



S.A(MD)No.792 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON	16.11.2023
PRONOUNCED ON	30.11.2023

CORAM

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

S.A(MD)No.792 of 2021
and
C.M.P(MD)No.10851 of 2021

1.S.Panneer Selvam

2.S.Gowthaman

3.S.Saravanamuthu

4.M.Lakshmanan ... Appellants/Appellants/Defendants

vs.

M.Abdul Ajeez ... Respondent/Respondent/Plaintiff

PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree, dated 21.09.2021, made in A.S.No.18 of 2019 on the file of the Sub-Court, Periyakulam, confirming the judgment and decree dated 26,08.2019 made in O.S.No.75 of 2013 on the file of the District Munsif Court, Periyakulam.

For Appellants :Mr.S.Srinivasa Raghavan

For Respondent :Mr.J.Vishnu



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JUDGMENT

Challenge is to the concurrent judgments made in A.S.No.18 of 2019 on the file of the Sub-Court, Periyakulam, dated 21.09.2021 and in O.S.No.75 of 2013 on the file of the District Munsif Court, Periyakulam, dated 26.08.2019.

2. The respondent/plaintiff filed the suit in O.S.No.75 of 2013 seeking the following reliefs:

(a) Relief of permanent injunction restraining the defendants from interfering with the plaintiff's enjoyment of common passage described in "F" Schedule Property of the plaintiffs and defendants 1 to 3.

(b) Relief of permanent Injunction restraining the defendants from indulging in any activity by raising the common passage;

(c) Mandatory injunction to remove the materials laid in "F" Schedule common passage to an extent of fifteen feet west-south and 4 ½ feet east-west; and for costs.



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3. The case of the plaintiff in brief is that,

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(i)A-Schedule Property in T.S.No.2600 belonged to late.S.A.Ahamed. He had executed a settlement deed in respect of this property in favour of his son Thiru.Aziz Rahuman. Plaintiff's father was a tenant in the middle portion of this property for more than sixty years. Aziz Rahuman attempted to evict the plaintiff from this property. Therefore, the suit in O.S.No.168 of 2007 was filed against Aziz Rahuman and the said suit was decreed ex-parte. Plaintiff purchased middle portion of A-Schedule property from Azizz Rahuman on 16.12.2009 and running a Studio. That portion is shown as B-Schedule property. South-East portion of A-Schedule Property was purchased by Tmt.K.Meenatchi through a sale deed dated 23.12.2009 and "Vellappa Jewellery" is functioning in this portion. It is shown as C-Schedule Property. South-west portion of A-Schedule Property was purchased by A.Ramachandran on 16.12.2009 and he is running "Om Sivam Jewellery" in this property and it is shown as "D"-Schedule Property.

4.On east of A-Schedule Property, there is a common passage and on the east of that, the properties in T.S.Nos.2599/2 and 2600/Part situate. These properties belonged to the brother of S.A.Ahamed namely S.A.Amjad Ibrahim. In this property, eastern portion was purchased by



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third defendant on 25.04.1985, middle portion was purchased by first defendant on 26.04.1985 and western portion was purchased by second defendant on 24.04.1985. These properties are shown as “E” Schedule property. In between “A” and “E” schedule properties, the suit common passage belong to plaintiff and defendants situates. It is shown as “F” Schedule property.

5.The predecessor in title of the defendants namely S.A.Amjad Ibrahim got his property through a settlement deed, dated 06.01.1965 from his father. It is shown as Item-2 in the settlement deed. In the settlement deed, dated 06.01.1965 and in the sale deed of the second defendant, the suit common passage is shown as common passage to the owners of the properties in T.S.Nos.2600 and 2601. Plaintiff and defendants have been enjoying the common passage for the beneficial enjoyment of their properties.

6.Fourth defendant, who is running a Juice Shop on the southern side of the common passage for the past one year, is storing his articles in the common passage. There are steps leading to plaintiff's property. For the maintenance work of E-Schedule Property, defendants got the key leading to the steps. When doing maintenance work, they had demolished the roof of bathroom in “F” Schedule Property and raised the



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level of the common passage. The drainage of the plaintiff is in the common passage. If the common passage is raised, that would affect the free flow of drainage water. In the said circumstances, the suit is filed for the aforesaid reliefs.

