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S.A(MD).No.319 of 2005

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
JUDGMENT RESERVED ON : 14.12.2021
JUDGMENT PRONOUNDED ON : 01.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD) .No.319 of 2005
and CMP(MD) .No.2742 of 2005
M.P(MD) .Nos.1 of 2008 and 1 of 2011

1.Chelliah
2.Thangaraj
3.Murugan
4.Shankar
5.Karuppiah
6.Murugan
7.Madasamy
8.Suresh
9.Palavesam
10.Murugan
11.Vellammal

... Appellants 1 to 11/
Respondents 2 to 6 and 11 to 16
/Defendants 2 to 6 & 11 to 16

Vs

1.Muthiah
2.Madasamy
3.Sankaran
4.Sudallandi
5.Murugesan
6.Kittu
7.Raju

... Respondents 1 to 7/Respondents 1 to 7
/Plaintiffs 1 to 7

8.Gomathi

... 8th Respondent/8th Appellant
/8th Plaintiff

9.Tankasi Municipality
Tenkasi

Represented by its Commissioner

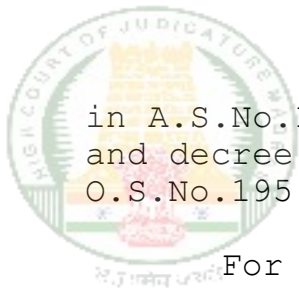
... 9th Respondent/1st Respondent
/1st Defendant

10.Sendu
11.Madasamy
12.Gurusamy alias Ali
13.Shanmugathammal

... Respondents 10 to 13/Respondents 10 to 13
/Defendants 7 to 10

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against
the judgment and decree of the Court of Principal Sub Judge, Tenkasi

<https://hcservices.ecourts.gov.in/hcservices/>



in A.S.No.17 of 2004 dated 15.07.2004 whereby reversing the judgment and decree of the Court of the Principal District Munsif, Tenkasi in O.S.No.195 of 2001 dated 31.12.2003.

For Appellants : Mr.T.S.R.Venkatramana, Advocate
For R1, R6 & R7 : Mr.F.X.Eugene, Advocate
For R9 : Mr.A.Sivanu Pandian,
Government Advocate

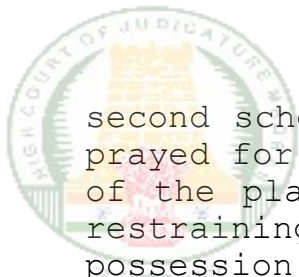
For R2, R4, R5, R8,
R10, R12 & R13 : No Appearance

JUDGMENT

The defendants are the appellants.

2.The plaintiffs filed O.S.No.195 of 2001 before the Principal District Munsif Court, Tenkasi for declaration that the second schedule property jointly belongs to the plaintiffs and the 7th defendant and the other defendants are not entitled to the same. The plaintiffs further prayed for a decree for permanent injunction as against the defendants 1 to 6 and defendants 8 to 16 not to disturb their possession. The defendants filed a counter claim contending that the second schedule property is a common pathway and for a mandatory injunction to remove the encroachment made by the 7th plaintiff in the said pathway. The trial Court dismissed the suit filed by the plaintiffs and decreed the counter claim of the defendants. As against the same, the plaintiffs filed A.S.No.17 of 2004 before the Principal Subordinate Court, Tenkasi. The learned Subordinate Judge was pleased to allow the appeal and decreed the suit of the plaintiffs and dismissed the counter claim. As against the same, the defendants have filed the present second appeal.

3.The plaintiffs have contended that one Padagalinga Moopnar had purchased the first item in the first schedule property on 21.07.1939 under Exhibit A2. The said Padagalinga Moopnar and his wife Anaimuthammal have jointly purchased the second item of the first schedule property under Exhibit A1 on 20.01.1959. The plaintiffs further contended that the plaintiffs and the 7th defendant are the legal heirs of the said Padagalinga Moopnar and Anaimuthammal. According to the plaintiffs, the plaintiffs and the defendants are in enjoyment of various portions of the first item of the suit schedule property. The plaintiffs had further contended that in the middle of the first schedule property, the plaintiffs and the 7th defendant have left a common Courtyard for a width of 5 feet and it falls within the first schedule property and the same is shown as second schedule property. The plaintiffs further contended that apart from the plaintiffs and the 7th defendant, no other person is entitled to use the said common Courtyard. The plaintiffs further contended that the defendants are making a claim that the second schedule property is a common pathway. However, the defendants are having an alternative pathway to reach the road on the southern side. Hence, they do not have any right to make a claim over the



