary, the plaintiffs properties were mentioned as they are situated on the east of S.F.No.763-B. The physical features noted by the Advocate Commissioner in Ex.C2 (rough plan) shows that there is a cart track which runs in between the properties of the plaintiffs and the defendants up to the mark 'B' and thereafter, it turns towards east and enter into the plaintiffs' property. Though in Ex.B1, it is stated that the plaintiffs have to go to their land through Pallavari situated on the eastern side, the Advocate Commissioner has stated that he has not found any other cart-track other than the suit cart-track. Further, it appears that taking into consideration of the aforesaid physical features, the trial Court has held that the plaintiffs are entitled to the cart track as shown in Ex.C2 plan as 'ABC' but the first Appellate Court without considering the aforesaid facts has reversed the findings of the trial Court and dismissed the suit in toto. This Court is of the view that since the Advocate Commissioner's report and plan would clearly show that the existence of the suit pathway on the west of the plaintiffs' property up to the mark 'B' and thereafter, it turns east and entered into the plaintiffs' property at the point marked as 'C' and the said cart-track is an old one, this Court is of the view that the first Appellate Court's finding that the plaintiffs are not entitled to use the suit cart-track even up to the points of 'ABC' is an erroneous one. Therefore, the findings of the first Appellate Court are liable to be set aside and the findings of the trial Court are to be restored. Accordingly, the substantial question of law is answered.

16. In the result, the Second Appeal is partly allowed. The judgment and decree passed by the first Appellate Court in A.S.Nos.37 and 58 of 1993 dated 02.02.1996 are set aside. The judgment and decree passed by the trial Court are restored. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

dna

To

1.The Sub-Court,
Gobichettipalayam.

2.The District Munsif,
Gobichettipalayam,
Erode District.

+lcc to M/s.R.Meenal, Advocate SR.No. 20813

+lcc to Mr.M.Narayanasamy, Advocate SR.No. 20047

S.A.No.1470 of 1996

and

CMP.No.14586 of 1996

gmr co

A.SK(22.04.2021)