



S.A.No.1322 of 2003

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.10.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.No.1322 of 2003

K.Baghyalakshmi

... Appellant/Respondent/Plaintiff

Vs

Thoosimadasamy (Died)

... Respondent/Appellant/Defendant

2.Theivanai

3.Chellammal

4.Chellapandi

5.Mariappan

6.Chandira

... Respondents 2 to 6

[Respondents 2 to 6 were brought on record as LR's of the deceased sole respondent vide order dated 21.09.2022 made in CMP(MD) No.4705 of 2022 in S.A.No.1322 of 2003]

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 25.02.2003 made in A.S.No.3 of 2003 on the file of the Sub Court, Sankarankoil, reversing the judgment and decree dated 13.12.2002 made in O.S.No.177 of 1998 on the file of the Additional



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District Munsif's Court, Sankarankoil.

For Appellant : Mr.S.Meenakshi Sundaram
Senior Counsel
assisted by Mr.M.Sengu Vijay

For Respondents : Mr.F.X.Eugene for R2 to R6
: R1 – Died

JUDGMENT

1. The plaintiff in O.S.No.177 of 1998 on the file of the Additional District Munsif's Court, Sankarankoil, which was laid for declaration of title, injunction and also mandatory injunction as concerning two items of suit properties, is the appellant herein. For narrative convenience, parties would be referred to by their rank before the trial Court.

2. The case of the plaintiff is that:

- The 1st Item of property is the house property which the plaintiff had purchased under Ext.A.1-sale deed dated 05.02.1996. The 2nd Item of property is a narrow strip of land which according to the plaintiff



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forms the eastern extremity of the property covered under Ext.A.1.

- According to the plaintiff, the 2nd Item of property is a pathway, that she had opened a drainage into this pathway, which to reiterate is part of her own property and that the defendant had closed the said drainage.
- To the immediate south of the plaintiff's property lies the property of one Madasamy and to the further south of Madasamy's property lies the defendant's property. The defendant had purchased the property vide Ext.B.1-sale deed, dated 17.06.1997. This sale deed deals with two items of property and the 2nd Item of property is stated to be a pathway measuring 3' x 120'. This is a pathway that connects the defendant's house to the main road on the north and the plaintiff's property abuts the road and that she has title over the property till the southern boundary of her property. The 2nd Item of property is the exclusive property of the plaintiff or is not the part of the property described as the 2nd Item of property in Ext.B.1 which the defendant had purchased. Indeed the defendant had also laid pipeline in the said portion of the property.



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- When the drainage which the plaintiff claims that she had opened into this 2nd Item of property from her eastern wall was closed, the suit was laid.

3. The defendant filed his written statement refuting the allegations contained in the plaint. According to him, Item-I and Item-II properties do not belong to the plaintiff. They belonged to the defendant and the measurements given in the sale deed of the plaintiff are totally false and from the date of possession, the defendant has been paying *kist*.

4. The dispute went to trial and before the trial Court, both sides adduced their oral and documentary evidences. For the plaintiff, she examined herself as P.W.1. She also examined two other witnesses as P.W.2 and P.W.3 and produced Ext.A.1 to Ext.A.4. On the side of the defendant, he examined himself as D.W.1 and examined two other witnesses as D.W.2 and D.W.3 and he produced Ext.B.1 to Ext.B.6. The trial Court also appointed an Advocate Commissioner and his report and plan came to be marked as Ext.C.1 and Ext.C.2.



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5. On appreciating the evidence before it, the trial Court granted a decree declaring the plaintiff's title and injunction over Item-I property, then declaration and prohibitory injunction regarding Item-II property and dismissed the suit as concerning the mandatory injunction sought for removal of the pipeline laid by the defendant in the 2nd Item of property.

6. The defendant promptly preferred a first appeal in A.S.No.3 of 2002 and the plaintiff came up with her cross objection challenging the dismissal of the suit declining the mandatory injunction she had sought. The first appellate Court allowed the appeal dismissing the cross objection which rendered a decree sought for mandatory injunction otiose.

