

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 18.02.2020
CORAM:
THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM
S.A.Nos.1179 & 1180 of 2014

S.A.No.1179 of 2014

1.Subban
2.Marayee
3.Ramajeyam
4.Rani @ Pushparani .. Appellants/Respondents1 to 4
Defendants 1 to 4

Versus

1.M.Tamilselvam ...Ist Respondent/Appellant/
Plaintiff
2.N.Ponnammal
3.P.Valarmathi .. Respondents 2 & 3/Respondents
5 & 6 /Defendants 5 & 6

Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 31.07.2014 made in A.S.No.92 of 2013, on the file of Subordinate Judge, Namakkal, reversing the Judgment and Decree, dated 20.09.2013 made in O.S.No.54 of 2009, on the file of Additional District Munsif Court, Namakkal.

For Appellants : Mr.T.Dhanyakumar

For Respondents : Mr.V.Chandrakanthan for R-1

No appearance for R2 and R3

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S.A.No.1180 of 2014

1.Ramajeyam
2.Marayee
3.Subban

.. Appellants/Respondents1 to 3
Plaintiffs 1 to 3

Versus

1.M.Tamilselvam ..Respondent 1/Appellant/
Ist Defendant
2.N.Ponnammal
3.P.Valarmathi .. Respondents 2 & 3/Respondents
4 & 5/Defendants 2 & 3

Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 31.07.2014 made in A.S.No.93 of 2013, on the file of Subordinate Judge, Namakkal, reversing the Judgment and Decree, dated 20.09.2013 made in O.S.No.100 of 2009, on the file of Additional District Munsif Court, Namakkal.

For Appellants : Mr.T.Dhanyakumar

For Respondents : Mr.V.Chandrakanthan for R-1

No appearance for R2 and R3

C O M M O N J U D G M E N T

These appeals are directed against the common Judgment passed in A.S.Nos.92 of 2013 and 93 of 2013 by the Sub Court, Namakkal, whereunder, the appellate Court set aside the Judgment and Decree passed in O.S.Nos.54 and 100 of 2009 by the Additional District Munsif Court, Namakkal.

2. The suit in O.S.No.54 of 2009 was filed by the first respondent- Tamilselvam for permanent injunction. It is the case of the plaintiff that the suit properties originally belonged to his father by virtue of the partition deed, dated 16.07.1979, however in the subsequent partition between the plaintiff, his father and brother, dated 21.11.1988, suit 'A' schedule was allotted to him. 'B' schedule property belongs to

the Government and it is being enjoyed by him vide order of assignment of the Tahsildar, Namakkal, dated 19.03.1998. The defendants are adjacent land owners and they attempted to interfere with his possession and hence, the suit.

3. The suit was opposed by the defendants contending that the suit schedule properties originally belonged to Marappa Gounder. His two sons viz., Kuppanna Gounder and Chinna Gounder partitioned the properties orally in 1950 and enjoyed by them accordingly and patta was issued in the year 1959. Since Chinna Gounder was allotted front portion, 'ABC' and 'BJ' cart tracks were formed for enjoyment of properties of Kuppanna Gounder, who was allotted back portion. After he passed away, two sons of Kuppanna Gounder viz., Kalianna Gounder and Kolandha Gounder partitioned their properties orally. Kalianna Gounder got D4 to D7 properties, while Kolandha Gounder got 'P' series properties. According to the defendants, the said Kolandha Gounder, died leaving behind his only daughter, the second defendant. The second defendant settled the suit properties in favour of her son / third defendant, vide registered settlement deed, dated 24.11.2004. The defendants 2 and 3 in O.S.No.100 of 2009 are the legal-heirs of Kaliappa Gounder and the disputed 'ABC' and 'BJ' cart tracks are being enjoyed by them and their predecessors for more than 60 years. While so, the sole plaintiff in O.S.No.54 of 2009 and the first defendant in O.S.No.100 of 2009 obliterated the cart tracks, planted trees and also put stones in order to prevent enjoyment of the disputed cart tracks. It is also stated that the suit cart tracks have been mentioned in the settlement deed and the sale deeds, dated 13.04.2007, 03.07.2007 and 28.10.2004.

