



S.A.(MD) No.592 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **18.10.2023**

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CORAM:

THE HONOURABLE MR.JUSTICE **G.CHANDRASEKHARAN**

S.A.(MD) No.592 of 2023
and
C.M.P.(MD) No.13744 of 2023

P.Palanisamy

..Appellant

Vs.

1.S.Jawahar

2.S.Chinnammal (1st wife)

3.Amaravathi (2nd wife)

...Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., to call for the records and set aside the judgment and decree dated 24.07.2018 in A.S.No.33 of 2016 on the file of the Principal Sub Court, Dindigul confirming the judgment and decree dated 06.07.2016 in O.S.No.684 of 2008 on the file of the Principal District Munsif Court, Dindigul.

For Appellant

: Mr.H.Lakshmi Shankar

For Respondents

: Mr.D.Deva Arul Samuel Gibson



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JUDGMENT

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This second appeal is filed challenging the judgment and decree in A.S.No.33 of 2016 on the file of the learned Principal Subordinate Judge, Dindigul, confirming the judgment of the learned Principal District Munsif, Dindigul, in O.S.No.684 of 2008.

2.The appellant/plaintiff filed a suit in O.S.No.684 of 2008 seeking the relief of declaration that the portion marked in Red in the rough sketch is a common pathway, for mandatory injunction for the removal of encroachment made by the defendants in the common pathway and for costs.

3.The case of the plaintiff as seen from the plaint averments in brief is that on the north of Mullipadi village, Aathimarathupatti village situates. On the south of the village, Santhanavarthini River flows from east and goes towards north. There is a water channel from Santhanavarthini River to Padiyoor Kanmai. In the water channel, from Santhanavarthini River to Aathimarathupatti, there is a 100 ft., breadth common pathway. This has been used as a north-south common pathway and also for reaching the crematorium.



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4.The land owners of the property situate on the west of this pathway have been using this pathway from time immemorial. In the middle of the common pathway, Kannimar and Satha temple situate. Behind these temples, the lands of the plaintiff and the defendants situate. Abutting the temple, S.No.354/2 and 355/1 situate and on the west, S.No.354/1 situates. The plaintiff purchased the land in S.No.354/1, measuring an extent of 1.7 acres. Then, that was sub-divided into S.No.354/3. The remaining portion in S.No.354/2 was purchased by the defendants. The plaintiff has been using the common pathway, measuring 5 ft., breadth and 200 ft., length to reach his lands in S.No.354/3. The 5 ft., breadth and 200 ft., length situates in S.No.354/2. The first defendant encroached this pathway and planted 12 coconut trees. Again he planted 17 coconut trees. This pathway was used by the plaintiff to reach his lands in S.No.354/3, 354/1 and 355/1. The defendants have been disturbing the plaintiff's use of this pathway from 2007. The plaintiff sent a representation to the District Collector about this encroachment. No action was taken. Therefore, the suit is filed for the aforesaid reliefs.

5.The case of the defendants is that they denied the existence of 100 ft., width common pathway on the western bund of water channel coming from Santhanavarthini River. The property in S.No.354/2 was purchased by the first defendant's mother and his aunt. They have been enjoying the property and



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planted coconut trees. There is no pathway in S.No.354/3. Plaintiff has not produced any documents to show the existence of the common pathway. The fact that no document as well as revenue records and plans produced to show the existence of pathway shows that there is no such pathway available on ground. There is a pathway to reach the plaintiff's land abutting the water channel running from Aathimarathupatti to Padiyoor Kanmai. That has been used by the plaintiff and other land owners to reach their lands. There is no pathway in the land of the defendants. There is also no common pathway between the land of the defendants and S.No.355/1. Defendants' mother, who is the owner of S.No.354/2, is not impleaded as defendant. The suit is filed only with a view to usurp the defendants property. Thus, the suit is liable to be dismissed.

6.On the aforesaid pleadings, the trial Court framed the following issues:

- “a) Whether the plaintiff is entitled for the relief of declaration as prayed for?*
- b) Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for? and*
- c) To what relief, if any, the plaintiff is entitled to?”*

7.During the course of trial, P.W1 to P.W3 were examined and Ex.A1 to Ex.A3 were marked on the side of the plaintiff. D.W1 and D.W2 were examined



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and Ex.B1 to Ex.B4 were marked on the side of the defendants. Ex.C1 and Ex.C2 were marked as Court exhibits.

