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S.A(MD).No.179 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.07.2022

CORAM:

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A(MD).No.179 of 2011
and M.P(MD).No.1 of 2011
C.M.P(MD).Nos.9175 of 2017, 5022 of 2022

1.Thirumony
2.Jeyasheelan

... Appellants/Appellants/Plaintiffs 2 & 3

Vs.

1.Sreekumaran Nair @ Anni
2.Sethumathavan Nair
3.Girija

....Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 29.11.2010 passed in A.S.No.26 of 2010 on the file of the Subordinate Court, Kuzhithurai, confirming the judgment and decree dated 29.03.2006 passed in O.S.No.302 of 2003 on the file of the I Additional District Munsif Court, Kuzhithurai.

For Appellants : Mr.R.Nandakumar
For Respondents : Mr.M.Dennis Joe (for R1)
Mr.M.Karuppasamy (for R2)
dispensed with (for R3)



S.A(MD).No.179 of 2011

JUDGMENT

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The plaintiffs, who are the father and the sons, having lost their suit for declaration of right of pathway successively before both the Courts below are the appellants herein. For narrative convenience, the parties are referred to as per their rank before the trial Court.

2. As could be noted later, this appeal takes a different turn and hence, the pleadings are confined to the barest minimum.

- The plaintiffs claimed title to their property under Ext.A.1, sale deed, dated 07.02.2001. This property is comprised in S.No.558/6. The main road is on the far east. Between the property of the plaintiffs in R.S.No.558/6 and the main road on the east, lie the properties in S.No.558/7, 558/8 and 558/9. This block of property belongs to the defendants. Of these properties, S.No.558/7 and S.No.558/8 are to the immediate east of the plaintiffs' property. Of these two properties, the property in R.S.No.558/7 is on the north and the property in R.S.No.558/8 is on the south. To the east of S.No.558/7 and to the east and south of S.No.558/8 lie a huge block of property in S.No. 558/9. The plaintiffs claim a five link wide pathway cutting across R.S.Nos.558/8 and 558/9 to reach the main road.



S.A(MD).No.179 of 2011

WEB COPY

- To the north of R.S.No.558/7 there is a small strip of property in R.S.No.560. It measures 2.5 cents. The plaintiffs had contended in their plaint that they had purchased this 2.5 cents only to have access to the main road from their property on the northern side. This became an abandoned venture since certain arrangement/agreement between the defendants who own the properties in 558/7 and 558/9 and the plaintiffs of Ext.B4 to Ext.B6 failed. Hence, the suit was laid.
- There are three defendants to the suit. All the three defendants contested the suit. They in effect denied the existence of a pathway and the right of pathway across R.S.No.558/8 as claimed by the plaintiff.

2.1 The dispute went to trial before which both sides adduced oral and documentary evidence. The trial court also appointed Commissioner for local inspection and he had filed his report and the plan. On appreciating the evidence before it, the trial court chose to dismiss the suit. Promptly, the plaintiffs preferred a first appeal in A.S.No.26 of 2010 and the first appellate court opted not to disturb the findings of the trial court and dismissed the appeal. Hence this second appeal by the plaintiff. This appeal is admitted. This appeal is not admitted and only notice was ordered to the respondents.



S.A(MD).No.179 of 2011

WEB COPY

2.2 The third defendant/third respondent did not enter appearance and was set *ex-parte*. Indeed she did not contest the first appeal as well. The second respondent though represented by the learned counsel, did not participate.

