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S.A.No.1115 of 20



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.10.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A.No.1115 of 2003

Arumugam ... Appellant/Appellant/Plaintiff

Vs.

1.Kamuthai ... 3rd Defendant/1st Respondent/
1st Respondent

2.Vellaiammal

3.Jeyammal

4.Chinnaiya

5.Dharman

6.Karupayee

... Respondents 2 to 6/
Respondents 3 to 6/
Defendants 4 to 8

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 26.06.2001 passed in A.S.No.55 of 1998 on the file of the Additional Sub Court, Dindigul, confirming the judgment and decree dated 18.03.1997 passed in O.S.No.1654 of 1990 on the file of the II Additional District Munsif Court, Dindigul.

For Appellant : Mr.V.K.Vijayaraghavan

For RR 3 to 6 : Mr.P.Thiyagarajan



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JUDGMENT

The Judgments and decrees passed in O.S.No.1654 of 1990 on the file of the II Additional District Munsif Court, Dindigul and in A.S.No.55 of 1998 on the file of the Additional Sub Court, Dindigul, are being challenged in the present Second Appeal.

2.The appellant herein as plaintiff instituted a suit in O.S.No.1654 of 1990 on the file of the trial Court against the respondents/defendants seeking for the relief of declaration that the plaintiff is entitled to the rights and for an injunction restraining the defendants from preventing the above use by the plaintiff. Further, the suit was also amended for mandatory injunction for reconstruction of the cart track.

3.For the sake of convenience, the parties are referred to herein, as described before the trial Court.



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4. According to the plaintiff, Survey No.659/1, 5 acres 42 cents with a well and an electric motor, Survey No.622/1, 1 acre 33 cents and Survey No.559/2, 6 cents with the usual footpath, vari, vaikkal, irrigation channel, mavadi, maravadai rights belonged to Venthu Moopanar, father of the plaintiff and the defendants 1 and 2. After his death in the year 1971, the plaintiff and the defendants 1 and 2 orally partitioned the property among themselves. In that partition, the plaintiff was allotted 1 acre 73 cents in Survey No.622/1, 21 cents in Survey No.659/1 and 6 cents in Survey No.659/2. On 29.08.1974, the plaintiff mortgaged his property to one Chellammal, who assigned it to Kumaravel. After that, the plaintiff leased it to a cultivating tenant Gopal. The plaintiff has mortgaged the property to Subramania Moopanar, who was in possession. The oral partition was reduced to a registered written partition deed on 25.03.1987. According to the said oral partition, the plaintiff was entitled to take water from the common well through an irrigation channel indicated as 'ABCDE' in the rough plan and also through another channel indicated as 'ARS'. Similarly, the plaintiff was entitled to a right of pathway and cart track over the path indicated in the rough sketch as 'WXYZ'. Neither the defendants nor others can prevent such use. In these circumstances, the third defendant claimed that the second defendant had fabricated a false



document in the third defendant's favour, in which, the third defendant intended to demolish the cart track and irrigation channel. The plaintiff was not bound by any agreement between the defendants. In the suit property belonging to the second defendant, there was a burial ground of their ancestor and a Temple, where the plaintiff and the defendants offered their prayers periodically. During the pendency of the suit, the defendants 1 and 2 died. Hence, the defendants 4 to 8 were impleaded as their representatives. Hence, the plaintiff has filed the said suit for the abovestated relief.

5.The third defendant had filed a written statement and admitted that the suit property originally belonged to one Venthu Moopanar and also admitted the oral partition. The third defendant was the purchaser of the sharers of the first defendant. However, all transactions of the plaintiff's share through othi or tenancy were denied. The existence and irrigation right of the plaintiff through 'ABCDE' channel and 'ARS' channel was also in damaged state. But the cart track 'WXYZ' was non-existence and was never in existence and it is only created by the collusive registered partition between the plaintiff and the other defendants, who are all brothers, to defeat the interest of the third defendant. It has been created subsequent to the



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sale by the second defendant to the third defendant. There was no temple in the suit property as alleged. The third defendant never obstructed the irrigation channel and no cause of action had arisen.

6.The third defendant filed an additional written statement and stated that it was not true to say that the third defendant had destroyed 'WXYZ' cart track. The plaintiff had left for Delhi a long time ago. A Commissioner was appointed whose report would show that no such cart track ever exists. The Commissioner's report also confirms the claim. The rights given as per the partition deed are not correct. It was subsequent to the sale deed obtained by the third defendant. On the date of the agreement, the third defendant's vendor had no right to execute the above said deed and they colluded with the plaintiff and remained exparte. The description of the non-existing 'WXYZ' cart track was a pure imagination on the part of the plaintiff. The plaintiff is not entitled to any cart track through the easement of necessity or easement of prescription and prayed for the dismissal of the suit.