second schedule property as a common pathway. Hence, the plaintiffs prayed for declaration that the second schedule is a common property of the plaintiffs and the 7th defendant and also for an injunction restraining the other defendants from interfering with the peaceful possession and enjoyment of the suit schedule property.

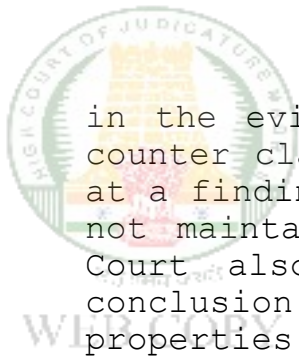
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4.The defendants filed a written statement contending that the second schedule property is a common pathway. The defendants further contended that the ancestor of the defendants 2 to 6 and the 12th defendant have purchased the properties located to the west of the plaintiff's property under Exhibit B4 to B7. As per the recital in the said documents, the present second schedule property is shown as a common pathway. The defendants further contended that the second schedule property does not form part of the first schedule as contended by the plaintiffs. The defendants further contended that the cement slabs have been laid by the Slum Clearance Board, throughout the sketch of the second schedule property. Electrical and cable wires are also drawn through the second schedule property to the properties of the defendants. The defendants further contended that both the plaintiffs' house as well as the defendants' house are facing southwards having an access to the second schedule pathway. The defendants further contended that especially the 7th defendant has encroached upon the said pathway and he has put up some construction. Hence, the plaintiffs prayed for declaration that the second schedule property is a common pathway of the plaintiffs and the defendants and further prayed for permanent injunction not to disturb their usage of the said common pathway. The defendants also prayed for mandatory injunction for removal of the encroachment made by the 7th plaintiff in the second schedule property.

5.The trial court after considering the documents namely Exhibits A1 to A4, arrived at a finding that the plaintiffs have not established that the second schedule property forms part of the first schedule property. The trial Court also relied upon the boundary recital in Exhibits B4 to B7 to arrive at a finding that the second schedule property is a common pathway of the plaintiffs and the defendants. The trial Court also relied upon the Commissioner's report which indicate that cement slabs have been laid by the Slum Clearance Board from the municipal cement road laid on the eastern side till the end of the house of the 15th defendant. The trial court also relied upon the Commissioner's report to arrive at a finding that electrical wire and cable wire are drawn through the second schedule property to the properties of the defendants. Based upon the said findings, the trial court dismissed the suit filed by the plaintiffs and decreed the counter claim of the defendants.

6.The First Appellate Court relied upon Exhibits A1 and A2 to arrive at a conclusion that the second schedule property forms part of the first schedule property. The First Appellate Court considered

<https://hcsres.cemil.com/it/icservices/>



in the evidence of DW1 and hence, the case of the defendants for counter claim cannot be accepted. The First Appellate Court arrived at a finding that the first defendant namely Tenkasi Municipality is not maintaining the second schedule property. The First Appellate Court also relied upon the deposition of DW1 to arrive at a conclusion that the defendants are not sure about whether the properties belong to the Municipality or it is a common private pathway of the plaintiffs and the defendants. The learned Subordinate Judge relied upon **1987 2 MLJ 302** to arrive at a finding that just because some electrical wires are being drawn through a particular property, the same cannot be considered as a common pathway. On the said findings, the First Appellate Court decreed the suit filed by the plaintiffs and the dismissed the counter claim filed by the defendants. As against the same, the present second appeal has been filed by the defendants.

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

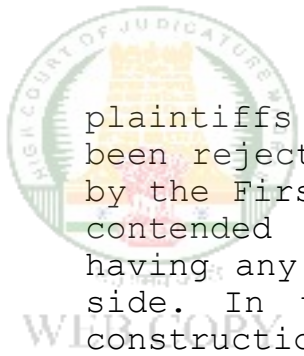
(1)whether plaintiff is entitle by a decree even though he failed to prove his case?

