

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.05.2012

CORAM

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Second Appeal No.1555 of 1998
and
C.M.P.Nos.15021/1998 and 16641/1998

1.Karuppan

Perumal @ Pondan(died)

2.Kullaian

Chinnan @ Silukkapattian(died)

3.Kittan

4.Vellayan

5.Padmavathi
(Set ex parte in Trial Court
and hence notice not sent)

6.Palanisamy

7.Gurunathan

8.Thangavel

9.Rangan

..Appellants/Respondents/Defendants

(6 to 8 Appellants are recorded as LRs of the deceased second Appellant and Appellants 6 to 8 are brought on record as LRs of the deceased second Appellant vide Order dated 14.11.2011 made in CMP.No.1026 of 2011 and 9th Appellant is recorded as LR of the deceased 4th Appellant and 9th Appellant is brought on record as LR of the deceased 4th Appellant vide Order dated 14.11.2011 made in C.M.P.No.1029 of 2011)

/vs/

Nagathal

..Respondent/Appellant/Plaintiff

Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree in A.S.No.83 of 1997 dated 10.02.1998 passed by the Second Additional District Judge, Erode reversing the Judgment and Decree in O.S.No.886 of 1993 dated 02.09.1996 passed by the First Additional District Munsif, Erode.

For Appellants : Mr.V.Bharadidasan

For Respondent : Mr.P.Subramaniam

J U D G M E N T

The Appellants/Defendants have projected the Second Appeal as against the Judgment and Decree in A.S.No.83 of 1997, dated 10.02.1998 passed by the Learned Second Additional District Judge, Erode in reversing the Judgment and Decree in O.S.No.886 of 1993, dated 02.09.1996 passed by the First Additional District Munsif, Erode.

2. After filing of the Second Appeal, the Second Appellant/Second Defendant (Perumal @ Pondan) has expired and his Legal Representatives (Petitioners No. 6 to 8) have been brought on record as Appellants/Defendants 6 to 8; also on the death of the fourth Appellant/fourth Defendant (Chinnan @ Silukkapattian), his Legal Representative (9th Petitioner) has been brought on record as 9th Appellant/9th Defendant, as per order passed by this Court in C.M.P.No.1026 and 1029 of 2011, dated 14.11.2011.

3. The Plaintiff facts of the Respondent/Plaintiff:-

As per the partition deed dated 30.06.1984, Shanmuga Gounder, the husband of the Respondent/Plaintiff has been allotted a plot of 0.21.5 hectares comprising the South Western corner of S.F.No.432/6 of Nasianur Village in Erode Taluk and that is referred to as 'Plaintiff's Plot'. The Respondent/Plaintiff, in view of the death of her husband, Shanmuga, has his heir and Legal Representative is entitled to and is in possession and enjoyment of the plot. As per the partition deed, the means of access to her plot is described as 'Mamool Cart-Track Pathway' passing through S.F.No.431 Harijan Natham. The Respondent/Plaintiff has been having access to her plot for her carts, cattle and men all these years only through the said Cart Track. There is no other means of access.

4. The Appellants/Defendants and others are residing in the said Natham Poromboke, bearing S.F.No.431 of Nasianur Village. The Harijan residents of S.F.No.431 are having their temple dedicated to Mahaliamman on the adjacent South of the Cart Track Pathway as mentioned supra. Of late the residents of the Harijan Quarters of Thottiyapalayam including (the Appellants/Defendants) are extending the front yard of the temple towards the North and South and are digging foundations to raise constructions thereon. In so doing, the residents are trying to encroach upon the Cart Track Pathway of the Respondent/Plaintiff. If the residents of said Harijan Quarters succeed in putting up constructions of the Cart Track Pathway, the Respondent/Plaintiff will be left with no means of access to her plot.

5.The 7th Appellant/7th Defendant is a co-sharer. Hence she is added as a party to the suit. All attempt by the Respondent/Plaintiff to persuade the residents of the said Harijan Quarters not to encroach upon the Cart Track Pathway proved futile. Therefore, the Respondent/Plaintiff has laid the suit for Mandatory Injunction directing the Appellants/Defendants and the other residents of the Harijan Quarters of Thottiapalayam represented by the Defendants to dismantle and remove the platform and other obstructions placed subsequent to the filing of the suit, the East-West Cart Track Pathway running along the Northern extreme of S.F.No.431 of Natham Poromboke of Nasianur Village, more particularly described in the plaint schedule, by digging foundations thereon, raising constructions thereon.

