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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.11.2021
PRONOUNCED ON : 29.11.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.382 of 2010

Nanjappan @ Selvaraj ... Appellant /
Plaintiff
versus

1.Velusamy
2.Kaliappan
3.Padmavathy ... Respondents /
Defendants

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 22.04.2009 made in A.S.No.40 of 2008 on the file of the learned II Additional Subordinate Judge, Gobichettipalayam, reversing the judgment and decree dated 18.02.2008 made in O.S.No.157 of 2006 on the file of the learned District Munsif, Sathyamangalam.

For Appellant : Mr.M.Rajeev Gandhi
for Mr.S.Kaithamalai Kumaran

For Respondent No.1 : Mr.M.Karthik
for Mr.I.C.Vasudevan

For Respondent Nos.2&3 : No Appearance

J U D G M E N T

The plaintiff in O.S.No.157 of 2006, on the file of the learned District Munsif, Sathyamangalam, is the appellant herein. Before the said Court, the appellant / plaintiff herein filed the above referred suit, as against the respondents / defendants, seeking the relief of permanent injunction, restraining the defendants and their agents, in interfering with the peaceful possession and enjoyment of the suit schedule property. Against which, the first defendant Velusamy filed a counter claim wherein, he seeking the relief to grant permanent



injunction against the plaintiff, his men and agents, restraining them from taking water in the water course, found available in the suit schedule property i.e. marked as red colour in the plan appended with the written statement filed by the first defendant.

2.By judgment and decree dated 18.02.2008, the learned District Munsif, Sathyamangalam, allowed the suit filed by the plaintiff and granted injunction, in his favour. While at the same time, the prayer sought for by the defendants, by way of counter claim has been rejected.

3.Aggrieved over the said findings, the first defendant preferred an appeal, in A.S. No.40 of 2008 on the file of the II Additional Subordinate Court, Gobichettipalayam. By judgment and decree dated 22.04.2009, the learned II Additional Subordinate Judge, Gobichettipalayam, had allowed the counter claim and granted the relief of injunction against the plaintiff. Aggrieved over the judgment and decree dated 22.04.2009, the plaintiff Nanjappan @ Selvaraj, preferred this Second Appeal.

4.For the sake of convenience, hereinafter, the parties, are referred to, as per their litigative status before the trial Court.

5.The laconic averments made in the plaint, are as follows:

(i) The suit property is a cart cart. In the suit property, the plaintiff along with the defendants 2 and 3 have $4/7^{\text{th}}$ share. In the remaining $3/7^{\text{th}}$ share, Velusamy (1st defendant), Saraswathi and Vasanthi, are having $1/7^{\text{th}}$ share each. In view of the compromise decree passed in I.A.No.221 of 1998 in O.S.No.103 of 1997 on the file of the learned Subordinate Judge, Gobichettipalayam, the suit property was commonly allotted to both plaintiff and defendants. As per the compromise decree, the property was allotted to the persons as specific. After the decree, the suit property was kept in common to all the above said persons. After entering into the compromise, on 06.06.2002, the father of the plaintiff Karuppusamy Gounder, sold his entire property along with the suit cart track to the plaintiff and the defendants 2 and 3. Accordingly, the plaintiff and the defendants 2 and 3 got $4/7^{\text{th}}$ share in the suit schedule property.

(ii) In the plan appended with the plaint, the suit cart track was referred as A, B, C in red colour. The plaintiff is not objected the common title and enjoyment of the defendants. Since one of the share holder viz. Subramani was



died on 10.12.1998 being the reason that, his wife Padmavathi disputed the plaintiff's possession, she was added as a party in the suit. She has also a co-owner in the suit schedule property. The width of the suit property is 20 feet. Due to the misunderstanding, now, the defendants obstructed the plaintiff from driving his cart in the suit property. Hence, the present suit has been filed seeking for the relief of permanent injunction.

6.The case of the first defendant, is as follows:

(i) The plaintiff and the defendants 2 and 3, are the close associates, colluded together and filed this false suit. The plaint plan is not correct and misleading. The plaintiff and defendants 2 and 3 are jointly entitled to 3/7th share. The remaining 4/7th share is common for the first defendant, his sisters, namely, Saraswathi and Vasanthi and one Balasubramanian, who has purchased the South-West land from one Karuppusamy Gounder. All the persons having the right in the suit cart track, are not added as parties and hence, the suit is bad for non-joinder of necessary parties.