(2)whether the learned Sub Judge was right in holding a Municipal road as a private path contrary to the provisions of District Municipalities Act?

(3)Whether the judgment of the First Appellate Court is sustainable on view of the fact that the learned Judge has misread Ex.B4 to B7 and C1 and C2 and the evidence of PW1 which specifically mention suit 2nd schedule pathway as common pathway?

(4)whether a common pathway used since 1959 from the date of B4 can be declared as private pathway?

8.The learned counsel for the appellants contended that all the physical features referred to in the commissioner's report will clearly indicate that the suit property is a common pathway right from the Municipal Road on the eastern side till the house property of the 15th defendant. The cement slabs have been laid in which the words SCB has been incorporated. The learned counsel further contended that the documents filed on the side of the defendants 4 to 7 will clearly show that the second schedule property is a common pathway. In fact in Exhibits B6 and B7 it has been specifically mentioned that the properties purchased by the ancestor of defendants 5 and 6 are located north of the common pathway. In Exhibits B4 and B5, there is a reference about the suit pathway as a common pathway. He further contended that the plaintiffs have not established that the second schedule property is part of the first schedule property. He further contended that the case of the



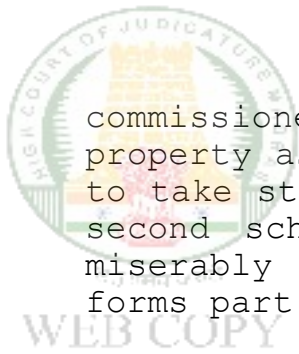
plaintiffs that the defendants are having alternative pathway has been rejected by the trial Court and the same has not been reversed by the First Appellate Court. The learned counsel for the appellants contended that apart from this pathway, the defendants are not having any other access to reach the municipal road on the eastern side. In the said common pathway, the 7th plaintiff has put up construction obstructing the access of the defendants to reach the municipal road on the eastern side. Hence, he prayed for allowing the second appeal and restore the judgment and decree of the trial Court.

9.Per contra, the learned counsel for the respondents contended that the plaintiffs have established that the second schedule property falls within the first schedule property. Apart from the plaintiffs and the 7th defendant, no other person is entitled to make a claim over the second schedule property. The respondent further contended that just because some electrical line or cable wire are drawn through the second schedule property, the second schedule property can never be considered to be a common pathway of the defendants. According to the learned counsel for the respondents, the second schedule property having a width of 5 feet is the common Courtyard of the plaintiffs and the 7th defendant. He further contended that the defendants are having access to reach the road laid by the Tamil Nadu Housing Board which is located on the southern side of the plaintiffs through a lane which is marked as KLMN. He further contended that the said KLMN is not a private lane and it is a public lane which can be used by the defendants to reach the main road on the southern side. Hence, he prayed for dismissal of the second appeal.

10.I have carefully considered the submissions on either side.

11.It is the specific case of the plaintiffs that the suit items 1 and 2 in the first schedule has been purchased by one Padagalinga Moopnar and his wife under Exhibits A2 and A1 on 21.07.1939 and 20.01.1959 respectively. According to the plaintiffs, the second schedule property falls within the first schedule property and it is used as a common Courtyard of the plaintiffs and the 7th defendant. The defendants in the written statement have specifically contended that the second schedule property does not fall within the first schedule property. Hence, the entire burden is upon the plaintiffs to establish that the second schedule property forms part of the first schedule property.

12.A careful perusal of Exhibits A1 and A2 will indicate that each of the properties are having an east-west measurement of 15 ½ and north-south measurement of 55 feet. Hence, the plaintiffs have to establish that the second schedule property falls within north-south measurement of 55 feet. Though the plaintiffs have pleaded that the second schedule property falls within the first schedule property, they have not taken any steps to give instruction to the



commissioner to measure the north-south measurement of their property as per Exhibits A1 and A2. The plaintiffs have also failed to take steps to establish that within this north-south 55 feet the second schedule property is located. Hence, the plaintiffs have miserably failed to establish that the second schedule property forms part of the first schedule property.