7.Before the trial Court, on the side of the plaintiff, he himself was examined as P.W.1 and Exs.A1 to A9 were marked. On the



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side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 was marked.

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8.On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has decreed the suit with regard to the declaration of the plaintiff's right over the well, irrigation channels and footpath and permanent injunction was granted with regard to the declaration. The suit was dismissed with regard to mandatory injunction and declaration for the right of cart track.

9.Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff herein as appellant, had filed an Appeal Suit in A.S.No.55 of 1998 on the file of the first Appellate Court.

10.The first Appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court.

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11.Challenging the said Judgments and decrees passed by the Courts below, the present Second Appeal has been preferred at the instance of the plaintiff as appellant.

12.At the time of admitting the present second appeal, this Court had framed the following substantial questions of law for consideration:

'1) Whether the Court below is right in negating the relief of declaration regarding cart track and for mandatory injunction viz., restoration thereof especially when it has been amply proved by Ex.A.4 and evidence of plaintiff?

2) Whether non-examination of the lessee of the plaintiff is fatal to the case of the plaintiff?'



13. Pending the Second Appeal, the plaintiff/appellant has filed a petition in C.M.P(MD)No.205 of 2024 in S.A.No.1115 of 2003 to accept the additional substantial questions of law and this Court, vide order dated 12.01.2024 allowed the petition, wherein the following additional substantial questions of law were raised for consideration:

'i) Whether the Courts below are right in rejecting the plea of declaration of plaintiff's right to the suit cart track and the consequential relief of injunction, especially when the plaintiff has established that when in case of division of property, one party for purpose of enjoying own property, has to have access to other portion of property, easement of necessity springs in existence and also he proved the existence of the suit cart track and the user thereof by the plaintiff?

ii) The non-consideration of the plaintiff's declaratory right and the user thereof by the lower Appellate Court without even framing the point for consideration is substantially erroneous in law?

iii) Whether the Courts below is right in negating the relief of declaration regarding cart track and for mandatory injunction viz., restoration



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thereof especially when it has been amply proved by Ex.A.4 and evidence of plaintiff?

iv) Whether non-examination of the lessee of the plaintiff is fatal to the case of the plaintiff?

v) Whether the plaintiff is not entitled to the right of pathway by easement of necessity and on the admission of D.W.1 the entire properties belong to Vendhu Moopanar and partitioned among his children?

vi) Whether the plaintiff is not entitled to the right of pathway by easement of necessity on the admission of D.W.1 who admits there is no other pathway to the plaintiff's property?'

14.The learned counsel appearing for the appellant/plaintiff would submit that the Court below failed to see that Ex.A.4-partition deed is only an affirmation of oral partition which has been accepted by parties and it is amply substantiated by the evidence of P.W.1 who speaks about the existence of cart track; the learned Judge has not considered the report of the Commissioner from proper perspective and coupled with the objections filed by the plaintiff to Commissioner's

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report, it would be seen that cart track was in existence and it was destroyed; the Court below failed to see that when the parties divided the properties the plaintiff got the eastern most portion and his access to the suit property can only through the cart track; the learned Judge ought to have seen that it is only the third defendant's father who has colluded with the third defendant by selling the property and entering into A4 partition deed, nevertheless the actual state of affairs has been spoken to by P.W.1 and the report of the Commissioner confirming the same.

15.The learned counsel appearing for the appellant/plaintiff would submit that the third defendant admitted in her written statement that the plaintiff's right over the well irrigation channels in 'ABCDE' and 'ARS' and also admitted the right to use the footpath adjacent to the above irrigation channel, which form part of the ridges to reach the plaintiff's property. On that basis, the trial Court passed the decree for an injunction restraining the defendants from making any obstruction for drawing water through the irrigation channels in 'ABCDE' and 'ARS' and the footpath over the ridges of the channel and dismissed the suit with regard to the mandatory injunction and prayed for allowing the Second Appeal.

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16.The learned counsel appearing for the appellant/plaintiff
relied upon the following Judgements:

*'i) In Koolan @ Munusamy Vs. Chennammal
reported in 2019 (2) MWN Civil 336;*

*ii) In Jasmine Ennasi Vs. Thaiyalnayagi Ammal and
others reported in 2019 (3) MWN (Civil) 568;*

*iii) In T.Sampath Kumar and others Vs.
K.Pushpalatha and others reported in 2018 (3) MNW
(Civil) 727;*

*iv) In R.Subbaiah Vs. Maheshwari and others
reported in 2021 (1) MWN (Civil) 79;*

*v) In Karmegam (died) and others Vs. Parvathi and
others reported in 2021 (3) MWN (Civil) 696;*

*vi) Kuruvilla Joseph and others Vs. Devagiri
Plantation Limited and others reported in 2021 (2) MWN
(Civil) 290 and*

*vii) Tamil Nadu Police Housing Corporation and
others Vs. R.Dhanalakshmi reported in 2018 (1) MWN
(Civil) 259.'*



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17. Heard the learned counsel appearing for the appellant/plaintiff and also perused the records carefully.

