



S.A.(MD) Nos.919 & 994 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.09.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) Nos.919 & 994 of 2011

and

C.M.P.(MD) No.11830 of 2019

S.A.(MD) No.919 of 2011:

- 1.Sheik Davood
- 2.Sahul Hameed
- 3.S.V.Halima
- 4.Fathima Firdousiya
- 5.Zainambu Kathija

... Appellants/Appellants/Defendants

Vs

- 1.Siddhi (Died)
- 2.Seithali Fathima
- 3.Hussaina

...1st Respondent/Respondent/Plaintiff

... Respondents 2 & 3/Lrs of Plaintiff

Prayer: Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 15.07.2008 in A.S.No.122 of 2006 on the file of the Sub-Judge, Tuticorin confirming the judgement and decree in O.S.No.28 of 2002 on the file of the Additional District Munsif, Tiruchendur dated 04.04.2005.



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SA(MD)No.994 of 2011:

1.Sheik Davood
2.Sahul Hameed
3.S.V.Halima
4.Fathima Firdousiya
5.Zainambu Kathija

... Appellants/Appellants/Plaintiffs

Vs

1.Siddhi (Died)
2.Seithali Fathima
3.Hussaina

...1st Respondent/Respondent/Defendant

... Respondents 2 & 3/Lrs of Defendant

Prayer: Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 15.07.2008 in A.S.No.124 of 2006 on the file of the Sub-Judge, Tuticorin confirming the judgement and decree in O.S.No.109 of 2004 on the file of the Additional District Munsif, Tiruchendur dated 04.04.2005.

In both Appeals:

For Appellants : Mr.C.Vakeeswaran

For Respondents : Mr.Raghuvaran Gopalan
for Mr.G.Mohan Kumar



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COMMON JUDGMENT

1.1 There are two appeals, which arise from two separate suits. The first of the suits is O.S.No.110 of 2001, which was instituted before the Subordinate Court, Tuticorin. Due to change of pecuniary jurisdiction, this suit was later transferred to the Additional District Munsif Court, Tiruchendur, where it was taken on file as O.S.No.109 of 2004. This suit was laid for declaration that the 5th Schedule of property in the suit is the exclusive lane of the plaintiffs.

1.2. The second suit in O.S.No.28 of 2002 was laid by the defendant in the earlier suit, wherein the property described in the 5th Schedule in the earlier suit is scheduled as Item No.2. The plaintiff in this suit would contend that this property is not the exclusive property of the plaintiffs in O.S.No.109 of 2004, but is a common lane.

2.1. Both the suits were tried together and evidence was recorded in O.S.No. 109 of 2004. The trial court, vide its common judgment dated 04.04.2005,



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partly decreed O.S.No.28 of 2002 and declared that the disputed lane is a common lane and dismissed the other suit in O.S.No.109 of 2004.

2.2. Challenging these decrees, the plaintiffs in O.S.No.109 of 2004 preferred A.S.No.124 of 2006 and A.S.No.122 of 2006. The First Appellate Court, Vide its judgment dated 15.07.2008, dismissed both the appeals. Hence, these Second Appeals. The parties would be referred to by the rank in O.S.No.109 of 2004 for narrative convenience.

3. As indicated earlier the dispute is over a lane that runs in between the residential properties of the plaintiffs and the defendant. According to the plaintiff, this lane is the exclusive property of the plaintiffs and pivot their cause of action on a custom in the residential area of the Muslims in Kayalpattinam. For understanding the nature of dispute a pictographic representation of the property may be useful.



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K A T C H E R I R O A D	2 nd Schedule 2 nd and 3 rd Plaintiffs	P A T H W A Y	1 st Schedule 1 st Plaintiff	
	3 rd Schedule 4 th Plaintiff		4 th Schedule 5 th Plaintiff	Muthu Magdom Fathima
	5 th Schedule – Disputed Lane			
	Defendant Property			

There is a main road on the far west. It is known by the name 'Katcheri Road'. The properties of the defendant and the plaintiffs are situated to the east of the said road. Between the properties of the plaintiffs and the defendant runs a east-west lane and this is the disputed lane. To be specific, this lane is described as the 5th Schedule in O.S.No.109 of 2004 and Item-2 in O.S.No.28 of 2002.



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Plaintiff's case:

4.1 Turning to the title of the plaintiffs, the entire block of property to the immediate north of the disputed lane originally belonged to certain Zainambu Nachiyar. She had divided her property into northern half and southern half.

4.2. So far as half of the property which is to the immediate north of the disputed lane is concerned, she had executed a sale deed dated 27.03.1944 in favour of her grand-daughter, who also goes by the name Jainambu Nachi. After the demise of Jainambu Nachi, this property devolved on her daughter Muthu Mohamed Fathima. Muthu Mohamed Fathima, in turn divided the southern half into western half and eastern half, with a lane in between. Western half is the 3rd Schedule in the plaint and eastern half is the 4th schedule. On 30.11.1999, vide separate settlement deeds, marked as Ext.A.3 and Ext.A.4, she settled 3rd Schedule to the 4th plaintiff, and 4th Schedule to the 5th plaintiff.



