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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.11.2021
PRONOUNCED ON : 24.11.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.449 of 2010
and M.P. No.1 of 2011

1.Periyana Gounder (Died)
2.Muthurasa Gounder
3.R.Duraisamy ... Appellants /Plaintiffs 1 to 3
4.Pavathal
5.Chandrika
6.Suseela
7.C.P.Sengottaiyan
8.P.Eswaramurthi ... Appellants

[Appellants 4 to 8 were brought on record as legal representatives of the deceased 1st appellant vide order dated 02.09.2021 made in C.M.P.Nos.11050, 11053 and 11054 of 2021 in S.A.No.449 of 2010]

versus

1.Kumarasamy
2.Balasubramaniam
3.Jagadeesan ...Respondents /Defendants 1 to 3

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 14.09.2009 made in A.S.No.48 of 2009 on the file of the learned I Additional Subordinate Judge, Erode, confirming the judgment and decree dated 30.06.2009 made in O.S.No.353 of 2007 on the file of the learned Principal District Munsif, Erode.

For Appellants : Mr.N.Sankaravadivel
For Respondents : Mr.S.Vadivel Murugan
for Mr.V.S.Sivasundaram



J U D G M E N T

Aggrieved over the concurrent findings made in A.S.No.48 of 2009 dated 14.09.2009 on the file of the learned I Additional Subordinate Judge, Erode and in O.S.No.353 of 2007 dated 30.06.2009 on the file of the learned Principal District Munsif, Erode, the appellants, who are the plaintiffs in the above referred suit, have preferred this Second Appeal, praying to set aside the findings rendered by the Court below.

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

3.The case of the plaintiffs, is as follows:

(i) The suit cart track is a common cart track belongs to both plaintiffs and defendants and the same was running in Survey Field i.e. R.S.Nos.384 and 385 in Thuyampoondurai Village, Erode Taluk. Vide Sale Deeds dated 27.10.1926 and 15.05.1941, the first plaintiff's father Rasagounder and the second plaintiff's father Karuppana Gounder, who are brothers, purchased an agricultural lands in old S.F.No.231 corresponding to R.S.No.382 in Thuyampoondurai Village. The third plaintiff's father purchased the land in Survey Field No.233 corresponding to R.S.No.382 under Sale Deed dated 20.02.1984. Ever since from the date of purchase, the plaintiffs and their forefathers used the suit common cart track to go to their land.

(ii) The common suit cart track in the rough plan at points A-B detached and run towards East. The common suit cart track shadowed in red colour, which runs about 500 feet from the point A-B to the point C&D, the suit cart track runs further East upto point E&F as shown in the rough plan. The plaintiffs land is situated North of the suit cart track from the point C&D. Immediately North of the suit cart track, at point 'W' as shown in the rough plan, the plaintiffs' well is situated. South of the well, there was a North-South pathway to reach the plaintiffs' land. TNEB Electric Transformer is situated in the lands belongs to the first defendant and in either side of the said Transformer, there was Electric Post at the distance of 50 feet in East and West. The Transformer was marked as T, in the rough plan and both the Electric Post were marked as P1, P2. Immediately, West of the P1 Electric Post, there was a cart track towards South at point K-L. The width of suit common cart track is 18 feet from A, B to C-D and CD to EF



the width of the suit cart track about 15 feet.

(iii) On either side of the suit cart track i.e. on Southern side and Northern side, there are about 80 coconut trees in the height of 25 feet. The suit cart track is situated in between two rows of the coconut trees. The age of the coconut trees would be about more than 30 years old.

(iv) The first defendant is owning land immediately on the South of the cart track from the point P1 upto point E-F. He has raised plantain trees near the Transformer "T". Further, East of it, he has raised sugarcane crops, which is about two months old. On the South of the first defendant's land, defendants 2 and 3 are owning lands. The defendants 2 and 3 are father and son respectively. They have put up a Thondupatti in Western portion of their land for tethering cattle. For reaching the said Thondupatti, there is a cart track from the point K-L. The defendants 2 and 3 raised sugarcane crops immediately East of their Thondupatti.

(v) When at the time, the third plaintiff while driving his tractor in suit cart track, on 07.05.2007, the defendants along with their henchmen attempted to prevent the third plaintiff from taking his tractor in the suit cart track and also proclaimed except the defendants, the plaintiffs have no right to use the suit cart track. The plaintiffs and their forefathers have perfected the title in using the suit cart track by way of easement by prescription and also by easement of necessity, as they have no cart track other than the suit cart track to reach their lands. Hence, the present suit has been filed for the relief of declaration, declaring that the plaintiffs are entitled to use the suit cart track and permanent injunction restraining the defendants in any manner in interfering in the plaintiffs' right in using the suit cart track.

