

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 22.02.2019

CORAM

THE HON'BLE MR.JUSTICE K.KALYANASUNDARAM

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S.A.(MD).No.234 of 2013andM.P.(MD).No.1 of 2013

1.R.Charles

2.C.Jerin Poothangam ... Appellants/Appellants/Defendants

-Vs-

Senthil Devi ... Respondent/Respondents/Plaintiff

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, against the decree and judgment passed in A.S.No.73 of 2011 dated 30.07.2012 on the file of the III Additional District and Sessions Court, Tirunelveli confirming the judgment and decree passed in O.S.No.55 of 2008 dated 30.09.2011 on the file of the Subordinate Court, Valliyoor.

For Appellants : Mr.H.Arumugam

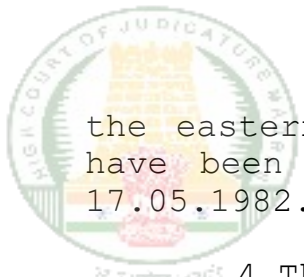
For Respondent : Mr.S.Palani Velayutham

JUDGMENT

This appeal is directed against the judgment of the III Additional District and Sessions Court, Tirunelveli passed in A.S.No.73 of 2011 confirming the judgment of the Subordinate Court, Valliyoor in O.S.No.55 of 2008.

2.The suit was filed by the respondent for declaring that the respondent is entitled to use the plaint second schedule property, for common pathway and for permanent injunction restraining the defendants, their men, agents or servants from in any way enjoying the plaint second schedule property by putting up any construction and for costs.

3.The case of the plaintiff is that the suit property and adjoining properties belonging to one Sami Asari and his sons namely Krishnan Asari, Arumuga Asari and Perumal Asari. The said Arumuga Asari died leaving behind his wife Mahalakshmi and sons Bharathi Krishnasamy, Elango, Nambirajan, Nagaraja Perumal and daughter Subbulakshmi. Thereafter on 17.05.1982 they entered into a partition in respect of their properties. During the partition, they allotted two cents for common pathway for their enjoyment of their properties. The allotted two cents in survey No.568/01 is on



the eastern side of the property for common usage. As such they have been enjoying the property as per the partition deed dated 17.05.1982.

4. The plaintiff would further state on 04.05.1992, a gift deed was executed in favour of Valliyoor Town Panchayat in respect of the said pathway. The legal heirs of Krishnan Asari sold first item of the suit property to one S.K.Nagavelu by registered sale deed dated 31.05.1994, who in turn sold the property to one Ramadoss and his wife Rethina Bai on 04.02.1998. The plaintiff became absolute owner of the property by virtue of sale deed dated 10.03.2008 through registered sale deed executed by said Ramadoss and his wife Rethina Bai. Since then they have been enjoying the property and also the common pathway. While so, the appellants/defendants attempted to construct a building in the common pathway and hence the suit.

5. The suit was resisted by the defendants by filing a written statement stating that the second defendant had purchased the first schedule property through a sale deed dated 13.02.2000 and the first defendant had purchased the third schedule property by way of sale deed dated 17.09.2001 and as such, they have been in possession and enjoyment of the same. It is the case of the defendants that common pathway is not in existence as claimed by the plaintiff.

6. Based on the above pleading, the Trial Court framed necessary issues and permitted the parties to let in oral and documentary evidence.

7. The plaintiff examined three witnesses and marked Exs.A1 to A17. On the side of the defendant, the first defendant gave evidence as D.W.1 and marked Exs.B1 to B5. The Report of the Advocate Commissioner and plan were marked as Exs.C1 to C3. After analyzing both oral and documentary evidence, the Trial Court decreed the suit.

8. Aggrieved by the judgment and decree, the defendants preferred an appeal in A.S.No.73 of 2011 before the III Additional District and Sessions Court, Tirunelveli. The Appellate Court confirmed the findings of the trial Court. Challenging the order and concurrent finding, in the present appeal has been filed.