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4.3. Turning to the northern half of the property, few months after the execution of Ext.A.7 sale deed, dated 27.03.1944, Jainambu Nachi had settled the same to her son Abul Hasan on 18.07.1944 (this sale deed is not marked). On 19.09.1954, Vide Ext.A.8 sale deed, Abul Hasan transferred his title to the northern half to one Katheeja Ummal. Katheeja Ummal in turn, settled the property to her daughter Mohamed Hayisha. This settlement deed is stated to be dated 05.06.1969 (document not produced). Subsequently, on 18.07.1978, under Ext.A.9, Mohamed Hayisha exchanges the northern half of the property with one Gnani Mohamed Syed Fathima. Thus, Gnani Mohamed Syed Fathima became the owner of the property to the immediate north to the 3rd and 4th Schedules. Gnani Mohamed Syed Fathima in turn divided the northern half into eastern half and western half. Eastern half is the 1st Schedule and western half is the 2nd Schedule. In the southern half she provided a lane between the 1st Schedule and the 2nd Schedule. Vide sale deeds dated 19.10.1992, she sold the 1st Schedule to the first plaintiff and 2nd Schedule to plaintiffs 2 and 3 respectively. This completes the title of the plaintiffs.



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4.4. According to the plaintiffs, in Kayalpattinam where the properties are situate, it is customary in the residential area of the Muslims for the owners of the residential property to set aside a small portion of their property on the south to constitute a private lane for them. The plaintiffs would allege that the northern half and southern half put together measures 36 feet north-south, and this includes the width of the disputed lane that lies to the south of Schedule IV and Schedule V properties shown in the rough sketch above. When the defendant attempted to encroach into half-width of the disputed lane, the plaintiffs rushed to file the suit in O.S.No.110 of 2001 and the same was re-numbered as O.S.No.109 of 2004 seeking declaration that the disputed lane is their exclusive property.

The case of the defendant:

5. The contention of the defendant in brief is that the lane is a common lane for both the plaintiffs and the defendant. She added that there are windows overlooking the disputed lane, and that she has been using it for ingress and egress into the residential building that lies to the south of the disputed lane for about 50 years prior to the suit. On the same set of facts she has laid a suit for declaration that the disputed lane is a common lane in O.S.No.28 of



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2002. Critical to the case of the defendants are the following facts:

- The defendant claims title based on Exts.B2 and B3 settlement deeds dated 26.12.1986 and 13.06.1987 respectively to the property to the south of the disputed pathway. Her title is traced ultimately to Ext.B1 dated 11.03.1940, under which a certain Ummu Kulthammal had purchased the northern half of the block of property which lies to the immediate south of the disputed lane.
- So far as the property that lies to the immediate south of the property covered under Ext.B2 and Ext.B3 is concerned, it was stated to have been purchased by the defendant's mother in the year 1939 under a settlement deed. This document however, is not marked.
- On the strength of this document, the defendant's mother had executed Ext.B9, Settlement Deed dated 18.06.1987 to her another daughter Rahmath Beevi. Rahmath Beevi, in turn, had executed Ext.B10 Settlement Deed dated 06.05.1992 to her daughter.

6.1 The dispute went to trial and as already indicated, evidence was recorded in O.S.No.109 of 2004. The first plaintiff examined himself as



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P.W.1 and he examined a certain M.A.Jinnah as P.W.2. The defendant, on her part, has examined herself as D.W.1 and also examined a certain Syed Ahamed as D.W.2. Both of them have produced documentary evidence. Each of the documentary evidence produced by the plaintiffs has already been referred to. Turning to the defendant's documents, she produced Ext.B1 to Ext.B10, of which, Ex.B.1 is a sale deed dated 11.03.1940 and Ext.B.2 is the settlement deed dated 26.12.1986 executed by the defendant's mother, namely, Ummu Kulthammal in favour of the defendant as regards the property to the south of the disputed lane and opposite to the 3rd and 4th Schedules. This apart, the trial Court had appointed an Advocate Commissioner for local inspection and he had filed his report that was taken on record as Ext.C1 to Ext.C3. Of them, Ext.C3 is the surveyor's plan.

6.2 On appreciating the evidence before it, the trial Court chose to dismiss the plaintiffs' suit and partly decreed the suit of the defendant. Indeed, a prayer for permanent injunction too was sought by the plaintiffs but was declined and there was no appeal against this. As against these decrees plaintiffs preferred two first appeals in A.S.No.122 of 2006 and 124 of



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2006, and they were dismissed. Hence, these second appeals by the plaintiffs.

