

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.08.2020

Pronounced on : 18.08.2020

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1422 of 2010

and

M.P.No.1 of 2010

K.A.Loganathan ... Appellant/Defendant

/versus/

S.E.Karthikeyan ... Respondent/Plaintiff

Prayer:

Second Appeal has been filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 16.09.2010 made in A.S.No.7 of 2010 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 26.02.2010 made in O.S.No.387 of 2008 on the file of the Second Additional District Munsif Court, Bhavani.

For Appellant : Mr.N.Manoharan

For Respondent : Mr.S.Kadarkarai

J U D G M E N T

(The case has been heard through video conference)

The appellant before this Court is the defendant in the suit. The suit was laid for declaration and permanent injunction in respect of the right to use the cart track more fully described in the B schedule of the plaint and marked as "C, E, F, G" Also a prayer for mandate injunction directing the defendant to remove all the constructions encroaching upon the eastern portion of the cart track was sought. The courts below allowed the suit and granted the relief sought. Aggrieved by that the present second appeal is preferred.

2. Plaint averment:

The suit property was originally purchased by the plaintiff's father on 22/04/1999. On the demise of his father the plaintiff became the absolute owner. The B schedule property is a common cart track provided in survey number 308/3. The cart track branches off towards west from Minna Vettuvapalayam road ends hence with the defendant's property. The said common cart track marked as "C,E,F,G" in the rough sketch filed along with the plaint is 8 feet breadth and 245 feet length. The contract has been used commonly by the plaintiff as well as the defendant. The right to enjoy the cart track commonly has been vested to the plaintiff in the sale deed dated 22nd April 1999. The remaining portion of the joint family properties in the suit survey number was subsequently sold to the defendant. While so, on 12/12/2008 the defendant unlawfully encroached upon a portion on the east of the cart track and had put up construction thereby preventing the plaintiff from use of his right of common enjoyment over the cart track. Hence, relief for declaration regarding the common right over the cart track and consequential injunction restraining the defendant from interfering the peaceful enjoyment of the cart track along with a relief of mandatory injunction to remove the obstructions and encroachments.

3. Written statement:

The title of the plaintiff is denied. The alleged purchase of the suit property under sale deed dated 22 April 1999 denied. A sale deed in favour of plaintiff's father does not disclose anything about the B schedule property. The B schedule property marked as "C,E,F,G" is not a cart track. The title deed relied by the plaintiff does not disclose anything about its length and breadth. The plaintiff is not the sole legal heir of Eswaran. The daughters of his father are necessary parties. The plaintiff is not entitled to file the present suit as if he is the absolute owner of the suit property. No right to use the cart track was given to the plaintiff father by his vendor. Through a settlement among the joint family members of the defendant, the suit survey property in S.No.308/3 extent of 1624 sq.ft was allotted to the defendant under the partition deed dated 08.12.2008. Since then the defendant is in peaceful possession and enjoyment of the above suit property. He has constructed a building and peacefully enjoying the same. The plaintiff never used the suit schedule property as a cart track. It is false to say that the plaintiff enjoying ingress and egress through the cart track. There is a North - South panchayat road situated on the west and abutting to the 'A' schedule property of the plaintiff. The said road ends with Bhavani to Kovindapady main road. The plaintiff's father has a vacant site north to the ABCD of the plaint A schedule property. That property is abutting to Bhavani to Kovindapady main road. The 'A' schedule property is house site and not an agriculture property. A

schedule property have access on the west as well as on the north. Therefore there is no need for them to use the 'B' schedule property as a common cart track.

4. The trial court framed the following issues:

1) whether the plaintiff is entitled for the declaratory relief ?

2) whether the plaintiff is entitled for permanent injunction as prayed ?

3) whether the plaintiff is entitled for mandatory injunction ?

4) what are the relief?

5. The plaintiff and the defendant mounted the witness box and deposed. Three exhibits by the plaintiff and two exhibits by the defendant were marked. The Commissioner Report and sketch were marked as exhibit C1 and C2.

6. The Trial court allowed the suit and granted the relief as prayed. Aggrieved by the judgement and decree, the plaintiff preferred appeal before the Sub- Court at Bhavani in A.S 7/2010.

7. The Appellate Court on framing the point for determination, re-appreciated the evidence and confirmed the judgement and decree of the trial court. Against the dismissal of the appeal, the present second appeal is filed.

8. The learned counsel appearing for the appellant would submit that the plaintiff never used the B schedule property as a cart track. His property described as A schedule is a housing site having access on the west and north. The Commissioner Report exhibit C1 and sketch exhibit C 2 would lend support to the defence version of non-existence of the suit cart track. A vague reference in the recital of Exhibit A-1 about common cart track, it does not mean that right has been conferred on the plaintiff to enjoy the B schedule property. The trial Court and the appellate Court failed to note that suit is bad for non-joinder of necessary and proper parties. The suit ought to have been dismissed for undervaluation.

9. The learned counsel appearing for the respondent would

submit that both the Courts below have held against the appellant on appreciating the law, facts and evidence. There is no Substantial Question of Law involved to interfere in the concurrent finding of facts and evidence under Section 100 of Civil Procedure Code,. The A schedule property marked as ABCD is the house site of 2175 sq.ft. B schedule property is a cart track running east-west. The sale deed exhibit - A-1 and the recital it is specifically mention that the purchaser is entitled to enjoy the pathways and cart tracks shown as boundaries of the property. The East-West cart track and North - South pathway of 20 feet are mentioned as boundaries of the property sold under exhibit - A-1. The Courts below having considered the evidence has rightly allowed the suit and granted the prayer sought.

10.Regarding the plea of non-joinder of necessary party, the Counsel for the respondent would submit that the title of Eswaran is admitted by the defendant. The plaintiff is the son of Eswaran is also admitted. Whether it is an absolute property of the plaintiff or he is one of the co-owner of the property either way he has locus to defend the rights of the property. When no relief sought against the co-owners, suit is not bad for non-joinder of necessary parties.

11.On perusal of the documents and evidence let in by the parties, this Court finds that the conclusion of the Courts regarding the existence of cart track in the B schedule property is well supported by evidence. The Commissioner Report and sketch indicates that attempt to encroach upon it and obstruct the free passage been made recently. Ex.A-1 the sale deed in favour of the plaintiff's father specifically mentions about this cart track and right of passage through it. A vein attempt has been made by the defendant to show that the recital in Ex.A-1 is not in respect of B schedule property. A dispassionate reading of the schedule to Ex.A-1 sale deed would clearly indicate that right of passage on two sides had been given to the purchaser to have access of 'A' schedule property.

12.The property in survey number 308/3 was held as one unit and later divided among the sharers. The cart track, which is the subject matter of the suit was used commonly by the sharers. Hence, while convey the land, the right in the common cart track has been referred in the sale deed by the owners. Plaintiff father had purchased a portion of the property from one of the sharers.

13.This Court finds that there is no error of law or facts in the finding of the courts below. No Question of Law involved in this case to interfere the concurrent finding of the Courts Below. Hence, this Second Appeal is dismissed with costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

ari/jbm

To:

1. The Subordinate Judge,
Bhavani.
2. The Second Additional District Munsif Court,
Bhavani.

Copy To
The Section Officer,
VR Section, High Court,
Madras-104.

+1cc to Mr.N.Manoharan, Advocate, S.R.No.27205

S.A.No.1422 of 2010

SSI (CO)
CS/04/05/2021

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