



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.03.2022

CORAM

WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.960 of 2010

Rukkumani ... Appellant/Respondent/Defendant
Vs.
Kasthuri ... Respondent/Appellant/Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed by the learned I Additional Subordinate Judge, Madurai in A.S.No.23 of 2007 dated 11.02.2010, reversing the decree and judgment passed by the learned District Munsif, Thirumangalam in O.S.No.171 of 1998 dated 20.12.2006.

For Appellant : Mr.Anand Chandrasekar
For Mr.T.Srinivasa Raghavan

For Respondent : Mr.V.Meenakshi Sundaram
For Mr.D.Nallathambi

JUDGEMENT

The defendant in O.S.No.171 of 1998 on the file of the District Munsif Court, Thirumangalam is the appellant in this second appeal. The suit was filed by the respondent/plaintiff namely, Kasthuri for permanent injunction restraining the defendant and others claiming through her interfering with her possession and enjoyment of the suit property. The suit property has been described as follows:-

"In Madurai District, in Thanakkankulam Village, in R.S.No.44/3A1-D2, the east west pathway measuring east-west 61 feet and north south 15 feet bounded.

*On the north by the property of Murugan,
On the south by the property of the defendant,
On the east by 30 feet wide convent road and
On the west by the property of the plaintiff."*

2.According to the plaintiff, the suit property has been set apart to be used as a common pathway by the plaintiff and the defendant. The appellant filed written statement controverting the plaintiff averments. Based on the divergent pleadings, the trial Court framed an issue as to whether the suit property is a common pathway



and whether the plaintiff is having easementary right over the same.

3.The plaintiff examined herself as P.W.1 and two other witnesses were examined on her side and Exs.A1 to A9 were marked. The defendant's husband/Jawahar was examined as D.W.1 and Exs.B1 and B2 were marked. Exs.C1 and C2 were marked through witnesses.

4.After considering the evidence on record, by judgment and decree dated 20.12.2006, the trial Court dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.23 of 2007 before the I Additional Sub Court, Madurai. By judgment and decree dated 20.04.2007, the decision of the trial Court was set aside and the appeal was allowed and the suit was partly decreed and the pathway right of the plaintiff was recognized to a certain extent. Aggrieved by the same, the defendant filed S.A.(MD)No.749 of 2007. The second appeal was allowed and the matter was remanded to the file of the first appellate Court. An advocate commissioner was appointed and his plan, sketch and report were marked as Exs.C2, C3 and C6. After consideration of the evidence on record including the additional evidence, the first appellate Court by the impugned judgment and decree dated 11.02.2010, set aside the decision of the trial Court and partly decreed the suit by granting permanent injunction in respect of the suit pathway measuring 62.8 meters east-west and 2 meters north-south. The advocate commissioner's plan, sketch and report were also directed to be marked as part of the decree. Aggrieved by the same, this second appeal came to be filed.

5.The second appeal was admitted on 06.01.2011 on the following substantial questions of law:-

"1.Whether the first appellate Court has failed to note the legal position that the denial of title of the owner servient tenement will disentitle the owner of the dominant tenement from claiming easement? and

2.Whether the lower appellate Court has committed an error leading rendering a perverse finding, in not considering the question whether the vendor of the plaintiff, who had not reserved a right of possession, could have validly conveyed a good title under the sale deed executed to the plaintiff?"

6.The learned counsel for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree passed by the first appellate Court and restore the decision of the trial Court.



7. Per contra, the learned counsel for the respondent submitted that the impugned judgment and decree do not call for any interference.

8. I carefully considered the rival contentions and went through the evidence on record. The plaintiff and the defendant are sisters. Even though the respondent had succeeded before the first appellate Court, before the second appeal could be taken up for disposal, she had written a letter dated 17.03.2022 requesting the appellant to grant her permission to use the suit pathway so that she can reach the 40 feet convent road lying on the eastern side. The appellant is owning two plots on the eastern side, while the respondent herein is owning two plots on the western side. The western most plot was purchased by the respondent/Kasthuri under Ex.A8 dated 04.10.1976. The four boundary description set out in the said document is as follows:-

*"On the north by east-west common pathway
On the south by Gnanasundarm's property
On the east by property bearing S.No.44/3A-D2 and
On the west by property bearing S.No.43".*

9. Ex.A8 was rectified vide Ex.B3 dated 27.08.1979. While in Ex.A8 the northern boundary description was mentioned as east-west common pathway, it was rectified as the southern boundary. The appellant purchased the eastern most plot under Ex.B1, dated 20.03.1978. The four boundary description set out in Ex.B1 is follows:-

*"On the north by Muthukaruppa Devar vakiyar's Punjai land
On the east by 40 feet road
On the south by Vellaiamman's Punjai land and
On the west retained by the vendor".*

