

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :12.10.2020

Pronounced on :22.10.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.560 of 2010

and

M.P.No.1 of 2010

1.Venkatachalam
2.Marappan
3.Thulasiammal
4.Subbayammal

... Appellants

/versus/

1.Sambayal
2.Indirani
3.Velusamy
4.Muthumani

... Respondents

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 20.11.2009 made in A.S.No.110 of 2008 on the file of the II Additional Subordinate Judge, Gobichettipalayam confirming the judgment and decree dated 20.08.2008 made in O.S.No.603 of 2004 on the file of the District Munsif Court, Gobichettipalayam.

For Appellants : Mr.R.T.Doraisamy

For Respondents: Mr.N.Chinnaraj for R1 to R3
No appearance for R4

J U D G M E N T

(The case has been heard through video conference)

The appeal filed by the plaintiffs, who have lost their suit for declaration and injunction before Courts below.

2.Gist of the plaint:

The suit property in S.Nos.126/2, 126/3, and 126/4 originally owned by one Padmanaban, who got the property from his father Perumal. The said Padmanaban sold it to Pattappa Gounder on 06.06.1993. The plaintiffs Venkatachalam and others are the sons and daughters of Pattappa Gounder. In S.No.126/2,

there is a cart track. In S.No.126/3 there is a cart track and grain drying yard (kalam). Earlier the plaintiff Senniyappa Gounder filed O.S.No.254/1994 against Pattappa Gounder and his son Vekatacham for declaration of exclusive title over a Koppu (water channel) in S.No.126/4 (marked 'AB' in the plaint plan) and permanent injunction. In turn, Pattappa Gounder and Venkatachalam filed suit O.S.No.291/1994 against Chenniappa Gounder for injunction in respect of 14 feet cart track running through S.No.126/3 up to the property of Pattappa Gounder. The cart track marked as 'ABC' in that suit plan. These two suits reached finality in A.S.No.71/1998 and A.S.Nos.8,9 and 13 of 1999.

3. In the batch of Appeal Suits arising from the suits in O.S.No.254/1994 and O.S.No.291/1994, the lower appellate Court reversed the trial Court judgment and declared the Koppu in S.No.126/4 as common Koppu. The defendants (Chenniappa Gounder and his descendants) in that suit were restrained from interfering the peaceful common enjoyment of the Koppu by Pattappa Gounder and Venkatachalam. Also restrained Chenniappa Gounder and his descendants from interfering the right of way to Pattappa Gounder and his son Venkatachalam using the cart track 'ABC' to reach the Koppu. The lower appellate Court passed the above common judgment on 21/06/2002.

4. While so, pending earlier suits and appeals, the defendants had encroached upon the cart track by putting up building and toilet. Hence, the present suit for mandatory injunction filed to remove the superstructures put up by the defendant encroaching the common cart track and grain drying yard. The suit property is described as below:-

Gopichettipalayam Taluk, Ammapalayam village, S.No. 126/2, 126/3 'cart track' shown as ABC in the suit O.S.291/1994 and S.No.126/4 'common koppu' as shown in O.S.254/1994.

5. Gist of the written statement:

The suit property in the schedule not properly described. The plaintiffs have included S.No.126/4 contrary to the judgment in A.S.No.71/1998. Perumal the vendor of the plaintiff got the property through Will and not through inheritance. This defendant in the earlier suit O.S.No.254/1994 never admitted the existence of cart track in S.No.126/3. In A.S.No.71/1998 filed against O.S.No.291/1994, the portion marked as 'ABC' is described as 'koppu' instead of 'cart track'. The plaintiff has not resorted to amend the same by way of review, instead had filed fresh suit. In the said appeal, the Court had declared the right of way in 'ABC' cart track passing through S.Nos.126/2 and 126/3 to reach the common koppu and consequential

injunction . The plaintiffs property lies on the east of common koppu. The plaintiffs have access from track on the north of their land and they never used the common cart track in S.No.126/3. The toilet alleged to have constructed by the defendant in the common cart track is not correct. The toilet is constructed within the boundaries of the defendant property in S.No.126/4 and not on the cart track marked as BC in the O.S.No.291/1994 suit plan. The allegation that toilet was put up by the defendant in the suit common cart track pending earlier litigation and started lying concrete floor and obstructing the common cart track two months after the common judgment in the appeals No.71/ 1998 dated 21/06/2002 is false. They are invented for the purpose of the suit. If it is true, the plaintiff would have taken necessary steps to amend his permanent injunction prayer into mandatory injunction in his earlier suit O.S.No.291/1994. On the field, beyond the cart track in S.No.126/3, towards east there is no cart track. The plaintiff after obtaining injunction to use the common cart track in S.No.126/3 width 14 feet, through this suit trying to establish a cart track towards east to take his vehicles. In fact, On the east of the common cart track in S.No.126/3, the way towards common koppu is only 8 feet width and the same was never used by the plaintiffs. Since there is no cause of action of the suit, the same has to be dismissed.