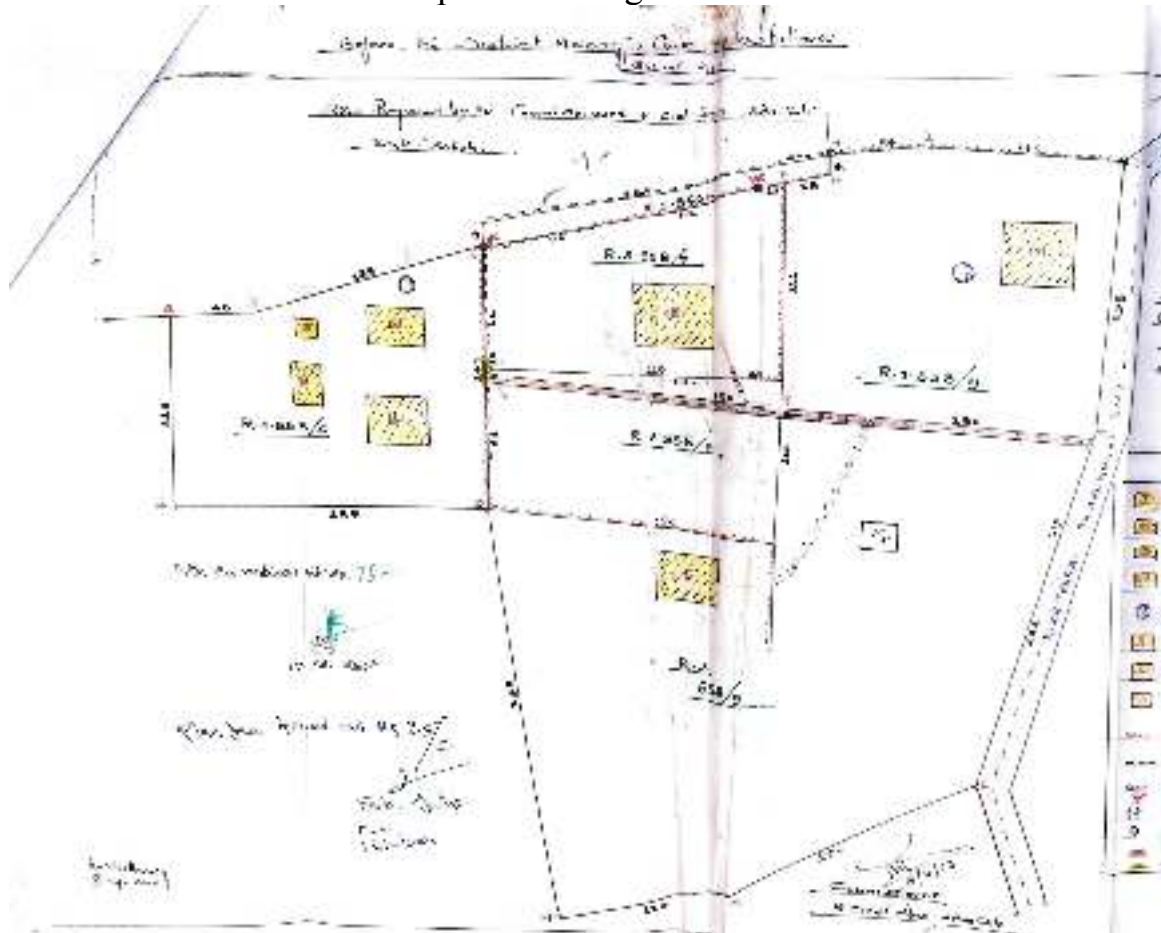
3.1 In the course of an argument, this Court was informed that now the plaintiffs are not using the first set of pathway to the immediate east of their property in S.No.558/8. But, they are using 2.5 cents that they have purchased in R.S.No.560. This is not disputed by the defendants. Still, this is not adequate for the plaintiffs to reach the main road on the east by cutting across the property in R.S.No.558/9.

3.2 This Court now is informed that both S.No.558/7 and S.No.558/9 were fully enclosed by the compound wall and in between these compound wall, there is a lane is formed with both the owners of properties in S.No.558/7 and S.No.558/9 leaving a factional portion of their respective properties for the purpose. This lane has an approximate width of 2.5ft., (North-South). This stretch is marked by the Commissioner's report as F, F1 stretch. After the dismissal of the suit before the Courts below, the plaintiffs and their family members are using R.S.No.560 on the north, and then take the lane in



S.A(MD).No.179 of 2011

F, F1 in the Commissioner's plan and then use 3.25 ft., wide pathway from point F1 to K in the Commissioner's report. This F1-K cuts across R.S.No. 558/9. The Commissioner plan denoting this shown below:



4. Now, the plaintiffs filed an affidavit along with the rough sketch and submits that they would be satisfied with the right of pathway along F, F1 and F1-K in the Commissioner's report. The rough sketch shows that the lane like structure along with F, F1 proceeds to further south to enable the



S.A(MD).No.179 of 2011

second defendant to have access to the pathway in F1-K. The learned counsel for the sole contesting first defendant/first respondent agrees on instructions to this proposal. Indeed this how parties have reconciled to the reality facing them. The affidavit along with the rough sketch is extracted hereunder:



S.A(MD).No.179 of 2011

WEB COPY 2

...2...

1. We are the Appellants in the above Second Appeal and such we are aware of all the facts and circumstances of the case.

2. We submit that we along with our father Mr.Kuttan have filed the O.S.No.302 of 2003 on the file of the 1st Additional District Munsiff Court, Kuzhithurai for Declaration of Easementary right over the "B" Schedule property to reach the "A" Schedule property of us (Plaintiffs) House and Property.