10. The middle plots were purchased by the appellant and the respondent on the same day ie., on 06.10.1988 under Exs.A2 and A3. Ex.A3 stands in the name of the respondent/Kasthuri. The four boundary description set out in Ex.A3 is as follows:-

*"On the north by common pathway
On the east by Rukkumani's property to be purchased
On the south by Ganasundaram's property to be purchased
On the west by Kasthuri's property".*

11. Ex.A2 stands in the name of the defendant/Rukkumani. The four boundary description of Ex.A2 is as under:-

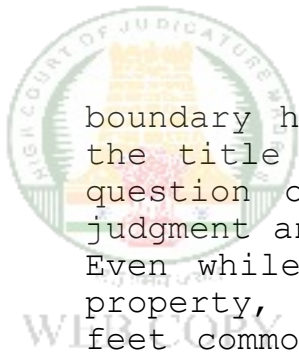
*"North by common pathway
East by Rukkumani's property
South by Vellaiammal's site*



West by the property to be purchased by Kasthuri."

12. Rukkumani as well as Kasthuri purchased the land from one and the same person. If Exs.A2 and A3 alone are taken into account, half of the suit property would of course qualify to be a common pathway. In other words, that portion of the suit property from west-east measuring about 23 feet may have to be considered as a common pathway. Upto this, there is no difficulty. The remaining 40 feet portion of the suit property from west-east alone will have to be determined. I have no difficulty in coming to the conclusion that the title of the appellant over the same will have to be necessarily upheld. This is for more than one reason. When Rukkumani purchased the eastern most plot under Ex.B1 dated 20.03.1978, the northern boundary was not mentioned as common pathway. Likewise, when Kasthuri purchased the western most plot under Ex.A8 dated 04.10.1976 again, the eastern boundary was not mentioned as a common pathway. The rectification deed made under Ex.B2 worsens the position of the plaintiff under Ex.B3. That is why, the plaintiff before commencement of this second appeal gave a request letter to the appellant calling upon her to permit her to use the suit property as a pathway. Even the trial Court also framed an issue as to whether the plaintiff can claim right of easement over the suit property. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court reported in **2009-2-L.W. 485 (Bachhaj Nahar vs Nilima Mandal & Ors)**. The Hon'ble Supreme Court in the said decision had categorically held that a Court cannot make out a case not pleaded and it cannot grant a relief, which is not claimed. According to the learned counsel for the appellant, the plaintiff filed the suit by proceeding on the premise that the suit property is a common pathway and having challenged the title of the defendant, she cannot now seek the relief of easement. While this contentions is correct as a matter of law, on facts after carefully perusing the plaint averments, I note that the plaintiff has virtually sought the relief of easement of necessity. Of course, in the same breath, she also sought to characterise the suit property as common pathway. The plaintiff cannot really be blamed for making a such a claim. That is because, the two plots lying in the middle were purchased by the respective parties on the same day from a common vendor and in both the documents, the northern boundary has been mentioned as common pathway. It cannot be disputed that atleast half of the suit property falls within the said description. The defendant in her written statement had also stated that she never obstructed the use of the pathway by the plaintiff. The defendant was aggrieved primarily by the characterisation of the suit property as a common pathway. It is on this ground, I distinguish the aforesaid decision relied on by the learned counsel appearing for the plaintiff.

13. Before me, the learned counsel for the respondent on <https://hcservices.courts.gov.in/hcservices/> stated that even though under Ex.A2, the northern



boundary has been mentioned as a common pathway, she would accept the title of the appellant over the same. The second substantial question of law is answered in favour of the appellant and the judgment and decree passed by the first appellate Court is modified. Even while declaring that the appellant is the owner of the suit property, since the plaintiff has no other way of accessing the 40 feet common road, the plaintiff and her family members and lineal descendants are permitted to use the suit pathway for reaching the 40 feet convent road.

14.At this stage, the learned counsel for the appellant points out that the plaintiff's son appears to have entered into a sale agreement with a real-estate developer. It is conceded by the respondent through her counsel that the present right of way given in favour of the respondent through the existing portion as mentioned in the commissioner's report and plan is restricted to the plaintiff, her family members and lineal descendants. If the plot owned by the plaintiff on the eastern side is sold in favour of any third party, the purchaser will not be entitled to claim the benefit under this decree.

15.The second appeal is allowed on these terms. No costs.

Sd/-

Assistant Registrar(CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To:

1.The I Additional Sub Court, Madurai.

2.The District Munsif Court, Thirumangalam.

Copy to:

The Record Keeper,V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to M/s.S.MADHAVAN, Advocate (SR-13269[F] dated 21/03/2022)

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-13600[F] dated
22/03/2022)

+1 CC to M/s.S.MADHAVAN, Advocate (SR-13809[F] dated 23/03/2022)

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21.03.2022

ss (CO)

TR(20.04.2022) 5P 8C

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