



S.A No.226 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.01 .2023

CORAM:

THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI

S.A No.226 of 2013

1.N.S. Babu Nadu
2.Pushpa
3.Ramani
4.Chandra

... Appellants

Vs.

1.Santha Ammal

...Respondent

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and decree in A.S No.94 of 2011, on the file of the Subordinate Court, Poonamallee, dated 11.08.2012 in confirming the judgement and decree in O.S 231 of 2002, on the file of the Principal District Munsif Court, Poonamallee dated 21.04.2011.

For Appellants: Mrs. V.Srimathi
for V.Raghavachari

For Respondent:Mr.S.Ganesh



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JUDGMENT

The appellants herein are the defendants in Suit O.S No.231 of 2002, on the file of the Principal District Munsif Court, Poonamallee, filed by the respondent herein/plaintiff for the relief of declaration that she is entitled to access through B schedule property and to direct the defendants to demolish and remove the construction put up by them over the B Schedule passage and also prayed for permanent injunction against the defendant in respect of B schedule property/suit passage.

2. The contention of the plaintiff is that she had purchased property in S.F No. 7/1 situated in Nazarathpet Village from Lakshmi Ammal/original defendant (died) for a extent of 4389 square feet through sale deed dated 14.09.1987. Subsequently, the plaintiff purchased another strip of land for a extent of 866 ½ square feet from said original defendant's in the same S.No. 7/1, through sale deed dated 07.09.1988 and she is living in the said properties which are described as A Schedule property and to have access to A schedule property from the street she is using six feet common passage as shown as B schedule property herein for their ingrees and egress except B schedule property the plaintiff has no other way to reach



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A schedule property. While so, the defendants put up construction into the near portion of the B schedule property to the extent of 1 feet and also fixed the sunshades protruding over the B schedule property. Hence the suit was filed against the original defendant/ Lakshmi Ammal, during the pendency of the suit she was passed away hence her legal heir impleaded as parties and they contested the suit proceedings their contention is that they were not denied the purchase made by the plaintiff from the deceased defendant but the defendants denied the valid right of way over the passage of 6 feet breadth notwithstanding a recital to that effect in the first sale deed in favour of the plaintiff.

3.Originally the suit passage was owned by one Subramnian Chettiaar and its breadth was only 5 feet. Thereafter, the defendant purchased five feet through sale deed dated 22.02.1988 from the said Subramanian Chettiar and granted five feet passage to the plaintiff through the second sale deed dated 07.09.1988. Hence the defendants contended that passage is only 5 five feet not six feet. Further they contended that she constructed wall within their boundary and not one feet on the passage even sunshade constructed by the defendant does not obstruct the right of the passage of the plaintiff as the sunshade is constructed at a height of 10 feet



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above the ground level. Hence they prayed to dismiss the suit.

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4. The Trial Court framed five issues and independently analysed the evidence as well as documents held that at the time of conveying the property to the plaintiff through sale deed dated 14.09.1987/Ex.A2 the defendants owned one feet passage, and five feet common passage was owned by Subramaniya chettiar. Thereafter, the defendant purchased the said five feet through sale deed dated 22.02.1988 though he owned five feet common passage but the one feet which was already possessed by the defendant at that time of execution of Ex.A1 the plaintiff being the purchaser entitled to have that one feet in addition five feet in common passage in B Schedule property. Accordingly the Trial Court declared that plaintiff entitled to access B schedule common passage six feet and decreed suit and also directed the defendants to demolish and remove the construction in the B schedule passage with the relief of permanent injunction.

5. Aggrieved over the same the defendants preferred an appeal in A.S No. 94 of 2011 on the file of the Subordinate Court, Poonamallee, which independently analysed the facts and evidence of the case and framed separate issues and held that the plaintiff has equal right on the common



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passage with the defendant as per the recital of Ex.A2/sale deed as well as admission made by the D.W.1 and also held that the defendants have not right to aerial projection of common passage and confirmed the findings of the Trial Court by dismissing the appeal.

6. Challenging the concurrent findings the defendants preferred this second appeal contending that both the Court below failed to take note of the fact that an extent of 5 feet common passage alone was available and the plaintiff also accepted the vendors sale deed marked as Ex.B1 and Ex.A3 as regards extent and estopped from denying her entitlement of user to the five feet passage alone but the Court below erroneously appreciated the facts and granted relief as if there is common passage with an extent of six feet is totally misconception of law and prayed to set aside the same.

7. This Court admitted the appeal with the following substantial questions of law:

- i. Whether the Courts below are justified in decreeing the suit, contrary to the recital in Ex.A3 and Ex.B1 as regards the extent of passage?
- ii. Whether Section 43 of the Transfer of property Act has any application, when the plaintiff had failed to prove specifically any error or fraudulent representation on the part of the appellants?