3. We submit that the Trial Court dismissed the suit by the Judgment and Decree dated 29.03.2006 and non-suited the Plaintiffs. Subsequent to O.S. Decree our father Kuttan died. Challenging the Judgment and Decree we have preferred the First Appeal in A.S.No.26 of 2010 on the file of the Sub Court, Kuzhithurai. The First Appellate Court dismissed the appeal and confirmed the Judgment and Decree of the Trial Court.

4. We submit that both the Courts below dismissed our claim on the assumption that the non production of the Sale Deed dated 12.12.1994 probalises the defendants case and a pathway could have been existing on the Northern side.

5. We submit that challenging the Judgment and Decree in A.S.No.26 of 2010, we have preferred the above Second Appeal before this Hon'ble Court.

6. We submit that we have produced the our Sale Deed document dated 12.12.1994 before the Hon'ble Court in

Page: 2
Cons: *ml*
Inl: *2*

K. Thiruvannam
[Signature]



S.A(MD).No.179 of 2011

WEB COPY

3

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C.M.P.(MD) No.5022 of 2022 and on the Eastern side boundary is mentioned as the property belong to the predecessor interest of the 3rd defendant. Which clearly illustrate that there is no pathway to reach the main road on the Eastern side.

7. We submit that now the 1st defendant has put up a compound wall on the east of his property in R.Sy.No.558/9 and a narrow strip of 2.5 feet pathway is left on the Eastern side of the compound wall [C D E F - portion in rough sketch] and now we are using the pathway through our Northern 2 cents of land comprised in R.Sy.No.560/11 and thereafter through the narrow strip of land which is left opened on the West to East with 3.25 feet width as mentioned in the Commissioner Report. We are utilizing the pathway [E F G H I J - Portion in the Rough Plan] to reach the main road (Kuzhithurai - Arumanai Road) on the Eastern side, we are also annexing a Rough Sketch indicating the above fact.

8. We submit that in view of the fact a narrow strip of 2.5 feet to left open to the East of the 1st Defendant's property C D E F Portion and further 3.25 feet in the F H I J portion. We are giving up our prayer in the plaint to declare the pathway right across the "B" Schedule property.

It is therefore prayed that this Hon'ble Court may be pleased to accept this affidavit and pass suitable orders in the above Second Appeal and thus render justice.

Solemnly affirmed at Madurai on this the 14th day of July 2023. The contents of this affidavit having been truly and audibly read over and explained to the deponent in Tamil who being unacquainted with English and seems to understand the same perfectly and signed their name in my presence.

Last & 3rd Page
Counsel
for: *[Signature]*

Before me

K. Thirumoni
[Signature]
Advocate, Madurai - 625 001

Phone 285, 1st floor
Kashim Residency
Othakadai,
Madurai



S.A(MD).No.179 of 2011

WEB COPY

4



ROUGH PLAN SUBMITTED BY APPELLANTS.
S.A(MD).179/2011





S.A(MD).No.179 of 2011

WEB COPY

5. This apart, this Court perused the records in the case and it is reasonably satisfied that the plaintiffs properties are landlocked and do not have an access to the main road on the east. What is now provided is a partial modification of their claim the pathway right. In other words, the plaintiffs' claim in R.S.No.558/8 will now stand dropped since the plaintiffs have chosen to use their own property in R.S.No.560 on the north as the alternate measure. It is only from point F in the Commissioner's report they need the pathway to reach the main road. This Court records the statement of both sides.

6. In conclusion, this Second Appeal is partly allowed and the decree of the first appellate Court is modified and the plaintiffs are granted a right of pathway through the properties of the first and third defendants along the lane in F, F1 and then, through F1-K in the Commissioner's report . The claim of pathway in RS.No.558/8 will now stand dismissed. To that extent, the decree of the first appellate Court will stand confirmed. The Registry is



S.A(MD).No.179 of 2011

required to make the Commissioner's report and also the rough plan appended to the affidavit filed today (i.e., 14.07.2022) as part of the judgment. No costs. Consequently, connected Miscellaneous Petitions are closed.

14.07.2022

Index : Yes/No

Internet: Yes/No

Rmk

To

1. The Subordinate Judge, Kuzhithurai.
2. I Additional District Munsif, Kuzhithurai.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.A(MD).No.179 of 2011

N.SESHASAYEE, J.,

Rmk

S.A(MD).No.179 of 2011
and M.P(MD).No.1 of 2011
C.M.P(MD).Nos.9175 of 2017, 5022 of 2022

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