4.The case of the defendants, is as follows:

(i) It is true that the first plaintiff's father Rasagounder and the second plaintiff's father Karuppanna Gounder are brothers and also, it is true that, they are having agricultural lands in R.S.No.382 of Thuyam Poondurai Village. On 20.02.1984, the third plaintiff's father, namely, Ramasamy Gounder purchased a portion of the property upto an extent of 10½ cents of punjai acres in old S.F.No.233 of Thuyam Poondurai Village for the purpose of cart track. It is denied that the forefathers of the plaintiffs 1 and 2 were using the suit cart track, since from 1926 onwards. They were having access in the



Eastern side of their lands alone and they never used the suit cart track, which is in the exclusive use of the defendants family. The extent of suit cart track in its length and breath described in the plaint, is completely incorrect.

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(ii) The first defendant certainly asserts that, those plaintiffs are not having any lawful continuity in the path and uninterrupted track to go through the Western side as alleged in this plaint. It is not correct to say that the common suit cart track runs about 500 feet from the point of village metal road and upto the Northern side of the first plaintiff's land as described in their plaint plan. The width of suit common cart track i.e. 18 feet from AB, CD and CD to F, the width of the suit cart track about 15 feet, are all utter false and an unadulterated lie.

(iii) The rough plan annexed with the plaint, is not correct. Those plaintiffs are having their access to go to the main road in Eastern side of their lands, there is no need at all to come in Western side to transport their agricultural products. That too, it is quite impossible to ply heavy vehicles, trucks in Western side of their lands in the suit cart track. It is not correct to say that, on 07.05.2007, the defendants along with their men attempted to prevent the third plaintiff from taking his tractor in the suit cart track. Further, it is not correct to say that, the plaintiffs forefathers have been using the suit cart track by taking cart etc. from time memorial. Out of jealous, the present suit has been filed. Hence, the suit filed by the plaintiffs, is liable to be dismissed.

5. Based on the above said pleadings, the learned Principal District Munsif, Erode, framed necessary issues and tried the suit. On the side of the plaintiffs, plaintiffs 1 and 3 themselves examined as P.W.1 and P.W.2 respectively and marked 11 documents, as Ex.A.1 to Ex.A.11. On the side of the defendants, second defendant Balasubramaniam was examined as D.W.1, on their side, one Thulasimani was examined as D.W.2 and 3 documents were marked, as Ex.B.1 to Ex.B.3. Further, the Report and Plan submitted by the learned Advocate Commissioner were marked as Ex.C.1 and Ex.C.2.

6. Having considered the materials placed before him, the learned Principal District Munsif, Erode, vide judgment and decree dated 30.06.2009, dismissed the suit filed by the plaintiffs. Aggrieved over the same, the plaintiffs preferred an appeal in A.S.No.48 of 2009. By judgment and decree dated 14.09.2009, the learned I Additional Subordinate Judge, Erode,



dismissed the appeal and confirms the findings arrived at by the trial Court.

7. Feeling aggrieved over the said findings of the Court below, the plaintiffs, are before this Court with the present Second Appeal. When the Second Appeal is taken up for admission, this Court formulated the following substantial questions of law;

"1. Whether the finding of the Courts below that the appellants / plaintiffs do not have a right to use the suit cart track as a common cart track is perverse ?

2. Whether the Courts below have committed an error in law in holding that the suit is bad for non-joinder of necessary parties as the owners of the land abutting the suit cart track have not been made parties to the suit ?."

8. It is the case of the plaintiffs that the first plaintiff's father Rasagounder and the second plaintiff's father Karuppana Gounder are brothers, they purchased an agricultural lands in old S.F.No.231 corresponding to R.S.No.382 in Thuyampoondurai Village under Sale Deeds dated 27.10.1926 and 15.05.1941 [Ex.A.1 and Ex.A2]. Similarly, the third plaintiff's father purchased the land in Survey Field No.233 corresponding to R.S.No.382 under Sale Deed dated 20.02.1984 [Ex.A3]. It is the further case of the plaintiffs that, ever since from the date of purchase, they used the suit cart track for ingress and egress their respective lands and also, they used the suit cart track to take cattle etc. to their respective property.

9. In this occasion, it is an admitted case on either side that, from the suit cart track, there was a pathway in K-L of the suit plan, which was there to reach the defendants lands, and abutting the said North South pathway, there was a cattle shed, which was put up by the defendants. In otherwise, abutting the suit cart track, there was a well in the plaintiffs land and on the South of the said well, there was a South to North pathway from the Point D.

10. In the said circumstances, it is the contention raised by the plaintiffs that, from the date of purchase, i.e. 1926 onwards, the plaintiffs used the suit cart track for reaching their lands. On the other hand, it is the contention raised by the defendants that, the suit cart track



has been enjoyed by themselves alone. In this regard, it is the evidence given by the plaintiffs that, the persons, who are having land abutting the suit cart track from the point AB to CD have not raised any objection to use the cart track by the plaintiffs at any time and hence, the plaintiffs using the cart track from time immemorial. Though the said evidence given by P.W.1 is denied on the side of the defendants, in order to prove their stand, the defendants have not examined those persons i.e. Paramasivam, Velusamy and Duraisamy as a witness to the defendants.