4. The defendants 1 to 3 in O.S.No.54 of 2009 instituted the suit in O.S.No.100 of 2009 for declaration, declaring their right to use 'ABC', 'BJ' cart tracks to reach their property by taking cattle, cart and other vehicles; for mandatory injunction to remove the bore well dug in 'BC' plaint plan; for removal of 22 coconut trees, 4 sapota trees and plantain in 'AB' plaint plan and to form a road at the width of 30 feet. The defense taken in the written statement in the first suit is their pleading in the second suit and it was opposed by the first respondent / first defendant denying and disputing the claim of the plaintiffs. It is stated that the second suit is counter blast to O.S.No.54 of 2009 and there was no such cart track exists and enjoyed by the plaintiffs. The second and third defendants are collusive parties. It is the case of the first respondent / first defendant that the land in S.No.15/4B is being enjoyed by the plaintiffs using the North-South cart track formed in the poramboke land, wherefrom another track is

available to reach the other properties of the plaintiff and the defendants 2 and 3 and prayed for dismissal of the second suit.

5. On the basis of the above pleadings, the trial Court framed necessary issues. Both the suits were taken up for joint trial and evidence was recorded and marked in O.S.No.100 of 2009. The plaintiff in O.S.No.54 of 2009 was referred as defendant. To fortify the case of the plaintiffs, P.W.1 to P.W.4 were examined and Exs.A1 to A17 were marked. On the side of the defendant, D.W.1 was examined and Ex.B1 was produced. The report and sketch of the Advocate Commissioner were marked as Exs.C1 and C2.

6. After considering the evidence adduced by the parties, the trial Court decreed both the suits partly. Aggrieved over the same, the plaintiff in O.S.No.54 of 2009 preferred appeals in A.S.No.92 and 93 of 2003 before the Sub Court, Namakkal. The appellate Court decreed the suit O.S.No.54 of 2009 and dismissed the suit in O.S.No.100 of 2009. Challenging the decision of the appellate Court, the present appeals have been filed.

7. Mr.Tamilselvam, learned counsel appearing for the appellants submitted that the suit property originally belonged to one Mariyappa Gounder. The plaintiffs and the defendants are the descendants of the said Mariyappa Gounder. It is the submission of the learned counsel that the plaint ABCEFG, EH, BJKL cart track had been in existence and the parties have been using the cart track for taking cattle, cart and other vehicles uninterruptedly for more than 60 years, hence, the appellants are entitled for declaration and other reliefs sought for in the second suit. He further added that D.W.1 in his evidence admitted the genealogy tree submitted by the appellants and also admitted that the appellants have been using the cart track. According to the learned counsel, except the plaint cart track, no other cart track is available to the appellants to enjoy their properties.

8. Per contra Mr.V.Chandrakanthan, learned counsel for the first respondent submitted that in the written statement, the defendant has categorically denied the genealogy tree drawn by the appellants. It is further contended that the properties are not ancestral properties of Mariyappa Gounder and in Ex.B1-partition deed, dated 16.07.1979, there is no mention about the cart track, but subsequently, in the year 1988, when the family property of the first defendant was partitioned between his brother Velusamy and father Marimuthu, wherein 'C' schedule property was allotted to his brother Velusamy and only for his enjoyment, the cart track was formed at the width of 10 feet and

it is not a common road. It is further submitted that the first respondent was not a party to Exs.A1 to A4-deeds and the suit has been filed claiming right over the property by easement of necessity. But the appellants / plaintiffs have not proved the existence of pathway at the width of 30 feet and usage of the pathway over a period of 60 years.

9. It is further contended that P.W.1 has admitted that he has not produced any evidence to show that the parties are descendants of Mariyappa Gounder and Kuppa Gonder and Chinna Gounder are the brothers and P.W.1 admitted in his evidence that he does not know the genealogy. P.W.1 further admits that in 1979 partition deed, the suit path way is not mentioned. According to the learned counsel, the trial Court, without looking into the evidence adduced by the parties, partly decreed both the suits, but the appellate Court on proper appreciation, rejected the case of the appellants. Hence, no interference of this Court is required and prayed to dismiss the appeals.

10. These Appeals have been admitted on the following substantial questions of law:-

"(i) Whether the decision of the lower appellate Court is vitiated in holding that the plaintiffs have not proved the easement of necessity to reach their lands over the suit pathways in S.Nos.32/2A1 and 15/5 owned by the first defendant?

(ii) Whether the plaintiffs have proved that the suit properties and also the other properties of the first defendant as well as the plaintiffs and the others were originally owned by one common owner and devolved on the parties to the litigation and as such all the parties are entitled to use the suit pathways as easement of necessity as prescribed under Section 13 of the Indian Easement Act?"