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18. According to the plaintiff, Survey No.659/1, 5 acres 42 cents with a well and an electric motor, Survey No.622/1, 1 acre 33 cents and Survey No.559/2, 6 cents with the usual footpath, vari, vaikkal, irrigation channel, mavadi, maravadai rights belonged to Venthu Moopnar, father of the plaintiff and the defendants 1 and 2. After his death in the year 1971, the plaintiff and the defendants 1 and 2 orally partitioned the property among themselves. In that partition, the plaintiff was allotted 1 acre 73 cents in Survey No.622/1, 21 cents in Survey No.659/1 and 6 cents in Survey No.659/2. On 29.08.1974, the plaintiff mortgaged his property to one Chellammal, who assigned it to Kumaravel. After that, the plaintiff leased it to a cultivating tenant Gopal. The plaintiff has mortgaged the property to Subramania Moopnar, who was in possession. The oral partition was reduced to a registered written partition deed on 25.03.1987. According to the said oral partition, the plaintiff was entitled to take water from the common well through an irrigation channel indicated as 'ABCDE' in the rough plan and also through another channel indicated as 'ARS'. Similarly, the plaintiff was entitled to a right of pathway and cart track over the path



indicated in the rough sketch as 'WXYZ'. Neither the defendants nor others can prevent such use. In these circumstances, the third defendant claimed that the second defendant had fabricated a false document in the third defendant's favour, in which, the third defendant intended to demolish the cart track and irrigation channel. The plaintiff was not bound by any agreement between the defendants. In the suit property belonging to the second defendant, there was a burial ground of their ancestor and a Temple, where the plaintiff and the defendants offered their prayers periodically.

19. According to the third defendant, she had admitted that the suit property originally belonged to one Venthu Moopnar and also admitted the oral partition. The third defendant was the purchaser of the shares of the first defendant. However, all transactions of the plaintiff's share through othi or tenancy were denied. The existence and irrigation right of the plaintiff through 'ABCDE' channel and 'ARS' channel was also in damaged state. But the cart track 'WXYZ' was non-existence and was never in existence and it is only created by the collusive registered partition between the plaintiff and the other defendants, who are all brothers, to defeat the interest of the third defendant. It has been created subsequent to the sale by the second



defendant to the third defendant. There was no temple in the suit property as alleged. The third defendant never obstructed the irrigation channel and no cause of action had arisen. She further stated that it was not true to say that the third defendant had destroyed 'WXYZ' cart track. The plaintiff had left for Delhi a long time ago. A Commissioner was appointed whose report would show that no such cart track ever exists. The Commissioner's report also confirms the claim. The rights given as per the partition deed are not correct. It was subsequent to the sale deed obtained by the third defendant. On the date of the agreement, the third defendant's vendor had no right to execute the above said deed and they colluded with the plaintiff and remained exparte. The description of the non-existing 'WXYZ' cart track was a pure imagination on the part of the plaintiff. The plaintiff is not entitled to any cart track through the easement of necessity or easement of prescription.

20. On a perusal of the materials available on record, it is seen that the plaintiff's title is not denied or disputed by the defendants. Under Ex.A.4-partition deed, the plaintiff claimed his right and in which, the third defendant denies as not binding because it is subsequent to Ex.B.1 through which she acquired title to the property.



The third defendant herself has acknowledged that there is no structure as alleged in the plaint for the worship of the ancestors. The third defendant does not deny the plaintiff's 1/3rd right of irrigation from the suit well and the defendant also acknowledged the plaintiff's right of irrigation through the channels shown in the rough plan as 'ARS'. Ex.A.4 was executed in the year 1987 by the second defendant after he had sold out his share of the property in the year 1981. According to the defendants, the plaintiff had no subsisting right on the date of execution of the document and he cannot validly create any right in favour of the plaintiff through Ex.A.4. Moreover, the third defendant is not a party to the said document and hence, the recitals thereon are not binding on her. According to the plaintiff, the existence of the cart track was not mentioned in the original sale deed or partition deed as it is the land belonging to the brothers. The irrigation channel and footpath were also not mentioned and rights were all to be implied, the cart track was also implied and as was not mentioned originally, since the third defendant created troubles, it has to be reduced in the form of written document. The other defendants are none other than the brothers of the plaintiff. The other defendants and the plaintiff have created Ex.A.4 collusively. As Ex.A.4 is subsequent to Ex.B.1 and the third defendant is not a party to it, it is not binding on



