



S.A. No.745 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14.03.2024

Pronounced on: 22.03.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No. 745 of 2018

and

CMP. No.21555 of 2018

- 1.Somasundarasamy Gounder
- 2.Sakthivadivelmoorthy

...Appellants

Vs.

1. Ramasamy
2. Chandrasekaran
- 3.Gunasekaran

...Respondents

PRAYER : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and decree dated 26.04.2017 made in A.S. No.35 of 2015 on the file of the Subordinate Court, Dharapuram and reversing the Judgment and Decree dated 19.08.2015 made in O.S. No.278 of 2011 on the file of the District Munsif Court, Dharapuram.

For Appellants : Mr.B.Vijayakumar,
and Mr.R.Babu

For Respondents : Mr.T.Murugamanickam,
Senior Counsel foreclosure
Mr.R.Prabakar for R1 & R2
No Appearance for R3

JUDGMENT



The plaintiffs who suffered reversal findings in a suit for declaration and permanent injunction before the First Appellate Court, after having succeeded before the Trial Court, are the appellants.

2. The parties are described as per their litigative status before the trial Court.

3. The brief facts of the case is as follows:

3.1. The case of the plaintiff is that originally the property comprised in R.S.122/6, measuring 4.54 acres belonged to the first plaintiff and the father of the first defendant in O.S. No.109 of 1957. The property was divided into 4 equal shares. S.F. No.180D, namely New RS.No.122/6, was divided into two halves and western half was allotted to the family of the first plaintiff and the eastern half was allotted to the first defendant. According to the plaintiffs, they had land beyond the eastern half situated in S.F. No.178/1 and in order to reach the same, a cart track was formed on the north of S.F.180D to branch eastwards from north south itteri and according to the plaintiffs, even in the partition deed dated 07.02.1985, the suit cart

track was defined and has been in existence from time immemorial and the plaintiffs and defendants are using the same to reach their respective houses.

Further, according to the plaintiffs, since the defendants restrained the plaintiffs from using the cart track by dumping stones, they have come forward with the suit for declaration and permanent injunction.

4. The suit claim was resisted by the defendants 1 and 2 stating that there was no partition between the family of the plaintiffs and defendants 1 and 2 and the father of the defendant had only purchased the eastern portion in S.F. No.180D from one Samiyappa Gounder on 03.04.1957. According to the defendants, the suit cart track is only to enable the defendants 1 and 2 to reach their eastern portion of S.F.No180D and the plaintiffs have no right to use the said cart track. The plaintiffs and the third defendant have fraudulently included the cart track in their family partition deed dated 15.12.2009 and the same would not bind the first and second defendants. The defendants have also stated that they have only permitted the plaintiffs to use the cart track for the school van to pick up the children in the plaintiffs' family, in order to avoid a circuitous route. According to the defendants, the plaintiffs cannot claim any easementary right over the suit cart track also and the suit was liable to be dismissed.



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5. The Trial Court, taking note of the evidence of D.W.1, that the cart track was in existence for more than 60 years and coupled with the fact that the Advocate Commissioner has found a well beaten cart track, proceeded to hold that the plaintiffs were entitled to use the said cart track and decreed the suit. On Appeal preferred by the defendants, the First Appellate Court reversed the findings of the trial Court and dismissed the suit for declaration and permanent injunction.

6. Aggrieved by the reversal findings rendered by the First Appellate Court, the plaintiffs have preferred the above Second Appeal. On 06.12.2018, the above Second Appeal was admitted on the following two substantial questions of law:-

“ (a) Whether the Lower Appellate Court is right in reversing the finding of the trial Court that the suit cart track is a common cart track when the same was clearly proved by the appellants by oral and documentary evidence above all on the basis of the commissioner's findings in his report and plan?

b) Whether the Lower Appellate Court is correct in allowing the appeal on the ground that, the property in survey No.180D on the eastern side have been owned by different owners while the appellants have been continuously and uninterruptedly using the cart track?”

7. I have heard Mr.B.Vijayakumar, learned counsel and Mr.R.Babu,



learned counsel for the appellants and Mr.T.Murugamanickan, learned Senior Counsel for Mr.R.Prabakar, learned counsel for the respondents 1 and 2.

8. The learned counsel for the appellants would submit that the Trial Court had clearly found the existence of the cart track and the defendants themselves had admitted that the cart track had been in existence for over 60 years and rightly decreed the suit. The learned counsel would also invite my attention to the partition deed under Exhibits A1 where there is a clear reference to the suit cart track. The learned counsel for the appellants would submit that the First Appellate Court has erroneously reversed the well considered findings of the Trial Court, especially, when the defendants had admitted to the plaintiffs' usage of the cart track even in their written statement. The learned counsel would also refer to the suit relief and states that the plaintiffs are not seeking any separate cart track but only common enjoyment of the suit cart track to reach their property. The learned counsel for the appellants would therefore, pray for the Second Appeal being allowed, answering the substantial questions of law in favour of the appellants.