(ii) It is admitted that, the suit cart track is common to the plaintiff, the first defendant and others. The first defendant never objected the usage of the cart in cart track by the plaintiff and other co-owners. The present suit is filed with an ulterior motive. It is false to state that, the first defendant had physically obstructed the plaintiff from driving a cart in the suit property. As per the compromise decree passed in I.A.No.221 of 1998 in O.S.No.103 of 1997 on the file of the learned Subordinate Judge, Gobichettipalayam, the plaintiff, the defendants and other co-sharers can draw water from the common well and irrigate their respective portions in their turn. There is a water course in the suit schedule property as shown in the plan filed along with the written statement and the first defendant is taking water through the said water course to irrigate his land. There is no other water course to irrigate his land. The first defendant is having the easement right to take water through the water course situated in the suit property.

(iii) After suppressing the above factors, the plaintiff filed the present suit, without showing the water course, which was used by the defendants in the suit cart track. Hence, the first defendant filed a counter claim, seeking the relief of permanent injunction against the plaintiff, restraining him in interfering from taking water in the existing water course found available in the suit property. The Court Fee



has also been paid under Section 27(C) of the Tamil Nadu Court Fee and Suit Valuation Act, 1955.

(iv) The averments found in the reply statement is that, it is not correct to state that the defendants taking water from the water course as mentioned in the written statement filed by the first defendant. It is also not correct that, the first defendant having easement right to take water through the water course found in the suit property. The plan filed along with the written statement, is not having true facts and the same is misconceived one. There was no water course through the suit property. The recital found in the compromise decree, is clear that the suit property is a cart track. Now, the first defendant creating a new right over the cart track by way of forcible manner. The first defendant neither have title nor easement right over the suit property for taking water through the channel situated on the bank of the suit cart track. Hence, the counter claim filed by the first defendant, is liable to be dismissed.

7. Based on the above said pleadings, the learned District Munsif, Sathyamangalam, framed necessary issues and tried the suit. On the side of the plaintiff, plaintiff himself examined as P.W.1. He examined one Nagappa Gounder as P.W.2 and marked 2 documents, as Ex.A.1 and Ex.A.2. On the side of the defendants, first defendant Velusamy was examined as D.W.1. and marked 3 documents, as Ex.B.1 to Ex.B.3. Apart from those documents, the Report and Plan filed by the learned Advocate Commissioner were marked as Ex.C.1 and Ex.C.2.

8. Having considered the materials placed before him, the learned District Munsif, Sathyamangalam, vide judgment and decree dated 18.02.2008, allowed the suit and dismissed the counter claim and accordingly, decree has been granted in favour of the plaintiff. Aggrieved over the same, the first defendant preferred an appeal in A.S.No.40 of 2008. By judgment and decree dated 22.04.2009, the learned II Additional Subordinate Judge, Gobichettipalayam, allowed the appeal, without assailing the decree passed in favour of the plaintiff, granted decree in favour of the first defendant, through which, the plaintiff was restrained in interfering with the alleged existing water course, through which, the defendants are taking water from the common well and irrigated their fields.

9. Feeling aggrieved over the said findings of the Court below, the plaintiff, is before this Court with the present Second Appeal. The Second Appeal was admitted on file after



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formulating the following substantial questions of law;

"1. Whether the lower Appellate Court has misinterpreted Ex.A.1 to hold that the first defendant is entitled to lay a channel along the suit cart track ?

2. Whether the finding of the lower Appellate Court that the first defendant is entitled to lay a channel in the suit cart track without the consent of the co-owners is perverse ?"

10.The learned counsel for the appellant / plaintiff would submit that, the suit cart track is having the width of 20 feet. It is admitted on either side that, the plaintiff, the defendants and others, are having the title in the said cart track. In the said circumstances, if any water channel is created in the suit cart track, the same will diminished the width of the cart track and as a result of which, it is very difficult to other co-sharers in taking cart and other things in the suit cart track. Without considering the said aspect, the first Appellate Court misconceived the factual aspects, granted decree and allowed the counter claim, which is erroneous in law.