11. In the case on hand, the dispute is only with regard to usage and enjoyment of the cart tracks, which are described as 'BC' and 'BF' in the plaint plan, which is marked as Ex.A5. It is the case of the appellants that they have been reaching their properties from Thiruchengode-Namakkal Main Road, which starts from the poramboke land in S.No.236/3 and 32/1 and runs through the patta land of the first defendant in S.No.32/2 and 15/5, which have been referred as 'BC' and 'BF' cart tracks respectively. In support of their case, they rely on Exs.A1 to A4, in which, the cart track is mentioned having width of 6.3 meters. P.W.3 and P.W.4 deposed in the line of the case of the appellants. The categorical case of the first respondent /

first defendant is that there is no cart track existing as claimed by the appellants and they have an alternate cart track to reach their lands.

12. A perusal of the Judgment of the trial Court shows that though the appellants have pleaded that the width of the cart track in dispute is 30 feet and the evidence have been let in that the appellant and his forefathers have been enjoying the cart track for 60 years including Exs.A1 to A4. The trial Court relied upon the partition deed and sale deed marked as Exs.A13 and A14 respectively to grant relief in favour of the appellants. It is seen that in a family partition of the first respondent / defendant under Ex.A13 partition deed, dated 21.11.1988, lands in S.No.32/2 and 15/5 was allotted to the first defendant and his brother was allotted to 'B' schedule property therein and he was given right to use the 20 link North-South Road formed in S.No.32/2. Under Ex.A14, sale deed, dated 28.10.2004, the right to use cart track formed in S.No.32/2 was conveyed to the vendors Anbu and Arun by the first respondent and his brother Velusamy. It is to be noted that admittedly no document was produced to establish the disputed cart track existed before Ex.A13, partition deed.

13. At this juncture, it is relevant to note that the Advocate Commissioner in his report which is marked as Ex.C1 stated that there exists North-South 10 feet road in the portion marked 'NOP'. Further, during the course of cross-examination, a suggestion was put to P.W.1 that the cart track belongs to the first defendant. Even though in Ex.A1 to A4, the width of the cart track is mentioned as 9.2 meters and the trial Court chose to reject those documents and the oral testimony of P.Ws'1 to 4, however, on the basis of Ex.A13 and A14 and the report of the Advocate Commissioner, and the suggestion referred above, came to the conclusion that cart tracks had been in existence, but not at the width of 30 feet and held that the plaintiffs / appellants are entitled for 13 feet cart track.

14. Insofar as the issue of common ancestor, the trial Court relied on the settlement registers of the year 1960 and 1961 marked as Ex.A11 and A12. The trial Court also took note of the fact that in Ex.B1 partition deed, dated 16.07.1979, 50% of the shares in S.No.15/4 and 15/5 were allotted to the father of the first defendant-Marimuthu. But as of now, the entire extent of land in S.No.15/4 came to the hands of the appellants / plaintiffs. Therefore, the trial Court held that the oral partition pleaded by the plaintiff in the year 1950 is true and that Marappa Gounder was the common ancestor of the plaintiffs and the defendants. To be noted that Ex.B1 partition deed came into existence in 1979 and it deals with the partition in the

family of Chinnappa Gounder, which had taken place on 16.07.1979. In the pleading and evidence, it is the categorical case of the appellants that in the year 1950, oral partition was made between Kuppna Gounder and Chinnappa Gounder, who are sons of Marappa Gounder, in which, the appellants got their property. Ex.A12 refers some other property. Therefore, this Court cannot countenance the finding of the trial Court.

15. The trial Court came to the conclusion that no alternative cart track is available and if there is any alternative cart track, it would have been shown in the Commissioner's Report and plan. The trial Court rightly rejected the prayer of declaration of right sought for in S.No.236/3 and S.F.No.32/1 [AB portion] on the ground that the Government was not made a party to the suit.

16. It is settled law that the defendants are entitled to take inconsistent plea and it is for the plaintiff, who approaches the Court for the declaratory relief has to prove the case and the burden of proof never shifts to the defendants. Further, even if there is any lacuna or lapse on the part of the defendants, it cannot be taken advantage of by the plaintiff. It is not disputed that the appellants / plaintiffs had approached the Court for declaratory relief on the ground that the appellants / plaintiffs and their forefathers have been continuously and uninterruptedly using and enjoying the cart tracks in dispute for over a period of 60 years. It is stated that the width of the cart track is 30 feet. The suit prayer includes mandatory injunction to remove the encroachment put up in the suit cart tracks. In order to prove the case of the plaintiffs, they examined themselves as P.Ws' 1 and 2 and also examined P.W.3 and P.W.4 and marked Exs.A1 to A4. The trial Court rejected Exs.A1 to A4 observing those documents came into existence after 2004 and they would not help the case of the plaintiffs. In Ex.A13, the width of cart track is mentioned as 20 links equivalent to 13 feet.

