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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2020

DATE OF VERDICT : 25.02.2020

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

S.A.NOS.1340 & 1341 OF 2002

S.A.No.1340 of 2002

- 1.T.R.Meyvel (died)
- 2.Sivagami Meivel
- 3.Mageswari Vadivel
- 4.Manivel Meivel

(Appellants 2 to 4 brought on record as
LR's of the deceased sole appellant
viz., T.R.Meivel vide order of court
dated 04.11.2019 made in CMP.No.
23055 to 23057 of 2019 in
SA.No.1340 of 2002)

...Appellants/Plaintiff/Ist Respondent

Vs.

- 1.Duraisamy
- 2.Palani Gounder
- 3.Ramasamy
- 4.Athayee
- 5.Periannan

...Respondents/Defendants

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 14.06.2002, in A.S.No.63 of 1998 on the file of the Subordinate Judge of Sankari reversing the decree and judgment dated 30.04.1998 in O.S.No.230 of 1990 on the file of the District Munsif of Sankari.

For Appellants : Mr.T.Dhanasekaran

For Respondents

For R1 to R4 : Mr.D.Shivakumaran

For R5 : Notice served -
No Appearance



S.A.No.1341 of 2002

- 1.T.R.Meyvel (died)
- 2.Sivagami Meivel
- 3.Mageswari Vadivel
- 4.Manivel Meivel

(Appellants 2 to 4 brought on record as LR's of the deceased sole appellant viz., T.R.Meivel vide order of court dated 04.11.2019 made in CMP.No. 23067 to 23070 of 2019 in SA.No.1341 of 2002)

...Appellants/Plaintiff

Vs.

- 1.Ramasamy
- 2.Athayee
- 3.Periannan
- 4.Duraisamy
- 5.Palani Gounder

...Respondents/Defendants

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 14.06.2002, in A.S.No.70 of 1998 on the file of the Subordinate Judge of Sankari reversing the decree and judgment dated 30.04.1998 in O.S.No.230 of 1990 on the file of the District Munsif of Sankari.

For Appellants : Mr.T.Dhanasekaran

For Respondents

For R1, R2, R4 & R5 : Mr.D.Shivakumaran

For R3 : Notice served -
No Appearance

COMMON JUDGMENT

These second appeals are directed as against the judgment and decree dated 14.06.2002, in A.S.No.63 of 1998 on the file of the Subordinate Judge of Sankari reversing the decree and judgment dated 30.04.1998 in O.S.No.230 of 1990 on the file of the District Munsif of Sankari and the judgment and decree dated 14.06.2002, in A.S.No.70 of 1998 on the file of the Subordinate Judge of Sankari reversing the decree and judgment dated 30.04.1998 in O.S.No.230 of 1990 on the file of the District Munsif of Sankari.



2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiff in SA.No.1340 of 2002 in brief is as follows :-

3.1. The second defendant is the father of the first defendant, fourth defendant is the wife of the third defendant and the fifth defendant is the son of the third defendant. The suit property originally belonged to defendants 1 and 2, Perianna Gounder and Arthanari Gounder. They were co-owners of the property comprised in survey No.195/1, 195/2. They orally partitioned their property even 15 years ago. The said Perianna Gounder and Arthanari Gounder partitioned their common properties by means of registered partition deed dated 06.04.1983. All the co-owners enjoyed the cart track marked as MNOP in the plan annexed to the plaint to reach the panchayat road from their respective shares. The said cart track running east to west with a breadth of 17 links and length of 353 links is in existence from the time immemorial. In fact, the said cart track clearly mentioned in the partition dated 06.04.1983 in the common share. The plaintiff, his brothers and his father purchased the share of Arthanari Gounder and his son A.Periannan by three sale deeds dated 13.07.1984, 29.08.1984 and 29.08.1984. After purchase, they partitioned their family properties by means of registered partition deed dated 19.01.1989. In the meanwhile, the share allotted to their vendor Arthanari Gounder was subdivided as survey No.195/1B. The property comprised in survey No.195/1B was allotted to the plaintiff and mentioned as 'C' schedule property. His predecessors in title used the cart track shown as MNOP in the plan annexed to the plaint to reach the panchayat road. Since there was no specific mention about the cart track in the three sale deeds which was purchased by the plaintiff and other from their vendors, the plaintiff purchased the right to enjoy the cart track from Arthanari Gounder and his son A.Periannan by sale deed dated 31.01.1990 for a valid sale consideration. Thereafter, the said Periannan died and the third defendant is none other than his own son. The fifth defendant inherited the properties. The deceased Perianna Gounder and the defendants are enimically disposed of towards the plaintiff due to some petty quarrels. Therefore, they also filed suit and obtained orders and obliterate the cart track. Fortunately, their attempt was thwarted and hence the suit.