9. The second appeal was admitted on the following substantial questions of law:

"(a) Whether the suit for declaration and injunction in respect of a common pathway alleged to be belonged to Panchayat is maintainable without impleading the Panchayat as necessary party?

(b) When the dispute pathway is not in existence of the land and P.W.2 also deposed as on date there is no pathway and further P.W.3, who is the



competent authority also deposed that the pathway does not exist whether the Courts below are right in relying upon Ex.C1 to C3 ignoring that the same are vague and contrary to the pleadings and decreeing the suit?

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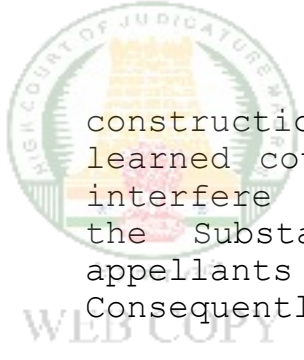
(C)When there is no mandatory requirement to make objection to the Commissioner's report contemplated under Order-26 of CPC and when the party is able to establish that the report is contrary to the physical features of the property whether the Courts below are right in accepting the commissioner's report solely on the ground that the objection was not made?"

10.Mr.H.Arumugam, learned counsel appearing for the appellants would urge that the plaintiff had instituted the suit for declaration and permanent injunction claiming that the second schedule properties are public pathway, however, the Panchayat which is a necessary party was not impleaded. According to the learned counsel for the appellants, the suit ought to have been dismissed for non-joinder of necessary parties. It is contended that no prayer has been sought for mandatory injunction. The learned counsel would argue that though the Advocate Commissioner report and sketch shows that existence of access to the property of the defendants, it is not stated that it is a public pathway, however, both the Courts without proper appreciation of the material evidence had decreed the suit.

11.Mr.S.Palani Velayutham, the learned counsel for the respondent had submitted that the documents produced by the plaintiff and the oral evidence would establish existence of pathway, and that both the Courts on the basis of the evidence have correctly come to the conclusion that the plaintiff is entitled for the relief and the appellants have not made out any case to interfere with the concurrent finding of the court below.

12.In the case on hand, it is not in dispute that the suit property was originally owned by Mr.Samidurai and it was partitioned among the sharers on 17.05.1982. A perusal of Ex.A1 would show that a gift deed was executed in favour of the panchayat in respect of the pathway. The plaintiff became absolute owner of the property by virtue of a sale deed dated 04.02.1998 under Ex.A2. The report of the Advocate Commissioner corroborates the case of the plaintiff with regard to the registration of the common pathway.

13.The Trial Court as well as the Appellate Court based on the evidence of P.W.1, Ex.A.2 and Exs.C1 and C2 came to the conclusion that the plaintiff has established her case and decreed the suit. It is not a case of the plaintiff that the defendants have put up construction in the common pathway. On the other hand, she has specifically stated that the defendants are attempting to put up



construction. Hence, I find no substance in the contention of the learned counsel for the appellants. This Court finds no reason to interfere on the concurrent findings of the Courts below. Hence, the Substantial questions of law are answered against the appellants and the Second Appeal is dismissed. No costs. Consequently, the connected M.P.(MD).No.1 of 2013 is closed.

Sd/-

Assistant Registrar (CS-III)

/ True Copy /

Sub Assistant Registrar(CS)

To

1.The III Additional District and Sessions Judge,
Tirunelveli.

2.The Subordinate Judge,
Valliyoor.

Copy To:

The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,
Madurai. **(2 Copies)**

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-49482[F] dated 25/02/2019)

+1 CC to M/s.S.PALANI VELAYUTHAM, Advocate
(SR-49724[F] dated 26/02/2019)

S.A. (MD) .No.234 of 2013
and
M.P. (MD) .No.1 of 2013
22.02.2019

vsg
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