



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.11.2022

CORAM : JUSTICE N.SESHASAYEE

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S.A.No.1346 of 1997

1.Meenakshiammal
2.Gurusangu

... Appellants/Appellants/
Plaintiffs

Vs

1.Pitchaiah Moopanar
2.Ramasubbu (Died)
3.R.Sivakumar

... Respondents/Respondents/
Defendants
... 3rd Respondent

***[R3-was brought on record as LR of the deceased
R2 vide order dated 24.09.2012 made in M.P. (MD)
Nos.1 to 3 of 2012 in S.A.No.1346 of 1997]***

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 24.03.1997 made in A.S.No.79 of 1994 on the file of the Principal Subordinate Court, Tenkasi, confirming the judgment and decree dated 20.06.1994 made in O.S.No.34 of 1991 on the file of the District Munsif's Court, Shenkottah.

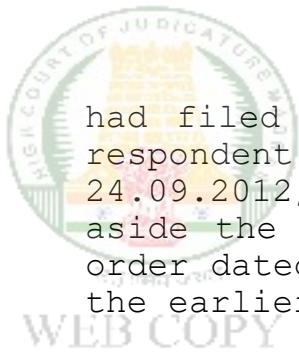
For Appellant No.2: Mr.M.P.Senthil

R1 & R3 : Mr.R.T.ARIVUKUMAR,

J U D G M E N T

The plaintiffs in O.S.No.34 of 1991 on the file of the District Munsif's Court, Shenkottah, are the appellants herein. The suit was laid for declaration of plaintiffs' right of way over the 2nd schedule of property, for mandatory injunction to remove certain constructions alleged to have been put up by the defendants, and also for prohibitory injunction not to obstruct the way. The suit came to be dismissed and so was the first appeal filed by the plaintiffs in A.S.No.79 of 1994 before the Principal Subordinate Court, Tenkasi. Hence, the second appeal at the instance of the plaintiffs. For narrative convenience, the parties would be referred to by their rank before the trial Court.

2. Earlier, this appeal came to be allowed vide judgment of this Court dated 14.07.2009. At the time of disposal, there was no representation for the defendants. Subsequently, the respondents



had filed M.P.(MD) Nos.1 to 3 of 2012 to bring on record the respondent as LR of the deceased 2nd respondent, which was allowed on 24.09.2012, and M.P.(MD) No.4 of 2012 to rehear the appeal by setting aside the ex-parte judgment dated 14.07.2009. This Court vide its order dated 14.11.2022, allowed M.P.(MD) No.4 of 2012 and set aside the earlier judgment dated 14.07.2009.

3. The facts are given in detail in the judgment of this Court dated 14.07.2009, and to save time, this Court reproduces the narration of facts as given in its earlier judgment dated 14.07.2009 as below:

"2. The Substantial question of law raised in the Second appeal is "Whether a co-owner can make permanent construction in a common lane?"

3. The brief facts leading to the filing of the Second Appeal is as follows:

The plaintiffs/appellants, according to them, are the absolute owners of the suit schedule property and they have filed a suit praying for declaration and for exclusive right of second schedule property in S.No.152/1 subject to easementary right to the defendants/respondents herein and for consequential relief for removing the toilet, bathroom and water tank put up in the common lane. The trial court went into the case of both sides. From the side of the plaintiffs/appellants herein, 9 documents were filed as Ex.A1 to Ex.A9. From the side of the defendants/respondents, no documents have been filed and two court documents have been filed as Ex.C1 and Ex.C2. Ex.C1 is the Advocate Commissioner's report, dated 01.04.1991 and Ex.C2 is the Advocate Commissioner's rough sketch showing the common pathway. Though the case of the plaintiffs / appellants before the trial court was that the second schedule property absolutely belongs to the plaintiffs/appellants herein and in support of it, they have filed three sale deeds Ex.A1, dated 14.6.1985, Ex.A2, dated 24.07.1981 and Ex.A3, dated 07.05.1990. They have also produced patta pass book, marked as Ex.A4, wherein also, survey number of the second schedule property has been properly mentioned. Apart from that, this dispute was also taken before the revenue authorities/Assistant Settlement Officer and the Revenue Authorities concerned also have passed an order dated 31.07.1976, stating that the common pathway was the subject-matter of the dispute between the