6.Written Statement pleas of the fifth Appellant/fifth Defendant (and adopted by the Appellants 1 to 4 and 6 /Defendants 1 to 4 and 6) :

The admission, execution, registration and genuineness of the alleged partition deed dated 30.06.1984 between Shanmuga Gounder and others. The allotment of 0.21.5 Hectares on the South Western corner of S.F.No.432/6 of Nasianur Village are not admitted. The Respondent/Plaintiff has to establish the same. In any event, any recital contained in the partition deed is not binding on the Defendants and is self serving. The plaint plan is wrong and drawn in such a way to suit the claim of the Respondent/Plaintiff. A Cart Track, which is not in existence at any point of time has been purposely shown to be in existence.

7.It is absolutely false to say that there exists an East West Cart Track in between the land of the Respondent/Plaintiff on the North and Mahaliyamman temple on the South. There has never been a Cart Track (or) a foot path on the North of Mahaliyamman Temple so as to reach the land of the Respondent/Plaintiff. Neither the Respondent/ Plaintiff nor their predecessors-in-title even used the said strip of land either as a Cart Track or as a foot path. In fact the space available on the North of Mahaliyamman Temple is only 5 feet broad. The Mahaliyamman temple in its present form has been in existence for a long time. The site, in which, the Appellants/Defendants are constructing a new Mahaliyamman temple has never been used by the Respondent/Plaintiff and the predecessors-in-title either as a Cart Track or as a foot path at any point of time. The Revenue Records will completely disprove the claim of the Respondent/Plaintiff. Therefore, the claim of the Respondent/Plaintiff that the Appellants/Defendants are extending the front yard of the temple towards North and South and are digging the foundation are absolutely wrong.

8.The suit Cart Track is only imaginary, which never existed. The plaint does not disclose under what colour of law is the Respondent/Plaintiff is entitled to use the imaginary suit Cart Track. The suit in a representative capacity is not sustainable. There is no cause of action for the suit. The cause of action alleged is false.

9.Additional Written Statement pleas of the Second Appellant/Second Defendant:-

The suit cart track is an imaginary one. The Appellants/Defendants raised construction only in the place, where there was existing foundation. It is false to say that the width of the cart track is reduced to 4 feet from 20 feet. The Respondent/Plaintiff is not entitled to claim the relief of Mandatory Injunction as there is no existing cart track. The temple has been constructed in Village Natham.

10.The seventh Appellant/seven Defendant has been set Ex parte in the suit.

11.Earlier, in the main suit, before the trial Court, 1 to 5 issues have been framed for determination. On behalf of the Respondent/ Plaintiff witness P.W.1 (Plaintiff) has been examined and Ex.A1 has been marked. On the side of the Appellants/Defendants witnesses D.W.1 and D.W.2 have been examined and no documents have been marked. On the side of the Court, Ex.C1-Commissioner's Report, dated 16.07.1993 and Ex.C2-Plan have been marked.

12.The trial Court on an analysis and perusal of the entire gamut of oral and documentary evidence available on record has come to a consequent conclusion that there is no cause of action as alleged by the Respondent/Plaintiff and also it is opined that apart from 5 feet way, there is no other way for the cart track to pass through and held that the Respondent/Plaintiff is not entitled to claim the relief of Mandatory Injunction as prayed for by her in the plaint and dismiss the suit with costs.

13.The Respondent/Plaintiff, before the first Appellate Court viz., The Second Additional District Judge, Periyar District, Erode as an agreed person has filed A.S.No.83 of 1997 as an Appellant being dissatisfied with the Judgment and Decree, dated 02.09.1996 passed by the Learned First Additional District Munsif in O.S.No.886 of 1993.

14.The first Appellate Court (The Second Additional District Judge, Periyar District, Erode) while delivering the Judgment in the first appeal in A.S.No.83 of 1997, dated 10.02.1998 has inter alia opined that as mentioned in Ex.C1 and C2, Report and Plan, there is an extent of 5 feet pathway and that the Respondent/Plaintiff is

entitled to use the same and if the Appellants/Defendants raised a platform, the Respondent/Plaintiff is entitled to remove the same by means of Mandatory Injunction and finally, allowed the appeal with costs, setting aside the Judgment and Decree of the Trial Court dated 02.09.1996 in O.S.No.886 of 1993.