11.Per contra, the learned counsel for the first respondent / first defendant would submit that, in the compromise decree, the right to take water for irrigating their respective lands, was given in favour of the plaintiff, the first defendant and 3 others. Unfortunately, there was no recital in respect to the water channel, which is necessary to take water. In the absence of any water course, it is very difficult to the first defendant in cultivating his field. After giving right in the common well, refusing to take water, is atrocious one. Furthermore, the existing shutter found in the suit property, is very narrow that, the first defendant got water course in the suit cart track. Only due to the misunderstanding now the plaintiff caused disturbance to the first defendant and therefore, it would necessary to dismiss the Second Appeal filed by the plaintiff.

12.The submissions made by the learned counsel appearing on either side, are considered.

13.Since in respect to the order of injunction granted in favour of the plaintiff, being the reason that, the first defendant has not filed any appeal, it is not necessary for this Court to decide whether the injunction granted in favour of the appellant / plaintiff, is found correct or not.



14. Secondly, on going through the facts and circumstances of the case, it is an admitted fact that, in view of the compromise decree passed in O.S.No.103 of 1997, either party in the suit were allotted a land with their respective shares, which are situated abutting the suit cart track. The terms of compromise, which has been filed before the learned II Additional Subordinate Judge, Gobichettipalayam, was marked as Ex.A.1. On going through the contents of the said document as well as in the decree passed by the learned II Additional Subordinate Judge, Gobichettipalayam, it is apparent while at the time of deciding the right in respect to the suit cart track, the party to the proceedings also entered into the compromise in respect to taking water from the common well.

15. The first plaintiff while at the time of giving evidence as P.W.1 categorically admitted that, the first defendant is having the right to take water from the common well. In this regard, it is his case that, previously the first defendant irrigated his field through the water course situated in others field. The said stand taken by the plaintiff, is denied by the first defendant by stating that, the existing water course was found available in the suit cart track.

16. In this occasion, it is necessary to see whether the alleged existing water course was found available as stated by the first defendant or not, for which, it would necessary to see the Report filed by the learned Advocate Commissioner, which was marked as Ex.C.1 before the trial Court. In the Report filed by the learned Advocate Commissioner, apart from mentioning the agricultural fields allotted to either party, he has narrated the physical features of the suit property. In his plan, he had mentioned the alleged existing water course in red colour, further, he has stated that, from point A to B and from B to C, till the first defendant's field, there was an existing water course. Though he has stated that, there are some obstructions in the water course, the same is not sufficient to disbelieve that, there was no existing water course found available abutting the suit cart track.

17. More than that, I am of the opinion that, after giving right to take water from the common well obstructing the water course, is nothing but atrocious one and the same has to be curtailed. The non-mentioning of the water course in the terms of compromise, is only a mistake. Though the first defendant previously taking water by using the others' fields, being the co-owners both plaintiff and defendants are having the duty to finalise the water course, which is necessary to take water to



irrigate the lands allotted to the respective co-owners. Only due to the mistake committed, while at the time of drawing the terms of compromise, both the plaintiff and the first defendant, are before this Court with the present suit.

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18. Whether right or wrong, after allotting the cart track in the width of 20 feet, if one of the sharers take water through the said water course, the same will cause hindrance to other co-owners in using the suit cart track peacefully. But at the same time, if the first defendant is not permitted to form a water course he cannot do any agricultural work in his field.

19. Thus, considering the facts and circumstances of the case, I am of the opinion that, permitting the first defendant to lay a pipeline in the depth of 3 feet in the portion mentioned by the learned Advocate Commissioner in his Report as A, B, C, [i.e. suit cart track] is the solution to solve the entire dispute having by the plaintiff and the first defendant.

20. Accordingly, the Second Appeal is dismissed with the following terms;

(i) The first defendant is directed to lay the pipeline on his own costs in the depth of 3 feet in the portion mentioned by the learned Advocate Commissioner in his Report as A, B, C, [suit cart track] within a period of three months from the date of receipt of a copy of this judgment;

(ii) Further, the first defendant is having the right to repair the pipeline, whenever necessary, after giving 24 hours advance notice to other sharers.

The judgment and decree of the lower Appellate Court dated 22.04.2009 passed in A.S.No.40 of 2008 on the file of the learned II Additional Subordinate Judge, Gobichettipalayam, is hereby modified as above. However, there is no order as to costs.

21. Registry is directed to enclose the plan i.e. Ex.C.1 submitted by the learned Advocate Commissioner along with the decree.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

sri



To

1.The II Additional Subordinate Judge,
Gobichettipalayam.

2.The District Munsif,
Sathyamangalam.

Copy To

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

S.A. No.382 of 2010

AD(CO)
GN(10/03/2022)