8. Parties are denoted as per the suit. The entire dispute is

whether the common passage is six feet or five feet. The suit properties were purchased by the plaintiff from the deceased defendant Lakshmi Ammal through two sale deeds dated 14.09.1987 and 07.09.1988 which was not disputed by the defendants, the claim of the plaintiff is that through sale deed dated 14.09.1987 she purchased property from the deceased defendant Lakshmmi Ammal along with six feet common passage from that onwards she enjoyed the property along with the said six feet common passage. Subsequently she purchased another strip of land from the said Lakshmi Ammal through sale deed dated 07.09.1988. Now, the common passage was reduced to five feet even the the plaintiff is entitled to use six feet common passage for the reason that at the time of earlier passage her vendor/first defendants possessed six feet right over the common passage now she could not be prevented by the same vendor. Further, the contention of the plaintiff is that even assuming that her vendor has having five feet common passage at the time of earliest purchase he paid consideration for six feet hence for the remaining one feet the plaintiff entitled to use one feet in addition to the said five feet since because she already paid consideration for entire six feet at the time of purchase through sale deed dated 14.09.1987 itself. It is



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admitted fact that at the time of earliest sale by the Lakshmi Ammal in the year of 1987 six feet common passage was conveyed to the plaintiff. As per the evidence of D.W.1, it reveals that Lakshmi Ammal was under the impression that she had six feet in B Scheduler property/passage thereafter one Subramani Chettiar raised objection to use the five feet passage after the dispute, the said Subramani Chettiear sold five feet to the defendant through Ex.B1 in the year 1988. The contention of the defendant's is that after that she executed another another sale deed dated 07.09.1988 she conveyed 5 feet common passage. Hence the plaintiff is not entitled for six feet.

9. As per the submission made by the learned counsel for the plaintiff and also on perusal of Ex.A2 which stands in the name of the plaintiff through which she purchased the property from the Lakshmi Ammal wherein it was mentioned that the path for land was mentioned as six feet. Since there was dispute between the defendants and Subramani Chettiar with regard to usage of passage another sale deed/Ex.B1 was executed by the Subramani chettiar as per that sale deed it reveals that to solve the usage of common passage the defendant's vendor/Subramani Chettiar sold only five feet to the Lakshmi Ammal. Thereafter the plaintiff purchased another bit of land from the Lakshmi Ammal for an extent of 866



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1/4 square feet with five feet passage through sale deed dated 07.09.1988.

WEB CONTENT

Hence, the Defendants convince the Court that Lakshmi Ammal had an impression that she owned six feet common passage in B schedule property, subsequently there was dispute with regard to six feet passage before that the six feet was conveyed to the plaintiff in Ex.A1. Hence as per Ex.B1 the the existence of common passage is only five feet not six feet recitals in Ex.A1 also clearly established the fact. Moreover on perusal of Ex.A2 the plaintiff purchased an extent of 4389 square feet with the right to sue the common passage now the defendant's not denied the plaintiff's right to use the common passage, the dispute only with regard to extent of path of the said common passage. As per the sale deed/Ex.A2 common passage was mentioned as (கிழமேல் 6 அடியில் இடபுரம் பொது வழி) but the plaintiff was under the impression that Lakshmi Ammal/first defendant owned six feet common passage but there was dispute with regard to that six feet with Subramani Chettiar. Hence as per the Ex.B1/sale deed the defendant purchased the five feet common passage from Subramani Chettiar. Eventhough, in Ex.A2 sale deed the path of common passage was mentioned as six feet and her vendor owned only five feet hence the plaintiff is not entitled to claim larger extent from the defendant since because the defendant owned only five feet. As



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rightly pointed out by the Appellant Counsel the trial Court has failed to appreciate this aspect. Furthermore, the plaintiff has paid consideration for the extent she purchased along with right to use common passage now, her right to use common passage is not disputed by the defendants. The contention of the defendant is that her vendor owned only five feet so also plaintiff entitled to use five feet common passage and the same was rightly established by the defendants. In fact, on the ground existence of common passage is five feet path and more than that remaining one foot is belongs to the defendant in which she is entitled to put up her construction. Furthermore as alleged sunshade put up by the defendants is ten feet from the ground is within his limit. Accordingly question of laws are answered. The Judgment and decree passed by the Courts below are hereby set aside. However, the plaintiff is entitled to use five feet passage. Accordingly it is clear that the plaintiff entitled to five feet common passage alone and she is not entitled for other relief of mandatory injunction and permanent injunction. Accordingly suit is partly decreed. No costs.

8. In the result, the Second Appeal is allowed. There shall be no order as to costs.



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T.V.THAMILSELVI,J.

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To

1. The Sub Court, Poonamalle.
2. The Principal District Munsif, Poonamalle.
3. The Section Officer,
V.R Section,

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