9. Per contra, Mr.T.Murugamanickan, learned Senior Counsel appearing for the respondents 1 and 2 would submit that admittedly, when the defendants were not parties to Exhibits A1 to A4, the recitals in those documents regarding the suit cart track cannot bind defendants 1 and 2. He would also refer to the discussion made by the Trial Court with regard to easement by prescription, easement of necessity and challenge the same, since it was not even the plaintiffs' case that the plaintiffs had acquired an easement by prescription or that the usage of the suit cart track was of utmost necessity for the plaintiffs. The learned Senior Counsel would submit that mere existence of cart track would not entitle the plaintiffs to declaration as prayed for and the burden was on the plaintiffs to prove that they have been enjoying the cart track as a common cart track which they have miserably failed to establish.

10. The learned Senior Counsel would also invite my attention to the findings of the Advocate Commissioner that the plaintiffs had an access to reach the main road. That apart, he would also specifically refer to the permission granted by the defendants, which was also pleaded in the written statement, to the plaintiffs to permit the school van to use the suit cart track for picking up school going children in the plaintiffs' family. He would also



point out that there has been no denial or even a suggestion of this specific averment made in the written statement which would only go on to prove that the defendants alone were entitled to the suit cart track. He would invite my attention to cross examination of P.W.1, where plaintiffs have categorically admitted that the suit cart track access was available only with the defendants 1 and 2. The learned Senior Counsel would also state that even when the defendants laid pipelines beneath the suit cart track, the plaintiffs never raised any objections and if really the plaintiffs were co-owners, they would have objected to the defendants laying pipelines.

11. I have carefully considered the rival submissions advanced by the learned counsel for the appellants and the learned Senior Counsel for the respondents 1 and 2.

12. As rightly contended by the learned Senior Counsel for the respondent 1 and 2, mere existence of suit cart track would not automatically lead to the presumption that the plaintiffs have a right to use said cart track. The plaintiffs have to independently establish that the said cart track was being used by them from time immemorial as claimed by them, or that it was absolutely necessary for them to use the said cart track



for reaching their property, or atleast that under document, there has been a grant of easement, namely use of the suit cart track. In this regard, though the plaintiffs have relied on Exhibits A1 to A4, admittedly, the defendants 1 and 2 are not parties/signatories to these documents. Therefore, it would not bind the defendants 1 and 2. Further, the properties also do not appear to be originally belonging to a common ancestor.

13. Though the plaintiffs approached the Court setting out a case that the entire property was held in common, the defendants have stoutly denied the same and stated that their vendor Samiappa Gounder, had purchased 2.27 acres in S.F. No. 180D from Gurusamy and others on 04.09.1951 and another extent of 2.27 acres in the same survey number on 11.04.1956 and from the said Samiappa Gounder, alone the father of the first defendant purchased the eastern portion of 2.27 acres. Thus, the case of the plaintiffs that properties originally belonged to joint family is falsified and the plaintiffs have chosen to twist material facts, even at the time of approaching the Court.

14. The plaintiffs have not been able to substantiate that they have been using the suit cart track. In fact, when the defendants had specifically



set out in the written statement that they have permitted the plaintiffs to use the cart track when the plaintiffs' family had school going children, to enable the school van to avoid a circuitous route, there was no rebuttal evidence on the side of the plaintiffs. Admittedly, after the children grew up and completed school, there was no requirement for the plaintiffs to even continue to take advantage of the permission granted by the defendants 1 and 2. It is also shown that the defendants have been enjoying the suit cart track exclusively by laying pipelines below the suit cart track. Further, the admissions of P.W.1 also do not help the plaintiffs' case. P.W.1, has clearly admitted that the suit cart track is being accessed only by defendants 1 and 2. Even on perusal of the Advocate Commissioner's report, I find that the plaintiffs have an access to reach the Main Road without any requirement to use the suit cart track.

15. The First Appellate Court has rightly assessed the oral and documentary evidence in the light of the pleadings of the parties, by way of plaint and written statement and reversed the erroneous findings arrived at by the Trial Court that mere existence of the suit cart track would entitle the plaintiffs to declaration that the suit cart track was a common cart track. I do not find any illegality or perversity in the findings arrived at by the First Appellate Court, warranting interference under Section 100 Code of Civil



S.A. No.745 of 2016

Procedure, 1908.

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16. Accordingly, this Second Appeal is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. No costs.

22.03.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No.
Speaking order/Non-speaking order
rkp
To
1. The Subordinate Judge, Dharapuram.
2. The District Munsif Judge, Dharapuram.

P.B.BALAJI, J.

rkp

Pre-delivery Judgment in



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