8.On considering the oral and documentary evidence, the learned trial Judge recorded a finding that the plaintiff has failed to establish the existence of common pathway as claimed in the plaint and when that is not established, the relief cannot be granted and thus, dismissed the suit. The first appellate Court concurred with the finding of the trial Court and dismissed the appeal. Challenging the judgments of the Courts below, this second appeal is filed.

9.It is the submission of the learned counsel for the appellant that from the oral and documentary evidence produced, especially the sale deeds produced and marked as Ex.A1 and Ex.A2, it is very clear that the plaintiff has access to his land through pathway and for other usual right. This recital goes to show that the plaintiff has a pathway to reach his lands. Originally, larger extent of S.No.354 was owned by plaintiff's vendor. Subsequently, S.No.354 was sub-divided into S.Nos.354/1 and 354/2 and then, S.No.354/1 was sub-divided into S.No.354/3. The only way to the plaintiff to reach his lands in S.No.354/1 and S.No.354/3 is through the common pathway available in S.No.354/2. This common pathway has been enjoyed by the plaintiff ever since from the date of purchase. Only from



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2007, there is obstruction from the defendants and then, the defendants obliterated the pathway in 2007.

10.The Commissioner's report and plan also show that the plaintiff can reach his lands only through the lands of the defendants. There is no access available from the common pathway on the east to reach the lands of the plaintiff in S.Nos.354/1, 354/3 and 355/1. When the defendants claim that there is alternative pathway available as pleaded in the written statement, they have not made any efforts to show the existence of alternative pathway. That means, there is no alternative pathway available. Thus, without the suit common pathway, the plaintiff's land would become a landlocked property and the plaintiff would not be in a position to reach his lands. When S.No.354 was a common tenement before the purchase made by the plaintiff and the defendants, there was a direct access from the common pathway on the east. The plaintiff purchased S.No.354/1 in 1974 and then, S.No.354/3 in 1979. As per Section 13 of the Indian Easements Act, 1882, the plaintiff is entitled to the right of easement of necessity in the lands of the defendants to reach his lands through the common pathway. However, without considering these aspects, the Courts below have negated the plaintiff's relief.



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11. In response, the learned counsel appearing for the respondents submitted that the suit has been filed making a claim of proprietary right in the suit property. The plaintiff claims the suit property on the basis of the title deed. However, the plaintiff's title deed does not indicate that there is a common pathway in S.No.354/2 and in that common pathway, the plaintiff is entitled for a right to use. As on ground, there is no pathway, much less a common pathway available in S.No.354/2. The Commissioner's report and plan shows that there are coconut trees aged more than 10 years situate in the defendants' property and there is no way available.

12. With regard to the submissions made by the learned counsel for the appellant seeking the relief under Section 13 of the Indian Easements Act, 1882, it is countered by stating that the suit is not filed based on the easementary right and no relief based on the easementary right was sought for. Thus, he submitted that the Courts below have rightly refused to grant the relief prayed by the plaintiff and dismissed the suit.

13. Considered the rival submissions and perused the records.

14. From the pleadings set out and the evidence made available, it is not in dispute that the plaintiff is the owner of the lands in S.No.354/1 and 354/3 and



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the defendants are the owners of S.No.354/2. The plaintiff framed the suit stating that there existed a common pathway measuring 5 ft., breadth and 200 ft., length in S.No.354/2 from the date of purchase of his lands and he has been using this pathway to reach his lands. The prayer is to declare this pathway as a common pathway and to remove the alleged encroachments made by the defendants in the common pathway. Obviously, the claim of common pathway is made on the basis of the recitals found in the plaintiff's sale deeds, namely Ex.A1 and Ex.A2.

15.As already stated, the specific case of the defendants is that there is no pathway in S.No.354/2. The plaintiff has examined P.W2 and P.W3 in support of his case, however, as rightly pointed out by the defendants in the written statement, there is no documentary evidence to show the existence of pathway in S.No.354/2. The Commissioner's report and plan marked as Ex.C1 and Ex.C2 do not show that there is a pathway in S.No.354/2.