4. Resisting the plaintiff's case, the first defendant filed written statement stating that his grand father one, Ramasamy Gounder purchased the common half share in the survey No.195/2 by the sale deed dated 11.02.1954. After purchase, he



is in possession of the same along with his son and grand son. Therefore, the first defendant's father Palani Gounder and Ramasamy Gounder are necessary parties and prayed for dismissal of the suit for non joinder of necessary parties. Further stated that the second defendant is unnecessary party to the suit, since his identity is not found. Therefore, the suit has to be dismissed for misjoinder of necessary party to the suit. The second defendant is not the father of the first defendant. The family of the first defendant is nothing to do with the property comprised in survey No.195/1 and it originally belonged to one Sengoda Gounder, who had three sons, namely Kandhasamy, Chinnannan and Ramasamy. One Perianna Gounder and Arthanari Gounder have purchased the property from them in the year 1956. The entire property faces the road on the west Thevoor Ammapalayam Kattuvalavu. There is no necessity to have cart track. Further the Sengoda Gounder has no interest, right or title over the property comprised in survey No.195/2. The owners of the land comprised in survey No.195/1 and 195/2 are two separate branches and they are not interrelated. Therefore, the allegation that the first defendant and his father and grand father are co-owners along with Perianna Gounder and Arthanari Gounder for the land comprised in survey No.195/1, 195/2 is absolutely false.

4.1 Further stated that the land comprised in survey No.195/2 belonged to one Perumal Gounder. The grandfather of the defendants, one, Ramasamy Gounder purchased half share from the legal heirs of the Perumal Gounder on 11.02.1964. The said Perianna Gounder and Arthanari Gounder also purchased from the legal heirs of the said Perumal Gounder the remaining half share on 11.02.1964. Immediately after their purchase, in the year 1965, the said Perianna Gounder and Arthanari Gounder partitioned the land comprised in survey No.195/2. The grandfather of the defendants was put in possession of his separate share along with other shareholders. The defendants' grandfather's share was sub-divided as 195/2B, 195/2B and the other shares allotted to the Arthanari Gounder and Perianna Gounder were subdivided as 195/2A, 195/2C, 195/2E, 195/2F. Since then, they were enjoying the respective shares as absolute owners from the year 1965. Therefore, the said Arthanari Gounder and Perianna Gounder have no title, interest or possession over the properties allotted to the grandfather of the defendants. Therefore, the partition deed between the Perianna Gounder and Arthanari Gounder has nothing to do with the defendants and there is no cart track in existence as mentioned in the plan annexed to the plaint. No cart track in the land comprised in survey No.195/2 and 195/1 and prayed for dismissal of the suit.



