

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.01.2020

Date of Verdict : 10.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1105 of 2003

1.Raju Naidu(died)

2.R.Devarajan

3.Renganayagi

...Appellants

(Appellants 2 and 3 brought on record as the legal heirs of the deceased sole appellant viz., Raju Naidu vide order of court dated 08.12.2014 made in CMP.No.454 of 2013 in SA.No.1105 of 2013)

Vs.

1.Subbian

2.Subbammal(died)

3.Ranganathan

4.Velusamy

5.Tamilarasi

6.Sundarambal

...Respondents

(RR4 to 6 brought on record as the legal heirs R2 viz., Subbammal vide order of court dated 26.09.2019 made in CMP.No.20067, 20071 and 20072 of 2019 in SA.No.1105 of 2003)

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.06.2000, in A.S.No.149 of 1995 on the file of the Court of I Additional District Judge cum Chief Judicial Magistrate, Coimbatore confirming the decree and judgment dated 28.04.1995 in O.S.No.2118 of 1984 on the file of the District Munsif Court, Coimbatore.

For Appellants : Mr.E.K.Kumaresan

For Respondents

For R1, 4 to 6 : Mr.R.Nandhakumar

R2 : Died

R3 : Notice served

JUDGMENT

This second appeal is directed as against the judgment and decree dated 29.06.2000, in A.S.No.149 of 1995 on the file of the Court of I Additional District Judge cum Chief Judicial Magistrate, Coimbatore confirming the decree and

judgment dated 28.04.1995 in O.S.No.2118 of 1984 on the file of the District Munsif Court, Coimbatore.

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 brief is as follows :-

3.1. The suit is filed for recovery of possession and mandatory injunction or alternatively mandatory injunction and permanent injunction. Originally, the property comprised in SF.No.521 admeasuring 4.46 acres situated at Bilichi Village belonged to one, Gopalakrishnama Naidu, who is the father of the plaintiff herein. On the south of the said property, admeasuring 1.89 acres was allotted to his sister's son, Venkiduswamy, who is the father of the third defendant herein. The remaining extent admeasuring 2.57 acres was inherited by the plaintiff after demise of his father, namely Gopalakrishnama Naidu. It is situated one kilometer west on the Mettupalayam Road and the plaintiff has access to his land through cart track of 12 feet breadth, which runs from the main road towards west and takes a turn towards north and reaches the property comprised in S.F.No.521/2 at its eastern extremity. The total area covered by the cart track in his land is 22 cents. While being so, on 12.02.1954, the plaintiff had sold out to an extent of 2.07 acres in SF.No.521 to one, Vadivambal inclusive of half extent of cart track admeasuring 11 cents. In turn, the said Vadivambal sold the said property to one, Bujjammal, who is the mother of the defendants 1 and 2 herein.

3.2 In the year 1977, the SF.No.521 was divided into five sub divisions and SF.No.521/3 admeasuring 40 cents belongs to the plaintiff and the cart track measuring 22 cents was given in the SF.No.521/2, which is common property to both the plaintiff and the defendants 1 and 2. The total extent belongs to defendants 1 and 2 as per sub division admeasuring 2.06 acres in SF.No.521/1, 521/4 and 521/2. While being so, the first defendant encroached upon the cart track in SF.No.521/2 and also reduced the breadth of the cart track to the width of 5 feet and it is also diminishing everyday. In fact, the first defendant also put up small shed and encroached the land belonging to the plaintiff. Hence, the suit.

4. The defendants resisted the plaintiff's case by filing written statement stating that the southern half portion admeasuring 2.23 acres in the total extent comprised in SF.No.521 admeasuring 4.46 acres belongs to the plaintiff. He sold out the same to the third defendant and his brother in the year 1941. Thereafter it was sub divided, in which the extent of 2.23 acres was allotted to the third defendant. Further, after selling away 2.07 acres to the mother of the defendants 1 and 2, the plaintiff is only entitled to an extent of 16 cents in SF.No.521. They did not have any

knowledge about the sub division and they have no notice about the sub division and it is not binding on them. After the sale in favour of the said Vadivambal, only the right to take his cart is retained. Therefore, the plaintiff cannot claim ownership about the entire cart track. In fact, the width of the cart track is only 7 to 8 feet and not 12 feet. Hence, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 was examined and nine documents were marked as Ex.A.1 to Ex.A.9. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.9 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submissions made by the learned counsel, the trial Court allowed the prayer of recovery of possession alone and dismissed the other prayers. Aggrieved over the judgment and decree of the trial Court, both the plaintiff as well as the defendants preferred an appeal suit in A.S.No.145 of 1995 and A.S.No.149 of 1995 respectively before the Court of I Additional District Judge cum Chief Judicial Magistrate, Coimbatore. The first appellate Court on appreciating the materials placed on record, dismissed the appeal preferred by the plaintiff in AS.No.145 of 1999 and allowed the appeal preferred by the defendants in A.S.No.149 of 1995. Challenging the judgment and decree dated 29.06.2000 passed in A.S.No.149 of 1995, the plaintiff has come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial question of law was framed :-

a) Whether the lower appellate court has committed error of law in overlooking the admissions of DW-1 that the width of the Cart Track is 12 feet and which is supported by Ex.B-9 release deed and holding that the appellant has not proved the width of the Cart track?

7. 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 statement.