the third defendant. The plaintiff has not proved through other documents or witnesses that a cart track exists. The Commissioner's report does not indicate a cart track or signs of a destroyed cart track. The mere fact that one place near the well is at lower topography cannot establish the existence of the cart track. There is no evidence to show that the cart track was destroyed by the third defendant. D.W.2 has stated that no such cart track existed. The submission of the learned counsel for the plaintiff that the plaintiff is not a party to the sale but between D.2 and D.3, he has not knowledge of the sale and hence, it is not bound by the above sale and hence, Ex.A.4 is valid and the submission of the learned counsel cannot be sustained in law. According to the plaintiff, the third defendant admitted Survey No. 659/2 belongs to the plaintiff. D.W.1 denies the existence of the above land of the plaintiff. Hence, she is not a trustworthy witness. D.W.1 is a totally illiterate lady, without any knowledge of the survey numbers. The alleged prevention and use of the irrigation channel by the defendants are also negatived from P.W.1's deposition itself, as he stated that the alleged act was done only now ie., after the suit. Hence, there is no cause of action on the date of filing of the suit regarding the irrigation channel. The existence of a pathway through ridges is established from the Commissioner's report only footpath leading to



the plaintiff's land. Hence, the alternative path is not pleaded and the defendants cannot introduce a new ground of defence at the trial stage. In the circumstances, the plaintiff is entitled to a declaration that he is entitled to 1/3rd share over the sale in Survey No.659/1, he is entitled to his 1/3rd share in the irrigation channel marked as 'ABCDE' in the plaint plan, he is entitled to Survey No.659/2 to the extent of 6 cents, he is entitled to the irrigation channel shown as 'ARS' in the plan and he is entitled only to the footpath leading to his land adjacent to the above irrigation channel forming part of the ridges. No injunction can be given with regard to the cart track indicated as 'WXYZ' in the plaint plan, as its existence has not been proved. As the plaintiff and the defendants all have equal rights over the well and above mentioned irrigation channels and footpath, they have to use it without hindrance or nuisance to others. Hence, a permanent injunction is granted in this regard. As the plaintiff had never proved the existence of the cart track nor the fact that the same has been destroyed by the defendant, the relief of mandatory injunction is not granted.

21.The right of way has been given as a footpath and not as a cart track when the plaintiff has come to access other portions of



the property, whether easement of necessity was in existence has to be proved by the plaintiff. Since the plaintiff was not in a position to prove that there existed an easement of necessity, as the plaintiff was not in possession of the property for a quite long time, as he has given it for lease and then the brothers have sold their portion. Whether any declaration can be granted as a right of way by the co-parcener when the property is divided into three parts has to be proved by him that he was using such a way ie., cart track which was in existence by evidence. In the absence of any such evidence and after selling the property which belongs to their brothers to the third parties ie., the defendants, the plaintiff now comes and pleads that there existed a cart track which has been ruined by the defendants are to be proved and in the absence of any such evidence that there existed a cart track, the declaratory right cannot be granted in favour of the plaintiff. Ex.A4 and the evidence of the plaintiff alone is not sufficient. Ex.A.4 is a partition deed after the sale deed executed by the brothers in favour of the third parties and only to overcome the difficulties, they have come out with a partition deed in Ex.A.4 and mere evidence of the plaintiff is not sufficient but ought to have examined other third parties to prove that there existed a cart track. Whether the plaintiff had right of easement of necessity or whether he was using the cart track earlier



while he handed over the property to others by way of a lease that should have been proved by the examination of the said lessee and in the absence of any such evidence and non-examination of the lessee is really fatal as no evidence to support the claim made by the plaintiff other than the pleadings. It is agreed that the property belonged to Venthu Moopanar and was partitioned among the children and the same was by oral partition and not been reduced into writing and claimed based on the oral partition, it is found that other brothers have sold their share in the disputed property to a third parties and after the sale, now they are entering into a written partition in which they have come out with the said clause as if there existed a cart track is not acceptable, as they are not the present owners of the said property who can execute such a right. It is submitted that there is a footpath available along with the channel which can be used by the plaintiff and the only necessity to have access has been provided by this Court, he can use the footpath along with the channel and not as a cart track as it was not mentioned anywhere during the partition and established the said right as per the oral partition. The said contention if existed it would have been mentioned in the earlier sale made by his brother in favour of the defendants.



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22.From the above, this Court is of the view that the Judgments and Decrees of the Courts below are accompanied with sufficient reasons, in which, this Court does not want to make any interference. Accordingly, the substantial questions of law framed are ordered as against the plaintiff and in favour of the defendants.

23.In the result, the Second Appeal stands dismissed. No costs.

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Internet : Yes/No
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To

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- 1.The Additional Sub Court,
Dindigul.
- 2.The II Additional District Munsif Court,
Dindigul.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

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Judgment made in
S.A.No.1115 of 2003

29.10.2024