7. These appeals were admitted for considering the following substantial questions of law:

*“i) Whether the Courts are correct in law in not considering the principle that boundary would prevail over the measurements of the land in dispute? and
ii) Whether the Courts are correct in law in overlooking the usual practice prevailing in the Kayalpattinam Village for the houses situated on the northern side leaving the space in the southern side and using the same as a pathway which exclusively for the owners of the house situated on the northern side?”*

8. The learned counsel appearing for the plaintiffs/appellants submitted:

- That the foundation of the case of the plaintiffs is the existence of a custom prevalent in the residential locality of the Muslims in Kayalpattinam. As per this practice, the owners of the property on the north would leave part of their property on the south to be used as a



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lane for the occupants of the rest of the portions on to its north. This custom is evidenced by the literature in Ext.A10 and Ext.A11. The defendant, though has disputed the custom prevalent in her written statement, had conceded it in her cross-examination when she was specifically confronted about the prevalence of the said custom. This admission about the prevalence of the custom by which the owners leaving part of their property in the south to constitute it into a lane, no matter how their properties are described in the title documents implies that whatever that lies in the southern portion of the property constituting a lane must be treated as part of the northern property.

- In the title documents of the plaintiffs in Ext.A1 to Ext.A4, it is stated that the disputed lane is the common lane left for the property on the north (which originally belonged to Jainambu Nachi). This has been the state of affairs at least since prior to 1944 sale deed which Jainambu Nachi had executed in favour of her son Abul Hasan under Ext.A7. Ext.A1 to Ext.A4 which were executed between 1992 and 1999, only re-emphasized this existing state of affairs. Indeed, in all the title deeds of the plaintiffs that are prior to Ext.A1 to Ext.A4, it is



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described that the northern half and the southern half of the property which Jainambu Nachi originally owned, a north-south measurement for each of the half is stated to be 18 feet, which implies that the north-south measurement of the entire property that Jainambu Nachi owned was 36 feet. However, in the tile documents they essentially purported to deal with 16 feet in each of the halves. This would imply that the balance length of 4 feet was earmarked for the pathway on the south. This is not elaborated in Ext.A10 and Ext.A11, when they gave the side measurements 16 + 16 which would make it 32 feet and only if the width of the lane is added to it, it would make it 36 feet. This state of affair was taken note by the Commissioner. But the trial court overlooked it.

- The first appellate Court had omitted to consider Ext.A10 and Ext.A11 that were filed before it, yet opted to sail with the line of reasoning of the trial Court. In particular, both the Courts below have overlooked the candid admission of D.W.1 on the prevalence of the custom.



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9. The learned counsel for the defendant would submit that while it may be true that both D.W.1 and D.W.2 have admitted that the owners of the properties on the north have always left a lane on the south for their convenient enjoyment, yet it could be seen from the Commissioner's report that the defendant has opened at least six windows and two doors facing or opening into the disputed lane. Indeed the Commissioner has also noted that even plaintiffs 1 to 3 have opened similar doors and windows on their northern wall of their respective houses in Schedule I and II properties. While it may be true that the lane to the south of the property on the north may be part of the northern property, yet in terms of usage, both the northern and the southern owners have been using the property.

10. After carefully weighing the rival submissions, the following aspects emerge:

- The plaintiffs claim right to the disputed lane based on customary right, and also backed it with their documents which have already been detailed in the narration above. Their case about the prevalence of the custom is not only supported by certain literature that they had



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produced vide Ext.A.10 and Ext.A.11, but also supported by the candid admissions of D.W.1 and D.W.2. This would imply that the title to the disputed lane must be considered as part of the northern property. But the issue is not much over the title to the disputed lane, but to its usage.

- Turning to the actual usage of the property, the Commissioner in his report does indicate that the defendant has opened two doors and six windows on her northern wall. She also has left her drainage opening into the disputed lane. Indeed the Commissioner also makes a statement that the occupation of the eastern portion of the defendant's property does not have an access except through the disputed lane. Though the plaintiffs have filed objections to the Commissioner's report, the Commissioner was not cross examined. The point is if the defendant had opened the doors on her northern wall for the first time, then the age of the said windows and the doors on the northern wall of the defendant's house are critical. The Commissioner, in his report was silent on this. Therefore, the burden is on the plaintiffs to



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elicit from the Commissioner about the age of these doors and windows. This apparently and admittedly has not been done. This would necessarily lead to a logical inference that the defendant indeed was using the disputed lane for her ingress and egress to her residential facility to the south of the disputed lane. After all, this is also how plaintiffs 1 to 3 were enjoying their property and used the lane to their north. This would make amply clear that the disputed lane, notwithstanding its title in the owners to the immediate north, in terms of its usage, it is used as a common lane.

11. Here, this Court finds that the first appellate court has not appreciated the entire evidence on record appropriately. Necessarily this Court has to intervene to set it right. This Court, therefore, allows these Second Appeals, modifies the prayer to the extent proved by the parties as below:

- (a) The plaintiffs' title to the soil of the disputed lane is declared; and
- (b) The plaintiffs' right to seek exclusive right of user over the disputed lane is rejected and the LRs of the defendant



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will have right of access over the disputed lane.

No costs. Consequently, connected miscellaneous petition is closed.

21.09.2022

Index : Yes/No

Internet: Yes/No

cm/ssb/abr

To

- 1.The Sub-Judge, Tuticorin
- 2.The Additional District Munsif,
Tiruchendur.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.

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