5. The second defendant filed separate written statement and stated that the defendants had no share in survey No.195/1 which belongs to Sengoda Gounder, who had three sons, namely Kandhasamy, Chinnannan and Ramasamy. The land comprised in survey No.195/2 belongs to Perumal Gounder. The defendant's father purchased half share by registered sale deed dated 11.02.1964 and the other share was purchased by the Perianna Gounder and Arthanari Gounder. Thereafter they partitioned by orally and they have been separately enjoying their respective shares. The partitions enjoyed by the defendants have also been separately subdivided as 195/2B and 195/2D. Therefore, it is false to state that east to west cart track with breadth of 17 links and to a length of 353 links from the time immemorial. Therefore, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

6. In support of the plaintiff's case, P.W.1 to P.W.4 were examined and thirty documents were marked as Ex.A.1 to Ex.A.30. On the side of the defendants, D.W.1 to D.W.3 were examined and Ex.B.1 to Ex.B.4 were marked. The Commissioner's report and plan were marked as Ex.C.1 and Ex.C.2 and the deposition document was marked as Ex.X.1. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court decreed the suit in favour of the plaintiff. Aggrieved over the judgment and decree of the trial Court, the defendants 1 and 2 preferred an appeal suit in A.S.No.63 of 1998 before the Subordinate Court, Sankari and at the same time, the defendants 3 to 5 filed separate appeal in AS.No70 of 1998. The first appellate Court clubbed both the appeals together and on appreciating the materials placed on records, allowed the appeals by reversing the judgment and decree passed by the trial Court. Challenging the same, the plaintiff has come forward with the present second appeals in SA.Nos.1340 and 1341 of 2002 respectively.

7. At the time of admission of the second appeals, the following common substantial questions of law were framed :-

a) Whether the appellate court is legally right in rejecting the claim of easementary rights even after noticing that the vendor was using the cart track before partition among them?

b) Whether the lower appellate court is legally right in rejecting the claim based on easement by necessity even after finding the existence of the cart track?



8. The learned counsel appearing for the plaintiff and the defendants are present and they reiterated the averments set out in the plaint as well as the written statements.

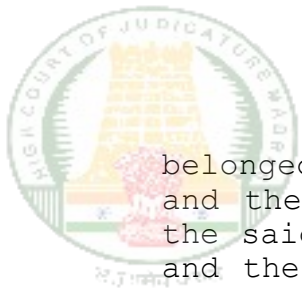
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9. Heard Mr.T.Dhanasekaran, learned counsel appearing for the plaintiff and Mr.D.Shivakumaran, learned counsel appearing for the defendants.

10. This Court considered the rival submission made by the learned counsel on either side.

11. According to the plaintiff, he purchased the suit property from Arthanari Gounder, which was marked as Ex.A.1. The said Arthanari Gounder and one, Perianna Gounder have partitioned their family property by partition deed, which was marked as Ex.A.2. The plaintiff's father also purchased the property admeasuring 1 ½ acres from the said Arthanari Gounder comprised in survey No.195/1. Thereafter, in the year 1984, the plaintiff along with his brother purchased one acre and 50 cents of land from Arthanari Gounder, which was marked as Ex.A.4. Thereafter, his brother also purchased another property admeasuring 20 cents from the said Arthanari Gounder, which was marked as Ex.A.5. Thereafter, the plaintiff along with his brothers and father partitioned their family property, in which the property comprised in survey No.195/1 was allotted in favour of the plaintiff, which was marked as Ex.A.6 dated 22.04.1991. Again, one more partition was held in respect of the property comprised in survey No.195/1, which was marked as Ex.A.7. Thereafter, the superstructure put up in the property comprised in survey No.195/1 was purchased by the plaintiff, which was marked as Ex.A.8. The plaintiff placed these sale deeds to prove his case that the cart track is situated in the property comprised in survey No.195/1 and 195/2 and prayed for injunction in respect of the portion marked as MNOP in the plan annexed to the plaint. Unfortunately, the plaintiff did not claim the cart track by any of these sale deeds which were marked by the plaintiff. In respect of the cart track, the plaintiff purchased the same by sale deed dated 31.01.1990, from Arthanari Gounder and it revealed that in the earlier sale deeds, the cart track did not find place and as such now for the sale consideration of Rs.2,000/-, it has been conveyed in favour of the plaintiff. Whereas the suit was filed on 21.09.1990. Therefore, the said sale deed is much later to the suit proceedings.