15. At the time of admission of the Second Appeal, this Court has formulated the following Substantial Question of Law:-

"Whether the Lower Appellate Court is correct in reversing the Judgment of the Trial Court and granting Mandatory Injunction, though the Respondent has not established any accrued right in the suit property?"

16. The Contentions, Discussions and Findings on Substantial Question of Law:-

The Learned counsel for the Appellants/Defendants submits that the first Appellate Court should not have held that the Respondent/Plaintiff is entitled to the right of pathway over the Harijan Colony in the exclusive occupation of the Appellants/Defendants.

17. The Learned counsel for the Appellants/Defendants urges before this Court that the First Appellate Court, after holding that the Respondent/Plaintiff has got an alternative cart track and not to have gone further and held that the pathway of 5 feet existence in which Harijan Colony and that the Respondent/Plaintiff is entitled to its user and that the said finding is against law, evidence besides the same being perverse.

18. According to the Learned counsel for the Appellants/Defendants, the first Appellate Court has committed an error in coming to the conclusion that the pathway in Village Natham is common to one and all. As such the Respondent/Plaintiff even as a stranger is entitled use the same.

19. The stand of the Appellants/Defendants is that the first Appellate Court should have appreciated the fact that there is no provision in the partition deed as to their right over the suit pathway and that the absence is fatal.

20. Finally, it is the submission of the Learned counsel for the Appellants/Defendants that the relief of Mandatory Injunction should not have been granted in favour of the Respondent/Plaintiff, overlooking the way of evidence and probabilities of the case.

21. Conversely, it is the contention of the Learned counsel for the Respondent/Plaintiff that the Advocate Commissioner in Ex.C1 Report has clearly stated that he has inspected the suit property at

about 5.00 p.m. on 16.06.1993, and also that he has inspected the suit property on 21.06.1993 and also as per order of this Court, again he has inspected the suit property at 11.00 a.m. on 10.07.1993.

22. Further the Commissioner has stated that in paragraph No.2 of his report that from Nasianur Road on the Eastern side at a breadth of 14 feet, there is a pathway proceeding and that in the center of the pathway, there is barricade put up with leaves and in between, there is a way of 5 feet breadth for walking and that the said barricade with leaves has been put up newly and adjacent to that facing on the Northern side, there is a shed, in which a buffalo is tied and there is an indication that this way, the buffalo cart has passed through, etc.,

23. The Advocate Commissioner's Report Ex.C1 has stated that in paragraph 1 that in the suit property, there is a pathway divided from the South-North Road on the Western direction and in the dividing place proceeding on the direction of North South, there is a road made of coconut leaves, in which there are idols of God and just opposite to that 'three Sulayutham' have been placed, which has been mentioned in his Plan Ex.C2 as 'A' and this pathway is also proceeding towards Western side and in the center of the pathway, a small foundation has dug up a two feet depth from the measurement of 20'x25' and that has been shown as 'B' in the plan etc.,

24. In Ex.A1-Partition Deed, dated 30.06.1984 between Shanmugha and Chennimalai, the general recitals are to the effect that both of them (maternal uncle sons) are entitled to run the Cart through Government S.No.431, Harijan Natham and to proceed to S.No.432/6. In fact, when the suit pathway is a 'Government Poromboke', the same vests with the Government, in the considered opinion of this Court. The Appellants/Defendants have constructed a house in the village Natham, in which they do not have a right.

25. It is the evidence of PW1(Plaintiff) that the Seventh Appellant/Seventh Defendant is her daughter and that Ex.A1 is the partition deed, dated 30.06.1984 in and by which her husband Shanmugha and her husband's brother Chennimalai gounder have partitioned themselves in her property and Ex.A1, an extent of 21/2 Aair have been allotted to them in S.No.432/6 at Nasianur and the property as per the document is situated on the South Western side and as per the document for reaching the property, there is a way and the said way is through S.No.431 and that way only they are passing through and there is no other way and that 1 to 6 Defendants are residing in S.No.431 and for them there is a Mahaliamman Temple on the Northern side of the temple, on the East West direction there is a way and the Appellants/Defendants have put up a building by means of foundation.