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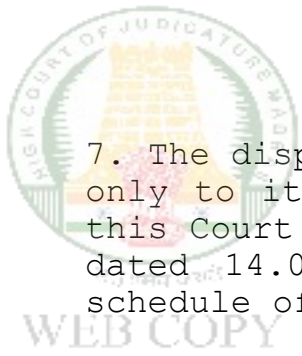
parties and by proceedings, dated 31.07.1976, marked under Ex.A7, clearly indicates that the suit second schedule property absolutely belongs to the appellants/appellants herein. However, the same was taken before the appellate authority/Directorate of Settlement and in his proceedings marked under Ex.A8, dated 28.10.1977, the Director of Settlement passed an order, holding that the second schedule of suit property is to be treated as a common pathway. As against that, neither the plaintiffs/appellants nor the defendants/respondents preferred an appeal and thus it has become final. Though the order dated 28.10.1977/Ex.A8 has become final, showing that the second schedule of suit property though faintly pleaded as the absolute property of the plaintiffs/appellants and defendants/respondents, the courts below ought to have ironed out the dispute on the basis of the order passed by the Director of settlement, in his proceedings, dated 28.10.1977. Surprisingly, both the courts below have not taken on record, the proceedings dated 28.10.1977. When the defendants/respondents have agreed and accepted that the second schedule property is a common pathway, the trial court should not have dismissed the suit filed by the plaintiffs."

4. The learned counsel for the appellants submitted that he has no instructions in the matter to argue in support of the judgment dated 14.07.2009.

5. The learned counsel for the 3rd respondent would submit that it is not the case of the defendants that the pathway is not a common pathway. Indeed they do admit that the plaintiffs have right of access over the pathway. This essentially leaves the issue to one of considering the decree for mandatory injunction. It is a case of the plaintiffs that the defendants have put up a bathroom and a water tank on the pathway, which caused obstruction. The learned counsel for the 3rd respondent submitted on specific oral instruction of his client that this water tank has since been removed. He added that so far as these obstructions are concerned, both the Courts have rejected the prayer for mandatory injunction essentially because the plaintiffs have not established that these constructions were made on the disputed pathway in the 2nd schedule of property.

6. This statement of the learned counsel for the 3rd respondent made on instruction of his client is now recorded.

<https://www.mhc.in.gov.in/judis>



7. The dispute is not over the title to 2nd schedule of property, but only to its use. So far as this part of the decree is concerned, this Court would not like to interfere with the decree of this Court dated 14.07.2009 declaring the plaintiff's right to use the 2nd schedule of property as the pathway.

8. So far as the alleged constructions put up by the defendants, which though are now stated to have been now removed are concerned, since it is uncertain whether these constructions were put up on the pathway or in the private property of the defendants, this issue needs some investigation. Inasmuch as the 3rd respondent (LR of 2nd defendant / 2nd respondent) is now making a statement before this Court that these constructions have been removed, there is no *in praesenti* danger vis-a-vis the same. At any rate, pursuant to the mandatory decree obtained by the plaintiffs, they appeared not to have approached the execution Court for executing the decree either.

9. In essence, this Court declares the plaintiffs' right to use the 2nd schedule of property as a common pathway and so far as the other reliefs are concerned, in view of the statement made on behalf of the 3rd respondent, they no more survive for consideration and the same are rejected.

10. In fine, this Second Appeal is partly allowed and the judgment and decree dated 24.03.1997 made in A.S.No.79 of 1994 on the file of the Principal Subordinate Court, Tenkasi, confirming the judgment and decree dated 20.06.1994 made in O.S.No.34 of 1991 on the file of the District Munsif's Court, Shenkottah, is modified to the extent indicated above. No costs.

Sd/-

Assistant Registrar(CS III)

// True Copy //

/07/2023

Sub Assistant Registrar(CS)

abr

To

1.The Principal Subordinate Judge,
Tenkasi.



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2.The District Munsif, Shenkottah.

3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.S.YASAR ARAFATH, Advocate SR.No.55144

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14.11.2022

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