12. The property comprised in survey No.195/1 conveyed in favour of the father of the defendants 3 to 5 by Arthanari Gounder in the year 1956, which was marked as Ex.A.15 and Ex.A.16. The property comprised in survey No.195/2 originally



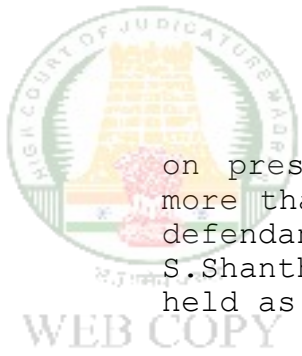
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belonged to the said Arthanari Gounder and one Perianna Gounder and the deed of conveyance was marked as Ex.A.17. Thereafter, the said property was partitioned by the defendants' grandfather and the said Arthanari Gounder and Perianna Gounder, in which 3 acres and 70 cents was allotted to Arthanari Gounder on the eastern side and the other share 3.70 acres was allotted to Perianna Gounder on the western side, which is clearly revealed in Ex.A.2. The plaintiff also categorically admitted that in the sale deed executed in favour of the plaintiff and his brothers, there was no mention about the cart track. Though the plaintiff contended that even before 15 years from filing of the suit, the property comprised in survey No.195/2 was partitioned and filed suit in the year 1990. Even assuming that it is true in the year 1975 itself, the defendants 1 and 2 partitioned the property comprised in survey No.195/2 and also subdivided as survey No.195/2D and 195/1B. They also got patta in their favour for their respective shares. Therefore, the said Arthanari Gounder had no title over the property comprised in survey No.195/2 and as such the sale deed executed in favour of the plaintiff, that too in the year 1999, in respect of the property comprised in 195/2 is not valid.

13. The plaintiff again purchased the superstructure by the sale deed dated 25.11.1991 from the said Arthanari Gounder and his son Perianna Gounder, which is also later to the suit. In fact, the property admeasuring 3.70 acres already purchased by the plaintiff, in which they failed to mention about the superstructure of the house. After filing the suit, the said sale deed was executed in favour of the plaintiff. Thereafter, they assessed the house for house tax. Therefore, only to strengthen the case, the sale deed was executed in favour of the plaintiff much after filing of the suit.

14. The plaintiff also claimed easementary right over the cart track. When the plaintiff claimed right by virtue of sale deeds executed in his favour, he cannot seek easementary right by prescription. Once he claimed easementary right by grant, he cannot claim easementary right as necessity. Further, there is absolutely no pleadings about the claim of the easementary right by grant, necessity or by prescription.

15. But the trial court decreed the suit that the plaintiff is entitled for easementary right by implied grant and also easement by prescription for the reason that the defendants 1 and 2 never objected the use of cart track by the plaintiff and also the cart track is situated in the land belongs to the defendants. To grant easement by prescription, there must be 20 years of continuous enjoyment of the cart track without any objection. On perusal of evidence, even before 1983, there was no cart track and as such the trial court wrongly concluded that



on presumption, the plaintiff was enjoying the cart track for more than 60 years. In this regard, the learned counsel for the defendants cited the judgment in the case of V.M.Saineesa Vs. S.Shanthi and 2 others reported in 2013-1-LW 846, wherein it is held as follows:

"...So far as the relief of declaration of easementary right is concerned, the plaintiff should aver and prove that she had been in enjoyment of the easementary right claimed in the plaint uninterruptedly for not less than 20 years, which period of 20 years would have ended within two years prior to the filing of the suit. In other words, though a person might have acquired prescriptive easementary right by enjoying such an easementary right for more than 20 years, if any interruption takes place and the right of the owner of the dominant tenement is denied, he or she should approach the Court within two years thereafter, failing which the prescriptive easementary right acquired earlier would stand extinguished....