16.The trial Court on the basis of the oral and documentary evidence produced, recorded a finding that the plaintiff claims pathway right in the land of the defendants. If really there is a pathway in the land of the defendants, that would have been reflected in the plaintiff's title deeds, Ex.A1 and Ex.A2. However, there is no specific mention about the existence of pathway in S.No. 354/2 in Ex.A1 and Ex.A2. The Commissioner's report and plan also do not show



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the presence of pathway in S.No.354/2. On these reasonings, the learned trial Judge dismissed the suit. That finding was also confirmed by the first appellate Court.

17. When there is a specific plea made that the suit pathway is in existence in S.No.354/2 from the date of purchase of the properties by the plaintiff through Ex.A1 and Ex.A2, it is the duty of the plaintiff to prove this claim. Though the submission was made that the pathway was obliterated in 2007, this Court finds that no such pleading is available in the plaint. It was just said in the plaint that the defendants had obstructed the common pathway by planting trees and placing thorns. Therefore, there is no iota of evidence available to show that there was a common pathway in existence in S.No.354/2 and that was obliterated in 2007 or obstructed by placing thorns.

18. With regard to the submission of the learned counsel appearing for the appellant that as per Section 13 of the Indian Easements Act, 1882, when a person purchased a portion of a larger extent of land, he is entitled as a matter of right to reach his land through the lands of the defendants. Section 13-a of the Indian Easements Act, 1882, reads as under:

“13.(a). If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the



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transfer or bequest, the transferee or legatee shall be entitled to such easement;”

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19.No doubt that as per this Section, when a person transfers or bequeaths an immovable property to another, if an easement in other immovable property of the transferor is necessary for enjoying the subject of the transfer, the transferee is entitled to such easement. Here is a case, it is not in doubt that the plaintiff purchased S.Nos.354/1 and 354/3, which situate on the west of the defendants' land. On the east of the defendants' land, there exists a common pathway. On the face of it, the submission of the learned counsel appearing for the appellant with regard to the right available under Section 13 of the Indian Easements Act, 1882, appears to have some force. However, the plaintiff should have seen to it that this right is incorporated in the sale deeds, when he purchased the property in 1974 and 1979. But it is not done. At least immediately after the purchase made by the defendants in 1983, he should have taken legal recourse for enforcing the right under Section 13 of the Indian Easements Act, 1882. That is not done.

20.On the careful analyses of the facts of the case, it is found that there is no pathway in existence in S.No.354/2. Therefore, it is not legally permissible and possible for the plaintiff, after this distant point of time from 1974 and 1979



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till now, now to set up a claim of easement of necessity under Section 13 of the Indian Easements Act, 1882. Though there is no clear evidence available with regard to the alternative pathway available to the plaintiff's land in S.No.354/1, from the Commissioner's report, it appears that there is access from the western common pathway to reach the lands in S.No.355.

21.From the consideration of oral and documentary evidences available in this case, it is found that there is no pathway much less common pathway available in S.No.354/2. There is no relief claimed on the basis of the easementary right under Section 13 of the Indian Easements Act, 1882. Plaintiff tries to set up a new and unfounded right of common pathway in defendants' land. In the said circumstances, this Court is of the view that the findings recorded by the Courts below do not call for any interference.

22.In *Sir Chunilal V. Mehta and Sons v. The Century Spinning Co. Ltd., 1962* reported in *AIR 1962 SC 1314*, the Hon'ble Supreme Court formulated what amounts to a substantial question of law, as follows:

- 1.Whether it is of general public importance (or)
- 2.Whether it directly and substantially affects the rights of parties **and if so**,
- 3.Whether it is **either** an open question (in the sense not finally settled by this Court or Privy Council or Federal Court) **(or)**



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4.The question is not free from difficulty and calls for discussion of alternative views.

23.In the case before hand, the appellant has not made out any of the aforesaid grounds to formulate substantial question of law. There is no substantial question of law arises for consideration in this second appeal.

24.In this view of the matter, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Speaking : Yes / No
NCC : Yes / No
Internet : Yes / No
Index : Yes / No

18.10.2023

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To

- 1.The Subordinate, Judge,
Dindigul.
- 2.The Principal District Munsif,
Dindigul.
- 3.The Section Officer (2 Copies),
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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G.CHANDRASEKHARAN, J.

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