11.Further, it is an admitted fact that, the suit cart track has not been subdivided during the time of resurvey. Hence, the said situation probalised the fact that the above referred 3 persons are the owners of the suit cart track. Therefore, in the absence of any resistance from the owners of the land wherein the suit cart track runs, it is not necessary for the plaintiffs to add them, as a party to the proceedings. Accordingly, in view of the above, I am of the opinion that, non-impleading the said Paramasivam, Velusamy and Duraisamy, who are the land owners, to the land found abutting the suit cart track, is not fatal to the case of the plaintiffs.

12.Now, on going through the judgment rendered by the Court below, it is the specific finding that the plaintiffs claimed the suit cart track by way of easement by prescription and also by necessity and hence, the same is nothing but fatal to the case of the plaintiffs and accordingly, the relief of declaration and injunction sought for by the plaintiffs, cannot be entertained.

13.Now, on considering the said findings with the pleadings set out in the plaint, it is true that, the plaintiffs claimed the right over the suit cart track by saying that, they have perfected title to use the suit cart track by way of easement by prescription and necessity. Though, it was pleaded that, the plaintiffs entitled the suit cart track by way of necessity, in order to show the ingredients for easement by necessity, the plaintiffs does not plead anything about the common ancestor and other things. The wordings set out in the plaint, para 11 would disclose that, the plaintiffs claim is only upon the enjoyment in the suit cart track and not by way of necessity.

14.Of course for acquiring the right by way of easement by prescription, the plaintiffs must show the following three necessary ingredients; (i) right must be definite and certain; (ii) right must have been independently enjoyed without any agreement with the servient owner; (iii) must be enjoyed



openly, peacefully and as of a right without any interruption for a continuous period of 20 years and in respect of any Government land the period of non-interruption shall be 30 years. In this aspect, it is the evidence given by P.W.1 and P.W.2 that the land owners, who are all having the lands abutting the suit cart track did not raise any objection for using the suit cart track. Only the defendants raised objection that the plaintiffs not having any right to use the suit cart track.

15. In this occasion, it is useful to see the Report and Plan i.e. Ex.C1 and Ex.C2 filed by the learned Advocate Commissioner wherein the learned Advocate Commissioner stated that the suit cart track runs from West to East as narrated in the plan appended with the plaint. In otherwise, the report filed by the learned Advocate Commissioner narrates the fact that on the Southern side of the suit cart track, the defendants are having the land and on the other hand, on the Northern side of the suit cart track, the plaintiffs are having land. Further, on either side of the cart track, there was coconut trees in the row, which are all having the age nearly around 25 years. Therefore, the same probabilise the fact that, the suit cart track was in existence for the past 25 years. In view of the above, since the forefathers purchased the property in the year 1926, it should be presumed that, the plaintiffs used the suit cart track from the date of purchase. Further, in respect to the Report filed by the learned Advocate Commissioner, the defendants had not filed any objection. Though the defendants filed petition to appoint another Advocate Commissioner, the same was not entertained by the trial Court and against which, the defendants did not take any Revision before this Court.

16. Therefore, absolutely it is necessary to uphold the Report filed by the learned Advocate Commissioner wherein the same probabilise the fact that, the plaintiffs used the said cart track from the date on which their forefathers purchased the property, without any interruption. Further, the photographs taken by D.W.2 also confirms the same that, the suit cart track runs from the village metal road and reach the plaintiffs and defendants land. It is a settled law having the alternative way is no bar for claiming a right by way of easement by prescription. In fact, due to the use of the suit cart track by the plaintiffs, the persons viz. Paramasivam, Velusamy and Duraisamy may be the aggrieved persons, in otherwise, the defendants are not an aggrieved person, due to the reason that, the defendants land are situated on the Southern side of the suit cart track, it cannot be said that,



using the suit cart track by the plaintiffs would affect the defendants enjoyment. The Court below, without considering those aspects came to the concurrent findings that, the plaintiffs are not proved their case.

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17.Hence, in the light of the above said submissions, I am of the considered opinion that, the said findings rendered by the Courts below are nothing but perverse and accordingly, the substantial questions of law 1 and 2 are answered affirmatively in favour of the appellants and accordingly, the Second Appeal is allowed, by setting aside the judgment and decree of the Court below and the suit is decreed as prayed for. Consequently, connected Miscellaneous Petition is closed. However, there is no order as to costs.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

sri

To

1.The I Additional Subordinate Judge,
Erode.

2.The Principal District Munsif,
Erode.

Copy To

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

+1cc to Mr.Sankaravadivel, Advocate SR.No.60604

+1cc to Mr.Sivasundaram, Advocate SR.No.60585

S.A. No.449 of 2010
and M.P. No.1 of 2011

MG(CO)
GN(23/12/2021)