....The plaintiff should have averred and proved that her easementary right to draw air and light over the property of the first defendant came to be interrupted only within a period of two years next before the institution of the suit and that within two years after the date of interruption, she has come to the Court with the suit. In this case, of course there is a plea that right from the date of her purchase under Ex.A1 in 1974, she was in enjoyment of the right of easement to draw light and air through the windows provided on the southern wall of her property. The appellant/plaintiff has even gone to the extent of stating that her predecessors-in-title and after them, she enjoyed the said right of easement for more than 75 years. Even if it is assumed that she was in enjoyment of right to draw air and light through the windows facing the property of the first defendant, if it is admitted or proved that the same was interrupted and the suit has not been filed within two years from the date of such interruption, then the appellant/plaintiff shall not be entitled to the declaration that she has got prescriptive easementary right to draw air and light through the windows facing the property of the first defendant....

16. This court held that without necessary pleadings, the relief of declaration for easementary right cannot be granted. In the case on hand, the plaintiff did not aver anything about his continuous enjoyment of the easementary right uninterruptedly for not less than 20 years. Further, though a



person might have acquired prescriptive easementary right by enjoying such an easementary right for more than 20 years, if any interruption takes place and the right of the owner of the tenement is denied, he should approach the court within a period of 2 years thereafter, failing which prescriptive easementary right acquired earlier could stand extinguished. Therefore, the plaintiff is not entitled for the relief of easementary right by prescription.

17. The learned counsel for the defendants also cited another judgment in the case of A.Kathirvel and another Vs. C.Thiagarajan and another reported in (2019) 1 MLJ 350, the head-note of which is extracted hereunder:

"Property Laws - Declaration of Title - Suit for Injunction - Plaintiffs filed suit for permanent injunction in respect of cart track, restraining defendants from denying Plaintiffs, right of usage - Trial Court decreed suit and same confirmed by Appellate court, hence this second appeal - Whether suit for bare injunction in respect of suit cart track is maintainable in absence of relief seeking for declaration of title over same - Held, Plaintiffs were put in notice even prior to institution of suit that Defendants had been denying their right of usage of suit cart track - Plaintiffs should have endeavoured to seek necessary relief of declaration while instituting suit - On that score alone, it is found that suit is not maintainable - Materials placed on record do not show legal entitlement of Plaintiffs to use suit cart track - Plaintiffs found to have other access to reach their lands and have not come out with a clear case as to nature of right they seek to enforce in respect of suit cart track - Plaintiffs had not chosen to amend plaint seeking relief of declaration as to nature of right which they seek to enforce in respect of suit cart track - Lower Courts have not appreciated Plaintiff's case in proper perspective both factually as well as legally and accepted Plaintiffs' case without considering defence version in correct angle - Appeal allowed."

18. In the above case, this Court categorically held that when the plaintiff instituted the suit that the defendants had been denying their right of usage of cart track, the plaintiff should have entitled to seek necessary relief of declaration while instituting the suit. In the case on hand, in the written statement filed by the defendants, they categorically denied the title, in which the suit cart track situated. When it being so, the plaintiff ought to have filed a suit for declaration.



Therefore, the prayer for declaration will be necessary, if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property or when some prima facie right of a third party over it, is made out or shown. The action for declaration is the remedy to remove the cloud on the title to the property. Therefore, the suit itself is not maintainable without the prayer of declaration of title. These points have been well considered by the first appellate court and concluded that the plaintiff is not entitled for any relief sought for and dismissed the suit. Accordingly, all the substantial questions of law formulated in this appeal are answered in favour of the defendants and as against the plaintiff.

19. In view of the above discussion, these Second Appeals are dismissed and the judgment and decree dated 14.06.2002 passed by the first appellate court in both the appeals in A.S.Nos.63 & 70 of 1998 are hereby confirmed, and consequently, the suit filed by the plaintiff in O.S.No.230 of 1990 on the file of the District Munsif Court, Sankari is dismissed. No costs.

Sd/-

Assistant Registrar(CS-IX)

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Sub Assistant Registrar

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To

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

+1cc to Mr.T.Dhanasekaran, Counsel for Appellant, Advocate,
S.R.No.17275

+1cc to Mr.D.Shivakumaran, Counsel for Respondents, Advocate,
S.R.No.16252

S.A.Nos.1340 & 1341 of 2002

NR(CO)
RLP(01/09/2021)