26. It is the further evidence of PW1 that in Harijan Colony, there are twenty houses and for the Harijan Colony there is a way to the temple from the Eastern side Road and that Mahaliamman Koil itself existence for long time and before filing of the suit, the foundation has been dug up and at the time, the Commissioner has inspected the property, there existed a way. It is not correct to state that to reach her land as per partition deed, there is a different way and further there is no need to proceed through the Harijan Colony way.

27. DW1 (the fifth Defendant) in his evidence has deposed that Harijan Colony is situated in S.No.431 and the Respondent/Plaintiff has a total extent of land of 16 acres, which is known as 'Karupaaee Forest' and that on the Western side of 16 acres of land, there is Nasianur Thar Road and for the colony there is a road on the Western side, which proceeds straight on the Northern direction and later, it proceeds on the Eastern direction and adjacent to that the Respondent/Plaintiff's 'Karupaaee Forest' is situated and there is no way as stated by the Respondent/Plaintiff, which has not been enjoyed by her and in the place where it is mentioned as way, there is a Mahaliamman temple and there is one 'Ammaiazaikum Temple' on the South North direction of Eastern side of the Harijan Colony (at the Eastern side of the turning) and that the Respondent/Plaintiff's land is situated at the height of 3 feet and a stone has been placed to avoid landslide and near the temple no Cart will pass through and there is a way to come around the temple and on the Southern side of the temple, there is a way at the distance of 50 feet to proceed to Harijan Colony and the plan annexed to the plaint is a wrong one.

28. DW1 proceeds in his evidence to that effect that on the Western side of the temple building, there is a 3 feet pathway. Before filing the suit, they have made arrangement to construct the temple and they have raised a platform after converting the pial and also put up a thatched roof. Added further, it is the evidence of DW1 that at the time of filing of the suit, there existed a way and for the temple there is a roof made of coconut leaves, which is one and half years old and in Ex.A1, Partition Deed, there is no mention that there is a way on the Eastern side of Nasianur.

29. DW2 (Ramasamy) in his evidence has deposed that on the Northern side of the temple and on the Southern side of the land of the Respondent/Plaintiff, there is a gap of 5 feet and after partition, there is a way proceeding on the Eastern side of the Nasianur temple and that the Nasianur Road is proceeding to the Respondent/Plaintiff's land and it is not correct to state that the said road is coming to an halt at a long distance of the Respondent/Plaintiff's land and from the pathway proceeding to eastern side, if one has come to the Respondent/Plaintiff's land from Itteri, one can proceeds straight and there is no need to enter into the colony.

30. It is to be borne in mind that the Mandatory Injunction is an order compelling a defendant to restore things to the condition in which they were when the Plaintiff's complaint who was made as per Kerr on Injunctions, 5th Edition Page No.42.

31. Further according to the American Judge Mr. Jacob Klein:

"A Mandatory Injunction is one that commands a party, plaintiff or defendant, to perform a certain act or acts. It is singular that while Courts of equity have frequently granted this particular remedy they seem nevertheless, to have stood at all times in a sort of dread respecting it, and to have viewed it with a kind of prejudice so much indeed that we find it stated by eminent Judges as we shall see that a temporary injunction in mandatory form is not to be granted at all.

"The form adopted at an early day for injunction of this sort was negative instead of positive. It restrained the defendant from permitting a condition of affairs which he had wrongfully brought about, occasioned or suffered to exist, from continuing any longer, and this compelled him to do the acts necessary to bring about a discontinuance of the wrongful stage of things produced by him, under the fear of attachment sequestration of property, or other punishment for disobedience. But no good reason exists for this round-about hesitating method of procedure. What the law declares to be just and proper to be done the Courts should require to be done in a positive and direct as well as an effectual manner.

"In looking at the reason of the thing, there is not any pretense for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the Court never has any hesitation in joining him. What difference could it make, if instead of fouling it day by day, he stopped it altogether? In granting a mandatory injunction the court did not mean that the main injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the persons injured, the Court said as in cases of specific performance, we will put you in the same position as before the injury was done. When once the principle was established why should it make no difference that the wrong doer had done the wrong or practically done it before the bill was filed? It could

make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence."