13.PW1 has clearly admitted that the cements slabs with inscription of SCB (Slum Clearance Board) has been laid from the municipal road on the eastern side to the 15th defendant's property on the western side. The PW1 has also admitted that originally these slabs were laid only on the western side in the year 1995 and thereafter, they were also laid in the eastern side to reach the municipal road in the eastern side. Hence, the pleadings of the plaintiffs that the attempts are being made to lay a road only in the year 2001 has been proved to be false. PW1 also admitted that the electrical wire and cable wire are drawn through the second schedule property to reach the house of the defendants from municipal road located on the eastern side. The PW1 has also admitted that the 7th plaintiff has encroached upon the second schedule property and has put up some construction. PW1 has also admitted in his deposition that the road in which the house of the plaintiffs and the defendants are located is called as Mettu Theru indicating the plaintiffs' address as well as the defendants' address are shown as Mettu Theru. PW1 has also destroyed some two or three slabs of SCB and laid a foundation for a wall obstructing the second schedule property.

14.The above said facts will clearly indicate that the plaintiffs have not established that the second schedule property is part of the first schedule property. On the other hand, the defendants have established that the second schedule property is used as a pathway at least from the year 1959 onwards. In fact, the documents of the year 1960-1961 namely Exhibits B6 and B7 specifically refer to a common pathway in the second schedule property. The defendants have also established that the Slum Clearance Board has laid cement slabs in the said second schedule property in the year 1995 itself. The said cement slabs extend from municipal road on the east to the 15th defendant's house on the west through out the entire extent of the second schedule property. The First Appellate Court has erroneously arrived at a conclusion that the plaintiffs have established the title over the second schedule property. The First Appellate Court has relied upon certain discrepancies in the case of the defendants that on one hand the defendants claiming it as a common pathway, on the other hand they claimed it as a public pathway maintained by the first defendant municipality. The said discrepancy will not materially affect the case of the defendants to have a right of passage over the second schedule pathway.



15. In view of the above said discussion, I find that the First Appellate Court has erroneously reversed the judgment and decree of the trial Court in the main suit as well as in the counter claim.

16. In view of the above discussion, the substantial questions of law are answered as follows:

(1) the plaintiffs have not proved that the second schedule property falls within the first schedule property by measuring north-south measurement covered under Exhibits A1 and A2 sale deeds. Hence, the plaintiffs are not entitled to a decree as prayed for.

(2) the Slum Clearance Board has laid cement slabs in the second schedule property indicating it to be a public pathway. Hence, the First Appellate Court was not right in holding that the second schedule property is a private pathway. The First Appellate Court has not properly appreciated Exhibits B4 to B7 sale deeds in favour of the defendants which clearly indicate the existence of the common pathway in the second schedule property. The First Appellate Court has also not appreciated the commissioner's report which indicates the physical feature of the second schedule property as a pathway.

(3) PW1 has admitted in various places of the cross examination about the existence of the cement slabs right from the municipal road on the eastern side to the 15th defendant's house on the western side.

(4) Hence, the view of the First Appellate Court that the defendants have not proved their case is not sustainable. The First Appellate Court is not correct in declaring the common pathway as a private pathway in view of Exhibits B4 to B7.

15. All the substantial questions of law are answered in favour of the appellants. The judgment and decree of the First Appellate Court is set aside and the judgement and decree of the trial Court is restored. The second appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)



To

1.The Principal Subordinate Judge
Tenkasi

2.The Principal District Munsif
Tenkasi

Copy to:

The Section Officer
V.R.Section
Madurai Bench of Madras High Court
Madurai. (2 Copies)

+1 CC to M/s.T.S.R.VENKATRAMANA, Advocate (SR-3505[F] dated 01/02/2022)

+1 CC to M/s.F.X.EUGENE, Advocate (SR-3573[F] dated 02/02/2022)

+1 CC to M/s.SPL.GP (SR-3771[F] dated 02/02/2022)

**S.A(MD) .No.319 of 2005
and CMP(MD) .No.2742 of 2005
M.P(MD) .Nos.1 of 2008 and 1 of 2011
01.02.2022**

RS (15.02.2022) 8P-8C