

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.09.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.408 of 2010

and

M.P.(MD)No.2 of 2010

1.Thankaraj ... Appellant/1st Respondent/1st Plaintiff

Bennet (died)

2.K.Mercy

3.Shaji

4.Shajitha

5.Sajeena

6.Samraj

7.Samilee

...Appellants/Legal representatives of the
deceased appellant

-VS-

1.Rajendran

2.Selvaraj

3.Palayyan (died)

4.Dasayyan

5.Kirisanthi Mary

6.Nesayyan

...Respondents/Appellants/Defendants

7.P.Manikandan

8.P.Ramesh

...Respondents

[Respondents 7 and 8 are suo motu impleaded as LR's of
the deceased third respondent vide order dated
15.03.2022]

PRAYER: Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree passed in A.S.No.97 of 2006 on the file of the Subordinate Court, Kuzhithurai dated 06.08.2009 reversing the judgment and decree passed in O.S.No.8 of 2000 on the file of the II Additional District Munsif Court, Kuzhithurai dated 23.06.2006.

For Appellants	: Mr.M.P.Senthil
For R1	: Mr.K.N.Thambi
For R7	: Mr.S.Sivakumar
For RR2, 4 to 6 & 8	: No Appearance

J U D G M E N T

The plaintiffs in O.S.No.8 of 2000 having been successful in their suit for declaration of right of easement of pathway and for mandatory injunction, and suffered defeat at the hands of the defendants in A.S.No.97 of 2006 before the First Appellate Court are the appellants herein. For narrative convenience, the parties are referred by their ranks before the trial Court.

2. The case of the plaintiffs is as follows:

- The disputed pathway is situated in 'A' Schedule property in R.S.No. 73/5. The plaintiffs claim title to the property to the south of 'A' schedule property in S.No.73/14 Vide sale deed, dated 18.11.1982

marked as Ext.A1. According to the plaintiffs, there exists a pathway measuring about 200 links by 20 links to the north of their properties and this pathway leads to the main road on the west. Between the property of the plaintiffs and the main road on the west property of a third party is situated. The defendants' property is stated to lie to the north of the 'A' schedule property and abutting the aforesaid main road on the west. They have purchased the property under Ext.A8, dated 02.03.1995. The properties of the defendants belonged to certain Thirumalai Grama Samudhayam. The said Samudhayam had executed Ext.A9, document dated 29.03.1999 granting right of way over 'A' schedule property to the plaintiffs. When the plaintiffs faced obstruction to the enjoyment of 'A' Schedule property to access the main road on the west, the suit came to be laid.

- Initially it was laid for declaration of their easementary right over the 'A' schedule property and later it was amended to include mandatory injunction to remove certain construction put up by the defendants to obstruct the plaintiffs' exercise of right over the 'A' schedule property.

3. The defence was indeed, there never existed a pathway in the description of 'A' schedule property on ground. Ext.A9 is a manufactured document as it was executed after the Samuthayam had sold the property to the defendants under Ext.A8 and the Samuthayam did not have any other property to enable it to execute Ext.A9.

4. The dispute went to trial, before which the plaintiffs had adduced both oral and documentary evidence. Some other documentary evidence produced on its side was already on record. Further on the side of the defendants, the first defendant testified himself as D.W.1. They did not produce any documentary evidence.

5. The Trial Court on its part appointed a Commissioner at the instance of the plaintiffs, whose reports were received as Ext.C1 and Ext.C2 and the Commissioner himself was examined as C.W.1.

6. On appreciating the evidence before it, the trial Court partially decreed the suit and granted right of way over the property measuring 200 links by

10 links as against the plaintiffs' claim of right of pathway over 20 links width.

7. This was taken in appeal by the defendants. Before the appellate Court, the defendants tried to produce some documents Vide I.A.No.93 of 2009. They were not taken on record by the First Appellate Court on the ground that some of the documents have been already produced by the plaintiffs themselves. The First Appellate Court ultimately dismissed the suit on the ground that the pathway, which the trial Court had found forming the southern boundary of the property of the defendants in terms of Ext.A8, is not there. It is in these circumstances, the plaintiffs have come before this Court with the present appeal.

8. This appeal is admitted for considering the following substantial questions of law:-

1. Whether the Lower Appellate Court is right in dismissing the suit on the ground that the plaintiffs are not able to state the nature of their claim?

2. Whether the Lower Appellate Court is right in rejecting the claim of the plaintiffs/appellants by misconstruing Ext.A8 and admission of D.W.1?

9. The learned counsel for the appellants submitted that the First Appellate Court has literally misread or mis-constructed Ext.A8. In this context, he aids with one of the documents, which the defendants wanted to produce before the First Appellate Court itself to indicate that there existed a pathway forming southern boundary of the properties of one of the defendants. If only that document had come before the Court, it would have settled the issue, the counsel argued. Indeed the plaintiffs are not keen to produce the document, which will set the record straight *vis-a-vis* the evidence available for evaluating the rival contentions in this case.

10. The Commissioner has reported non-availability of the pathway fitting the description of 'A' schedule property on line. In fitness of things, the trial Court ought to have impeached the Commissioner's report, since the plaintiffs have elicited an element of bias that could have prevailed upon the Commissioner in aiding the defendants.

11. Per contra, the learned counsel for the defendants/respondents submitted that the plaintiffs' property is not a landlocked property as there exists a pathway to the south of their property to reach the main road on the west. Secondly, the boundary description of Ext.A8 does not show that there ever existed a pathway to the south of the property sold thereunder to the first defendant. He also submitted that when the defendants wanted to file some documents to show their right over the property, the opportunity was denied.

12. Few facts emerge out of the submissions made on either side:

- (a) The Commissioner has not noticed the alleged availability of an alternate pathway for the plaintiffs to the south of their property. It must be stated that there is no specific allegation to this aspect in the written statement and when the Commissioner was confronted with the suggestion such as this, he was in the witness box and he merely said that he did not look into that.

(b) The defendants admittedly wanted to produce some documents and the First Appellate Court for certain reasons had declined the opportunity.

13. The plaintiffs now wanted to rely on certain document, which the defendants have produced before the First Appellate Court and was rejected to fortify their case about the availability of a pathway to the north of their property. According to them, this document will also go to corroborate the schedule description under Ext.A8. The plaintiffs indeed sought some time to produce this particular document produced by the defendants before the First Appellate Court.

14. If this document is *prima facie* relevant, then an opportunity must be given to the defendants under Order XLI Rule 21 of the Civil Procedure Code to rebut it. The defendants too appear to have been aggrieved over the rejection of documents by the First Appellate Court.

15. In order to settle the issue conclusively and to the satisfaction of the parties, this Court considers it appropriate that the matter is remanded back

to the First Appellate Court. The parties are required to appear before the First appellate Court on **17.10.2022**. The First Appellate Court is now required to receive the evidence and dispose of the matter within a period of three months. This Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

07.09.2022

Internet: Yes

Index: Yes/No

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Note: Issue order copy on 13.10.2022

To

1.The Subordinate Court, Kuzhithurai.

2.The II Additional District Munsif Court, Kuzhithurai

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N.SESHASAYEE, J.

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