32. The power of granting Mandatory Injunctions must be exercised with the greatest possible care, as per decision Isenberg V. East India House Estate Co. Ltd.; (1963) 3 De.G.J. & Sm.263 at p.272, per Lord Westbur, L.C. But every injunction by the restrictive or Mandatory should be granted with care and caution and no more care or caution is required in the case of a Mandatory Injunction than a restrictive injunction as per decision Smith Vs. Smith, (1875) L.R. 20 Eq. 500 at p. 504, per Jessel M.R.

33. This Court, at this stage, aptly points out the decision of Hon'ble Supreme Court Manoharlal v. Seth Hiralal, AIR 1962 SC at p. 527, it is observed that 'the grant of injunction is a sort of equitable relief to be adjusted or moulded in relief of equity and justice to the facts and circumstances of each case independently'. Where a party is found to have taken law in his hand, the Court should take care that the interest of other party are not harmed subsequently, mandatory injunction is a good tool to deal with such situation as per decision in Ryan v. Mutual Tantive Investminister Chambers Assn. AIR 1985 Cal. at p. 248.

34. This Court worth recalls the decision in Assam State electricity Board v. N.W.Cachar Tea Co. Ltd., AIR 2000 (Gau) 176 wherein it is held that Mandatory injunction could be granted only if a party is feared to suffer grave injustice, but if party is itself not bona fide, is found to be engaged in mala fide practice, it cannot be granted a mandatory injunction.

35. In Ex.A1 Partition Deed, dated 30.06.1984, it is mentioned in B Schedule thus:

Govt.S.No.432/6, Punja Hec. 0.77.5 (Tharisu) Rs.2.62 in which the East West way in Harijan Natham etc.. Moreover, from the recitals of Ex.A1 Partition Deed, dated 30.06.1984, it is quite evident that the Respondent/Plaintiff has a right of way. As such, from the recitals in four boundaries, it cannot be contended on the part of Appellants/ Defendants that the Respondent/Plaintiff has no way.

36. Inasmuch as the Appellants/Defendants have constructed houses in the Natham to which place they do not have a right. As a matter of fact, they cannot prevent another person to use the pathway and as such, the Respondent/Plaintiff is entitled to use the suit pathway, as held by this Court. Further, as mentioned in Exs.C1 and C2, Report and Plan, the Respondent/Plaintiff is entitled to use the five feet pathway and in that place, if the Appellants/Defendants raise a platform, then, it will harm the Respondent/Plaintiff or cause injury to her and therefore, she is entitled to get the relief of Mandatory Injunction in her favour, in the considered opinion of this Court.

37. There are Adi Dravidar residences in the temple pathway. In that place, there is a temple, as evidenced from the Commissioner's Report that if the Appellants/Defendants conduct Mahaliamman Pooja festival, it will pass through the Cart track, then at the time of the festival, it will cause hinderance. As such, during the pooja time once in a year for three weeks the Respondent/Plaintiff is directed not to use the common pathway.

38. In the light of the forgoing discussions and on an overall assessment of the entire conspectus of the facts and circumstances of the case in a cumulative fashion, this Court comes to an irresistible conclusion that the First Appellate Court is correct in reversing the Judgment of the trial Court in O.S.No.886 of 1993, dated 02.09.1996 and rightly granted the relief of Mandatory Injunction in favour of the Respondent/Plaintiff and accordingly, this Court answers the Substantial Question of Law against the Appellants/Defendants.

39. In the result, the Second Appeal is dismissed, leaving the parties to bear their own costs. Resultantly, the Judgment and Decree of the First Appellate Court in A.S.No.83 of 1997, dated 10.02.1998 is hereby confirmed by this Court for the reasons assigned in this Second Appeal. Consequently, connected Miscellaneous Petitions are closed.

Sd/
Asst. Registrar

/true copy/

Sub Asst. Registrar

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To

1. The Second Additional District Court,
Erode.

2. The First Additional District Munsif Court,
Erode.

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

+ 1 cc to Mr. B. Bharathidasan, Sr.30019

+ 1 cc to Mr.P. Subramanian, Sr.30028

S.A.No.1555 of 1998 and
C.M.P.Nos.15021 & 16641 of 1998

GV(CO)
EU 7.9.12