



WEB COPY



S.A.No.675 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.12.2023

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.675 of 2017
and C.M.P.No.17505 of 2017

1.Masthiappan @ Rajan

2.Santha

3.Nagarathinam

... Appellants

vs.

1.Venkatachalam @ Ravi

2.Sivabagiyam (died)

3.Anusuya

4.N.Mani

5.M.Divyatharani

... Respondents

(R2 Died, R4 and R5 are brought on record as legal representatives of the deceased R2 vide Court order dated 07.11.2023 made in C.M.P.Nos.25104, 25107 and 25108 of 2023 in S.A.No.675 of 2017)

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree passed in A.S.No.36 of 2016 by the Sub-Court, Sathyamangalam dated 17.04.2017 reversing the judgment



S.A.No.675 of 2017

and decree made in O.S.No.3 of 2015 on the file of the District Munsif Court, Sathyamangalam dated 09.08.2016.

For Appellants : Mr.R.Babu
for M/s.B.Kumarasamy

For R1, R3, R4
and R5 : Mr.K.Govi Ganesan

For R2 : Died

J U D G E M E N T

The unsuccessful defendants are the appellants. The respondents 1 to 3/plaintiffs filed a suit for declaration of title and permanent injunction in respect of the suit cart track. The suit was dismissed by the Trial Court and the appeal filed by the respondents 1 to 3/plaintiffs was allowed by the First Appellate Court. Therefore, the unsuccessful appellants/defendants are before this Court.

2. According to the respondents 1 to 3/plaintiffs, the great Grandfather of the plaintiffs namely Kariappa Gowder entitled to 7.43 acres of Punja Land in Old S.F.No.102 by virtue of a registered Sale Deed dated 02.07.1916. After his death, his three sons namely Ajjappa Gowder, Borusamy Gowder and Lingappa Gowder orally divided the suit property. In the said partition, 1/3rd share on the eastern side was allotted to Lingappa



S.A.No.675 of 2017

Gowder and he sold his share in favour of his brother Ajjappa Gowder by a registered Sale Deed dated 11.02.1924. Later, the said Ajjappa Gowder and Borusamy Gowder divided their entire family properties orally and Ajjappa Gowder was allotted 3.97 acres in Old S.F.No.102, which was subsequently subdivided and given new subdivision number as S.F.No.102-B. The remaining Punja Land measuring to an extent of 3.46 acres in Old S.F.No.102 was allotted to Borusamy Gowder, which was subdivided as S.No.102-A. It was further averred by the respondents that after death of Borusamy Gowder, his sons namely C.B.Maranna Gowder, C.B.Kariyappa Gowder (junior) and C.B.Nanjappa Gowder had divided their properties under a registered Partition Deed dated 23.04.1976. In the said Partition Deed, C.B.Kariyappa Gowder was allotted the above said Punja Land measuring to an extent of 3.46 acres in Old S.F.No.102-A and other land. The said C.B.Kariyappa Gowder died intestate on 16.12.2004, leaving behind the respondents 1 to 3/plaintiffs and his wife namely Savithiri as his legal heirs. After death of Savithiri, the respondents 1 to 3/plaintiffs have been enjoying the suit property. The respondents 1 to 3/plaintiffs are having permanent residence in the above said land and they are having access to the said land from Bannari Main Road on the northern side through the suit cart



S.A.No.675 of 2017

track running through the land of the appellants/defendants. The respondents have no other alternative way to approach their land except the suit cart track from the main road. The suit cart track has been in existence for more than 80 years. The appellants/defendants wanted to acquire the properties of the respondents for a throw away price. When the same was refused by the respondents, appellants attempted to interfere with the right of the respondents to use cart track running through the land of the appellants. Therefore, the respondents were constrained to file a suit for above said relief.

3. The 1st appellant/1st defendant filed a written statement and the same was adopted by other appellants 2 and 3. According to the appellants, when sons of Borusamy Gowder divided his share under Ex.A4 dated 23.04.1976 a separate cart track was formed to reach their land through the properties of the third parties and the same has been referred to specifically in 1976 document. Therefore, the respondents have got alternative cart track to reach their land from Bannari Main Road through the properties of third parties as referred to in 23.04.1976 document. The appellants specifically denied the existence of cart track in their land in S.No.102-B. The other



S.A.No.675 of 2017

averments of the respondent regarding continuous user of suit cart track has also been denied by the appellants. It was asserted by the appellants that all along the respondents had been using the cart track referred to in Partition Deed dated 23.04.1976. The same has been described in the plan appended in the written statement. On these pleadings, the appellants sought for dismissal of the suit.