17. It is contended by the first respondent / defendant that there was no cart track in S.No.32/2 and only when his family property was partitioned in the year 1988, a cart track was formed in S.No.32/2 for the enjoyment of the other family members and the same was conveyed to their purchaser under Ex.A14. In support of their contention, Ex.B1 partition deed dated 16.07.1979 was marked. It is to be noted that under Ex.B1, the ancestors of the first defendant have partitioned their property, but admittedly there is no mention about the cart tracks in dispute in the document. It is true that in the Commissioner's Report, it is stated that there exist North-South

10 feet cart track in S.No.32/2. In the pleading and in the evidence, the appellants / plaintiffs claimed right of easement by way of necessity.

18. It is an admitted fact that the second plaintiff in the second suit settled her property to his only son / the first plaintiff under Ex.A1 deed dated 24.11.2004 and in the settlement deed, it has been stated that the settlee has right to enjoy his property through the land of the first defendant and one Valarmathi, the third defendant in O.S.No.100 of 2009. P.W.2 has also admitted this fact during her cross-examination, which proves availability of an alternative cart track to the appellants herein.

19. The appellate Court, after scrutinizing the pleading and evidence and the admission made by P.W.2, came to the conclusion that there are two cart tracks available to reach the properties of the appellants, but the relevant fact was not mentioned in the pleading. In this regard, the appellate Court followed the decision of this Court reported in [2003] 2 LW 716, wherein it has been held that "when alternative partway is admittedly available to the plaintiffs, however inconvenient it may be, there cannot be a claim on the ground of easement of necessity". The appellate Court also held that for seeking relief of mandatory injunction, there should be an accuracy of land as to how much land in existence, and how much is encroached.

20. Taking note of the above facts, in my considered view, the appellants / plaintiffs failed to prove their case and the reasonings and findings of the trial Court are not sound and they have been made overlooking the material evidence available on record. The first appellate Court rightly reversed the decision of the trial Court and this Court finds no ground warranting interference in these appeals.

21. In the light of the discussion and finding, the questions of law are answered against the appellants. In the result, the appeals fail and they are dismissed as devoid of merits. However, there shall be no order as to costs.

sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1. The Subordinate Judge,
Namakkal.

2. The Additional District Munsif Court,
Namakkal.

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The Section Officer

VR Section

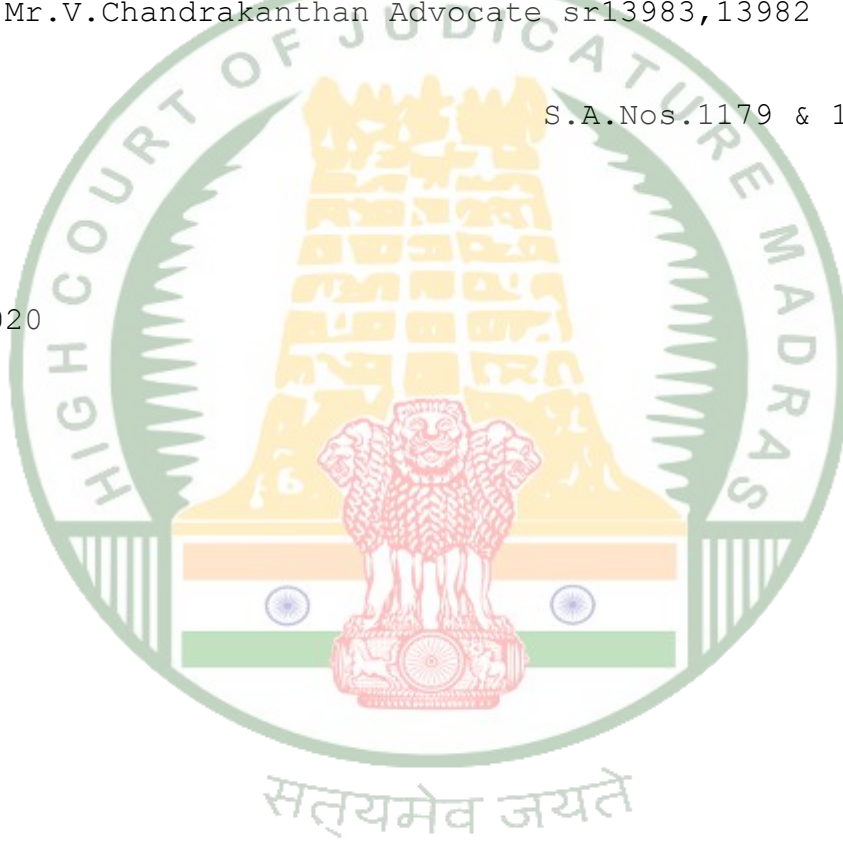
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