6. The trial Court on considering the rival submissions framed the following issues:

- 1) Whether the plaintiff is entitled for the relief of mandatory injunction ?
- 2) Whether the suit is barred by limitation ?
- 3) What other relief ?

7. On appreciating the evidence, the trial Court held that the plaintiffs have failed to identify the alleged encroachment by the defendants. The measurement of the encroachment is not pleaded and proved. The plaintiffs omitted to get a Commissioner appointed for noting the physical features and measurements. Therefore the plaintiffs are not entitled for the relief prayed.

8. On appeal by the plaintiffs, the lower appellate Court confirmed the trial Court judgment and decree.

9. The lower appellate Court while dismissing the appeal reiterating the reasons stated by the trial Court added that, if really the defendants have constructed toilet with an intention to prevent the plaintiffs from using the common cart track even during the pendency of O.S.No.254/1994, this plaintiffs ought to have filed the suit immediately for mandatory injunction or atleast they ought to have filed an amendment application for mandatory injunction in O.S.254/1994 itself. The present suit

filed after 10 years is beyond the period prescribed for filing suit for mandatory relief.

10.The learned counsel appearing for the appellants would submit that the Courts below ought not to have dismissed the suit for want of rough sketch and Commissioner Report since in the earlier suit in O.S.No.254 of 1994 Senniappa Gounder has admitted the existence of cart track in S.No.126/2 and the existence of common well, kalam and open space in S.No.126/3. When the first appellate Court in the common judgment rendered in A.S.Nos.8 of 1999, 9 of 1999, 13 of 1999 and 71 of 1998 has granted injunction in favour of the appellants to use the common cart track up to common canal (koppu), the same fact need not be again re-agitated in the present suit. The grievance of the appellants was the obstructions caused by the respondents by putting up obstructive structure in the common cart track and wall on the side of the common canal(koppu) defeating the right of the plaintiffs ascertained through the Court decree to use the canal(koppu) jointly.

11.The learned counsel appearing for the respondents would submit that the right of way in the existing common cart track never been obstructed by the respondents. The alleged structures were well within the property of the respondents. The appellants attempted to ascertain larger extent of land as cart track on the defendants property under the garb of common cart track. The Courts below have rightly dismissed the claim since the appellants failed to ascertain the right and also ascertain the extent of cart track. The identification of the property, which is essential in a case of mandatory injunction lack in the case of appellants. Hence, the dismissal of the appellants case is in accordance with law.

12.Heard the learned counsel appearing for the appellants and the respondents.

13.On perusal of the records and submissions of the learned counsels, it is clear that the appellants, who alleges encroachment in the common cart track had not taken steps to identify the alleged encroachment. It is vaguely alleged by the appellants that the cart track lies in S.No.126/2, the kalam, cart track and open space lie in S.No.126/3. While describing the suit schedule property in the plaint, instead of giving the right and proper description, the appellants have referred the sketch in the judgment rendered in the earlier two suits. No efforts taken by the appellants in the course of trial to establish the fact that the offending constructions was put up in the common area leading to obstruction to the cart track.

14.As pointed out by the Courts below, the alleged toilet

in S.No.126/3 was admittedly put up by the defendants while O.S.No.254/1994 was pending. No steps has been taken by the appellants to remove the said superstructures within the mandatory period. Besides, the appellants have not even established that the alleged superstructures are in the common area.

15.In the said circumstances, as pointed by the Courts below, in the suit for mandatory injunction, there must be a specific identification of the property for the Court to act upon and make the decree executable. Vague description of the property referring the old suits without proper measurement, had invited dismissal of the suit. Therefore, this Court finds that the dismissal of the suit filed by the plaintiffs is perfectly in accordance with law and no substantial question of law involved in this case for interference.

16.In the result, this Second Appeal is dismissed. No order as to costs. The judgments and decrees passed by the Courts below is confirmed. Consequently connected Miscellaneous Petition is closed.

Sd/-

Deputy Registrar (CS)

//True Copy//

Sub Assistant Registrar

Ari

To:

1.The II Additional Subordinate Judge,
Gobichettipalayam.

2.The District Munsif Court,
Gobichettipalayam.

3.The Section Officer,
VR Section, High Court,
Madras.

S.A.No.560 of 2010
and
M.P.No.1 of 2010

SPD (CO)
GN (29/06/2021)