4. The Trial Court on appreciation of oral and documentary evidence available on record, came to the conclusion that existence of suit cart track as alleged by respondents 1 to 3/plaintiffs itself was doubtful and consequently, dismissed the suit. Aggrieved by the same, the respondents 1 to 3/plaintiffs preferred an appeal in A.S.No.36 of 2016 on the file of Sub Court, Sathyamangalam. The First Appellate Court on re-appreciation of evidence available on record, came to the conclusion that existence of suit cart track had been proved by the respondents 1 to 3/plaintiffs by referring to Exs.A14 and A16. Therefore, the First Appellate Court reversed the findings of the Trial Court and allowed the appeal. Aggrieved by the same, the appellants/defendants have come by way of this second appeal.

5. At the time of admission, this Court formulated the following



S.A.No.675 of 2017

substantial questions of law:-

WEB COPY

“(a) Whether the appellate court was right in granting the relief of easementary right which obviously do not exist physically and there is documentary evidence that a 15 feet cart track is in existence according to the recitals in the partition deed in the year 1976.

(b) Whether the courts below was right in appointing Advocate Commissioner without hearing the appellants even before issues were framed thus facilitating evidence gathering to one of the litigant.”

6. Mr.R.Babu, learned counsel appearing for the appellants submitted that when existence of alternative pathway available to reach the respondents' land has been proved by recital in Ex.A4-Partition Deed dated 23.04.1976 entered among the fore-fathers of the respondents, the suit filed by the respondents/plaintiffs seeking declaration of easementary right based on necessity is liable to be dismissed. The learned counsel further submitted that the Advocate Commissioner's report and plan clearly established that the existence of alternate pathway as pointed out by the defendants and the physical existence of suit cart track in the land of the appellants is very much doubtful. The learned counsel further submitted that the First Appellate



S.A.No.675 of 2017

Court without taking into consideration the Ex.A4 and the Advocate Commissioner's report and plan in proper perspective came to the conclusion that the respondents proved their case of easement of necessity.

7. Mr.K.Govi Ganesan, learned counsel appearing for the respondents/plaintiffs submitted that the First Appellate Court based on Exs.A16 and A14 came to the conclusion that the existence of suit cart track in the land belonging the appellants had been proved and the same is based on proper appreciation of evidence available on record. The learned counsel further submitted that when the Advocate Commissioner visited the suit property immediately after filing of the suit, he had not noted any existence of alternate pathway. The same was noted only in his subsequent visit. In these circumstances, the existence of alternate pathway pointed out by Advocate Commissioner is very must doubtful.

8. The respondents/plaintiffs specifically pleaded that suit cart tract is the only access to reach their land from Bannari Main Road and there was no other alternative cart track to reach their land. However, the said averment of the respondents got falsified by Ex.A4 and Advocate



S.A.No.675 of 2017

Commissioner's report and plan. Ex.A4 is a Partition Deed entered among fore-fathers of the respondents namely Borusamy Gowder and his sons namely C.B.Maranna Gowder, C.B.Kariyappa Gowder (Junior) and C.B.Nanjappa Gowder. In the said document, there is a clear recital that there is a cart track from Sathi Bannari Road leading to respondents property in S.No.102-A through S.No.103/C. It is also mentioned that width of the cart track was 15 feet. The relevant recital in Ex.A4 reads as follows:-

“சத்தி பண்ணாரி ரோட்டிலிருந்து க.ச.103/சி 98 நெ. சாலைகளில் 15 அகலத்தில் போட்டிருக்கும் புதிய வண்டித்தடம் நம்மாள் மீவரும் பொதுவாக பாத்தியப்பட்டது என்றும், நம்மருக்கு க.ச.97, 102ஏ, 100பி நெ சாலைகளில் கிணற்றில் பொருத்தியிருக்கும் மின்சார மோட்டார்கள் சர்வீஸ்கள் முறையே 9.11 மற்றும் 270 உள்ளதை தமக்கு பிரிந்த கிணற்றில் உள்ள மின்சார மோட்டார்கள் அவரவர்களுக்கு அந்தந்த மோட்டார் சர்வீஸ்களை அவரவர் பெயருக்கு மாற்றிக் கொள்ளத்தக்கது என்று தீர்மானித்து எழுதப்பட்டிருக்கிறது.”