7. It may be stated here that before the first appellate Court, the defendant had filed some documents under Order 41 Rule 27 of Civil Procedure Code. This is the suit register extract in O.S.No.522 of 1996 filed by the plaintiff and few others against the Municipality for some declaration of their right that the property belonged to them and not to the Municipality. Acting on this document and without granting the plaintiff a right to adduce rebuttal



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evidence, the first appellate Court had come to the conclusion that the property in question neither belonged to the plaintiff, nor to the defendant and dismissed the suit. Hence the second appeal by the plaintiff.

8. The appeal was admitted for considering the following substantial questions of law:

“(i) Whether the lower appellate Court is correct in reversing the judgment and decree of the Trial Court without giving any finding on facts or law which warranted the reversal of the Trial Court judgment and decree?”

“(ii) Whether the lower appellate Court is correct in placing reliance upon Ex.B.7, which is inadmissible document under the Evidence Act?”

“(iii) Whether the lower appellate Court failed to note that oral and documentary evidence adduced on the side of the appellant?”

“(iv) Whether the lower appellate Court is correct in holding that the right of the adverse possession is occurred to appellant when there is specific admission by D.W.3 with



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regard to possession and enjoyment of the property? and

*(v) Whether the lower appellate Court failed to note that
Ex.C.1 and C.2 corroborated the claim of the appellant?"*

9. Heard both sides. To start with, there is no dispute between the parties to the title of the plaintiff over the 1st item of property. The dispute is all about the narrow strip of land that abuts the plaintiff's house on the eastern side which runs southward up to the northern edge of the defendant's property. The trial Court had appointed a Commissioner whose plan provides a clue to understand the dispute between the parties.

10. If Ext.A.1 is scrutinised, it nowhere mentions about the availability of a pathway, now described in this suit as Item-II. All it says is some 510 sq.ft. was sold in S.No.316/1, and the Commissioner had found that the plaintiff's house occupies 282 sq.ft. This leaves the balance of 228 sq.ft. in terms of Ext.A.1, but it is not adequately clear whether the plaintiff's vendor had title to this 228 sq.ft. Turning to the defendant's title to Item-II pathway in his Ext.B.1-sale deed, he had not examined his vendor, nor attempted to



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establish how his vendor had title to Item-II.

11. The plaintiff had pleaded that the defendant has an access to the main road on the north through the west. If the plaintiff's sale deed is considered, the western boundary stated is the property of one Chelliah Asari. When defendant's title document in Ext.B.1 is considered, his western owner is one Karuppiah Asari and in between the plaintiff's property and the defendant's property, lies the property of certain Madasamy Asari. This would imply that the defendant cannot have an access of right on the west unless he trespasses into a stranger's property. This Court was informed that the property of Madasamy Asari on the western property lies vacant, but even if it is so, this Court with its judgment cannot grant a right to the defendant over a stranger's property who is not before the Court. This would imply that the defendant's property would be landlocked without Item-II property, the defendant cannot have access to the property on the north.

12. It is now not so much about title to Item-II. Neither side has adequately



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established the right of their vendors over Item-II pathway. But inasmuch as the pathway continues to be there, and since the character of the property is is a pathway, it cannot be but used only as a pathway. Therefore, even assuming if Item-II property belongs to the plaintiff, still inasmuch as the plaintiff does not own any property till the southern end where the defendant's property ends, it would be nigh difficult for the defendant to enjoy his property unless he is provided an access. Therefore, the relief sought for in this case necessarily has to be moulded and whatever that represents Item-II must have to be held as a common pathway. It matters least with whom the title lies.

13. Turning to the use of pathway, parties are always entitled to only a surface of soil, and any utilisation of the sub-soil such as for laying the pipeline etc., cannot be denied to any. Therefore, this Court moulds the relief and declares that Item-II is a common pathway. The legal heirs of the defendant are also equally entitled to use the sub-soil of Item-II and both the parties are injuncted from putting any construction obstructing the surface of the soil as a pathway. Hence there cannot be any decree for



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mandatory injunction.

14. In conclusion, this Second Appeal is partially allowed in the manner hereinabove stated. No costs.

17.10.2022

Internet: Yes
Index: Yes/No

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To

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



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N.SESHASAYEE, J.

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