8. Heard Mr.E.K.Kumaresan, learned counsel appearing for the plaintiff and Mr.R.Nandhakumar, learned counsel appearing for the defendants.

9. This Court considered the rival submissions made by the learned counsel on either side.

10. The plaintiff filed the suit for the relief of recovery of possession and mandatory injunction or in alternative, mandatory injunction to re-lay the cart track and

for permanent injunction restraining the defendants in interfering with the possession of the cart track along with the suit properties. According to the plaintiff, one, Gopalakrishnama Naidu owned the entire extent comprised in S.No.521, in which he conveyed admeasuring 1.89 acres to his sister's son, namely the father of the third defendant herein and the balance extent admeasuring 2.57 acres was inherited by the plaintiff. Thereafter the plaintiff sold out to an extent of 2.07 acres including half extent of the cart track admeasuring 11 cents by the registered sale deed dated 12.02.1954 in favour of one, Vadivambal. She sold out the same to one, Bujjammal, who is none other than the mother of the defendants 1 and 2 herein. The property comprised in S.No.521 was sub divided into 521/1 to 5 and the remaining extent of 40 cents comprised in S.No.521/3 and the cart track admeasuring 22 cents equally belong to the plaintiff and the defendants 1 and 2. The share of the defendants 1 and 2 is comprised in S.No.521/2. Thereafter the defendants 1 and 2 removed the boundaries and encroached upon the cart track.

11. The copy of the sale deed executed in favour of Vadivambal was marked as Ex.A.1. The plaintiff did not produce any document to show that the entire extent admeasuring 4.46 acres comprised in S.No.521 belonged to his ancestors. In fact, he also did not give any evidence and his son was examined as P.W.1. Therefore, he would not have knowledge about the transactions took place in the year 1954 and 1955, since at the time of examination he was only 48 years. In support of his case, the plaintiff marked patta, Ex.A.3 and the field map in respect of the property comprised in S.No.521 marked as Ex.A.4, patta in respect of the property comprised in S.No.521/3 and 521/1 dated 13.05.1987 as Ex.A.5. Further, he also marked Ex.A.7 joint patta issued in the name of the plaintiff as well as the first defendant and the chitta Ex.A.8. The patta stands in the name of the plaintiff would not concur any title to the suit property. Except patta, no other documents were produced by the plaintiff to prove his title over the suit property.

12. Further, the defendants also categorically denied the sub divisions made in the property comprised in S.No.521. Even assuming that there is a sub division, there is no proof to show that the cart track was exclusively owned by the plaintiff, the said Vadivambal, and the defendants 1 and 2 whose mother Bujjammal purchased extent of 2.07 acres from her. When the plaintiff filed suit for declaration he has to prove his case by unimpeachable document. While the appeal suits were pending before the first appellate court, the Advocate Commissioner was appointed to verify the physical features of the suit property and his report and plan were marked as Ex.C.1 and Ex.C.2. He was directed to note down the physical features by fixing the boundaries with the help of a surveyor along with the survey sketch. The Advocate Commissioner's report and plan on the second inspection, were

marked as Ex.C.3 and Ex.C.4. The measurement noted by the Advocate Commissioner is also not supporting the case of the plaintiff and was not able to explain the measurement noted down by the Advocate Commissioner. Therefore, the plaintiff failed to prove the extent which was allegedly encroached upon by the defendants 1 and 2.

13. It is also clearly stated in Ex.A.1 that the entire cart track is sold out and as such the plaintiff is having only the right to use the same and it is also categorically admitted by P.W.1 that there is no interference on the part of the defendants, when the plaintiff is enjoying the said right of using the cart track. Therefore, the first appellate court rightly held that there is no satisfactory evidence to support the case of the plaintiff that he was having title, possession and enjoyment of 40 cents comprised in S.No.521 with the cart track is the width of 12 feet admeasuring 22 cents, in which he has half share and dismissed the appeal filed by the plaintiff. In fact, the plaintiff also preferred second appeal as against the judgment and decree passed in A.S.No.145 of 1995 in SA.No.1065 of 2013 and the same was also dismissed on the admission stage itself by order dated 10.10.2003.

14. Therefore, this Court does not find any valid reason to interfere with the findings rendered by the first appellate court as such the first appellate court have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly and allowed the appeal filed by the defendants. Accordingly, this Court is of the considered opinion that no substantial question of law is involved in this appeal. Be that as it may, the substantial question of law formulated by this Court in this Second Appeal, is answered in favour of the defendants and as against the plaintiff. As such, the judgment and decree dated 28.04.1995 passed in O.S.No.2118 of 1984 on the file of the District Munsif Court, Coimbatore insofar as granting mandatory injunction are set aside and the judgment and decree passed in A.S.No.149 of 1995 on the file of the Court of I Additional District Judge cum Chief Judicial Magistrate, Coimbatore are restored.

15. Accordingly, this Second Appeal is dismissed. No order as to costs.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

To

1. The I Additional District Judge cum
Chief Judicial Magistrate Court,
Coimbatore
2. The District Munsif Court,
Coimbatore.
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1cc to Mr.E.K.Kumaresan, Advocate SR.No.10556

+1cc to Mr.R.Nandhakumar, Advocate SR.No.10270

S.A.No.1105 of 2003

RSV(CO)
GMY(27/08/2020)



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