9. Therefore, the Partition Deed entered among the fore-fathers of the respondents/plaintiffs clearly established that there was a cart track to reach respondents' property through third party land in S.No.103/C. The said document clearly falsifies the easement of necessity pleaded by the respondents. The 15 feet cart track referred to in Ex.A4 was fortified by



S.A.No.675 of 2017

Advocate Commissioner's report and plan marked as Exs.C3 and C4.

Though in his first report and plan Exs.C1 and C2, Advocate Commissioner failed to note down any existence of alternative pathway, the same cannot be put against the defendants because the first visit of the Advocate Commissioner was made immediately after filing of the suit before service of summons of the defendants. After appearance of the defendants, at his request, the warrant was reissued to the Advocate Commissioner and in the presence of both the parties, he visited the suit property and noted the existence of alternate pathway on the eastern side of the respondent's land. The Advocate Commissioner also noted that the width of the cart track was 15 feet which more or less tallies with the width of the cart track mentioned in Ex.A4. Therefore, recitals in Ex.A4 coupled with Exs.C3 and C4 clearly establish there exist a cart track on the eastern side of the respondents' property, which leads to Bannari Main Road through lands of third parties. In such circumstances, the plea of easement of necessity raised by the respondents is liable to be rejected.

10. Though the respondents also claimed that the suit cart track had been in existence for the past 80 years, the respondents failed to lead any



S.A.No.675 of 2017

acceptable evidence in this regard. In fact, the Advocate Commissioner in his report noted the existence of suit cart track over the defendants property.

However, in his report, he clearly mentioned there are lot of ups and down in the alleged cart track. In these circumstances, the cart track noted by the Advocate Commissioner cannot be treated as a regular cart track, which had been used for more than 80 years.

11. It was submitted by the appellants that a pathway leading to the respondents' land without permission by the appellants had been projected to be the cart track. In the absence of any reference to suit cart track in Ex.A4-Partition Deed entered among the fore-fathers of the respondents, this Court is unable to accept the plea of the respondents that they had been using suit cart track for more than 80 years.

12. The First Appellate Court based on Exs.A16 and A14 rendered a finding the existence of suit cart track has been proved. A perusal of Ex.A16 would suggest the recital in the said document refers to a cart track in S.No.105/A on the eastern side and southern side. The recital clearly refers to a North-South Cart Track on the eastern side and east-west Cart Track on



S.A.No.675 of 2017

the southern side. Therefore, it appears to be a 'L' shape cart track in S.F.No.105/A. However, the suit cart track claimed by the respondents is not a 'L' shaped cart track, it is a North-South Cart Track from Bannari Main Road to respondents' land. Hence, the cart track referred to in Ex.A16 cannot be treated as the one referring to the suit cart track. Ex.A14 is survey plan for S.No.543 but not for suit survey number. In Ex.A10, survey plan for suit Survey No.542, there is no reference about suit cart track.

13. In these circumstances, the findings reached by the First Appellate Court as if, the existence of suit cart track has been proved by reference in Ex.A16 is not acceptable to this Court. Accordingly, the substantial questions of law framed at the time of admission are answered in favour of the appellants and against the respondents. Therefore, the Second Appeal is allowed by setting aside the judgment and decree passed by the First Appellate Court.

In Nutshell:-



S.A.No.675 of 2017

WEB COPY

(i) The Second Appeal is allowed by setting aside the judgment and decree passed by the First Appellate Court.

(ii) The judgment and decree passed by the Trial Court is restored.

(iii) Consequently, the connected civil miscellaneous petition is closed.

(iv) In the facts and circumstances of the case, there shall be no order as to costs.

19.12.2023

Index : Yes/No
Speaking order : Yes/No
Neutral Citation : Yes/No
dm



S.A.No.675 of 2017

To

WEB COPY

- 1.The Sub-Court,
Sathyamangalam.
- 2.The District Munsif Court,
Sathyamangalam.



WEB COPY



S.A.No.675 of 2017

S.SOUNTHAR, J.

dm

S.A.No.675 of 2017

19.12.2023