

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 10.09.2020	Pronounced on:15.09.2020
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CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

S.A.No.1621 of 2010

R.Pattayyan

.. Appellant /Plaintiff

/versus/

K.Padmanabhan

.. Respondent/Defendant

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 26.11.2009 made in A.S.No.95 of 2008 on the file of the Third Additional Subordinate Judge, Coimbatore confirming the judgment and decree dated 25.04.2008 made in O.S.No.896 of 2005 on the file of the Third Additional District Munsif Court, Cimbatores.

For Appellant : Mr.Sudharson for
Mr.N.Damodaran

For Respondent : Mr.Mukundan for
M/s Sarvabhuman Asso.

J U D G M E N T

(The case has been heard through video conference)

This Second Appeal is preferred by the plaintiff against the concurrent finding of the Courts below.

2.The plaintiff being the owner of the property in S.No.153/1 of Madhampatti village claiming Easementary Right over 13 feet cart track prescribed to him under the sale deed Ex.A2 laid suit for mandatory injunction and permanent injunction alleging that the defendant has encroached 3 feet east-west, 35 feet north-south of the cart track at the entrance of the cart tack. His case is being a dominant tenement, his right of easement of way cannot be encroached by the survient tenement.

3.The suit was defended on the ground that there is no 13 feet cart track in the field. It is only 11 feet width. The vendor to the plaintiff and the defendant were using the said

cart track, which was about 11 feet width. The defendant purchased 1755 sq.ft. of land with specific boundary in the year 1996 and had put up a construction in the year 2000 within the boundaries mentioned. The suit filed for mandatory injunction after five years of the construction is barred by limitation.

4.Both the Courts held that the plaintiff has failed to prove the width of the cart track is 13 feet. Though the revenue records refers above 4 metre road settled to the local body, the trial Court specifically held that the Advocate Commissioner's Report is defective, since the measurement made by him was not with the assistance of the surveyor.

5.In this second appeal, it is contended that the Commissioner Report ought not to have been rejected. The settlement deed dated 09.09.1999 in favour of the Executive Officer, which is marked as Ex.A6 clearly indicates that 13 feet road was donated to the local body by the promoters of the layout. While so, the Advocate Commissioner in his report has specifically mentioned that the cart track which is 13.2 feet from East - West on the southern end is only 11 feet on the north eastern corner. Further, the Advocate Commissioner has also noticed that the entire building of the defendant appear to be newly white washed.

6.Therefore, the learned counsel appearing for the appellant would submit that when there is enough evidence to show that the defendant has encroached upon the cart track by 2 feet and his house is a newly constructed building, the Court below ought not to have dismissed the suit for not taking the aid of surveyor while measuring the land and reject the relief of mandatory injunction on the ground it is barred by limitation.

7.The learned counsel appearing for the respondent/defendant would submit that the defendant purchased the property in the year 1996 and put up a tiled house in the year 2000. From 2001, he is paying electricity charges, house tax and water tax, which are proved through Exs.B3 to B7. Any suit for mandatory injunction ought to have been filed within three years. Obviously, the present suit was filed after five years of construction. Hence, the relief of mandatory injunction has been rightly rejected.

8.Regarding the extent of the cart track, the learned counsel would submit that the property of the plaintiff as well as the defendant was originally held by Marudhachala gounder. He sold the portion of the property in S.No.153/1 to an extent of 3.87 acres to one Ayyasamy on 07.07.1963. In the Insolvency proceedings initiated against Ayyasamy, the Official Receiver sold the property to the plaintiff under sale deed dated

17.12.1974, which is marked as Ex.A2. The defendant purchased a vacant site from the legal representatives of Late Marudhachala gounder for a valid consideration on 03.04.1996 vide Ex.B2. In none of the plaintiff's documents the width of the cart track is mentioned. Even according to the plaintiff, the cart track commences from Kuttai Poromboke in S.No.169/1A2C1. Whereas, the land of the defendant falls under S.No.162/3 to reach S.No.153/1 situated on the south. The road, which is subject matter has already been sub-divided during UDR proceedings and separate S.No.162/3A has been assigned. Therefore, the description of the property in the plaint and the area alleged to have been encroached by the defendant are not one and the same. The vendor of the defendant had mounted the witness box and deposed that the extent of the cart track is only 11 feet. The measurement provided by the Advocate Commissioner without help of the Surveyor is defective and rightly rejected by the Courts below.

9. In support of his argument, the learned counsel would rely upon the following judgments of this Court:-

- (1) T.Matheswari v. T.G.Tulasi reported in (2011) 1 CTC 673
- (2) K.Ramanraj v. P.Jagadeesan reported in (2019) 4 MLJ 230
- (3) 1.Chinnu Padayachi and another v. Dhanalakshmi and others reported in 2011(3) MWN (Civil) 615.

10. The contention of the plaintiff is that while he purchased the property in S.No.153/1, he was granted easementary right over the cart track to reach his land from Kuttai poromboke in the north. The land which was originally held by Marudhachala gounder has been divided into layouts subsequently. The extent of cart track has not been mentioned in any of the documents. Relying upon the settlement deed of the year 1999 and the Field Map sketch after UDR sub-division, the plaintiff claims that the width of the cart track is 13 feet throughout. The examination of the Field Map marked as Ex.A3 indicates that the S.No.153 is on the southern portion. The kuttai poromboke in S.No.169/1A2C1 is on the northern side. In between, S.No.162 is located. A portion in this survey number is the property of the defendant. If the defendant had encroached upon the public street, which was settled to the local body by the promoters of layouts under Ex.A6, the local body is the appropriate authority to initiate proceedings for removal of encroachment. The field position in the year 1996 was not the same as it was in the year 1963, when Marudhachala Gounder sold 3.87 acres to Ayyasamy. After laying out the land for residential plots, the land of the plaintiff is connected to Karadimadai to Kuppanur main road through the alleged cart track which has now been converted into a public street by virtue of settling the portion of the property in favour of the local body.

11. Therefore, in view of this Court, the suit is bad not only on the ground of limitation, but also on the ground of non-joinder of necessary party, namely, local body which is the owner of the said portion by virtue of settlement deed.

12. In the result, this Second Appeal is dismissed. No order as to costs. The judgments and decrees of the Courts below are confirmed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To:

1. The Third Additional Subordinate Judge, Coimbatore.

2. The Third Additional District Munsif, Coimbatore.

Copy to
The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr. N. Damodaran, Advocate sr 30115.

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