7. Defendants filed written statement denying the plaint averments. The case of the defendants is that “F” schedule property belongs only to the defendants and the plaintiff has no right, title or interest in this property. Plaintiff's vendor A.Aziz Rahuman has got an extent of 925 sq. ft., in T.S.No.2601 by way of gift settlement, dated 27.04.1981 from his father S.A.Ahamed. S.A.Ahamed has not given any right to Aziz Rahman in the suit common passage which lies in T.S.No.2600. Suppressing this fact, this suit is filed. There is no common passage in T.S.No.2601. When his prior owner has not given any right in “F” Schedule Property, plaintiff has introduced a fraudulent recital in the sale deed, dated 16.12.2009, as if he had right in the passage. Veeriah started his juice shop about forty years ago and the fourth defendant is looking after the juice shop for the past 25 years. Defendants 1 to 3 and their forefathers were tenants in the suit properties for more than 75 years and they allowed the fourth defendant's family to run the Juice Stall for the last forty years. Structures available are concrete structures and there is no alteration effected by the defendants.



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Defendants have every right to repair their property. They are using the suit F- Schedule Property for ingress and egress. Since the defendants do not extend permission to him, as his predecessor in interest had, from the vendor of these defendants, plaintiff had come forward with the vexatious suit. Alleged removal of ceiling in the bathroom is denied. Defendants wanted to remove the faulty landing which was in dilapidated condition and removed a small portion of it and as the plaintiff objected, they stopped it. Rubbish will be removed as soon as the repair work is over.

8. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and Exs.A1 to A12 were marked. On the side of the defendants, D.Ws.1 & 2 were examined and Exs.B1 to B6 were marked. Apart from these documents, Exs.C1 -Commissioner's report and Plan was marked.

9. On the basis of oral and documentary evidence, the learned trial Judge found that the suit F-Schedule Property namely the passage is a common passage and it is in common enjoyment of the plaintiff and defendant's 1 to 3, directed the defendants not to interfere with the plaintiff's common enjoyment of "F" Schedule Property by raising the common passage and ordered mandatory injunction for removal of construction materials to an extent of 15 feet north-south and 4 ½ feet east-west.



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10. In an appeal by the defendants in A.S.No.18 of 2019, the learned Appellate Judge dismissed the appeal by confirming the judgment and decree of the trial Court. In the said circumstances, the defendants have filed this second appeal.

11. This second appeal was admitted on the following substantial questions of law:

“i) Whether the Courts below committed mistake by decreeing the suit for bare injunction even after title to the suit property was denied by the defendants specifically in the written statement?;

ii) Whether the Courts below have committed an error in finding that a common passage existed between the properties of the appellants and the respondent when none of the documents of title of respondent/plaintiff and his predecessors mention of any such passage, much less the common passage?;

iii) Whether the Courts below have committed an error in allowing the plaintiff to take advantage of the alleged discrepancies in the defence of the appellants/defendants instead of calling upon the respondent/plaintiff to prove his case on the strength of his pleadings of evidence?; and

iv) Whether the Courts below have committed an error in omitting to find that a declaration of easementary right over the alleged common passage ought to have been prayed



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*for by the respondent/plaintiff and a mere suit for injunction
would not be a correct course of action?*

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12. It is the submission of the learned counsel for the appellants that when there is no mention about the existence of a right of usage of passage in the settlement deed in Ex.A2 in favour of the plaintiff's vendor Aziz Rahuman and when a new right is created in Ex.A12 sale deed executed by Aziz Rahuman in favour of the plaintiff in respect of the suit passage, it goes without saying that this right is created fraudulently only to get a right in the passage in which the plaintiff or his predecessor in title has no right at all. Even in the parent document of the year 1942, there is no mention about the common passage to the east of T.S.No.2601. T.S.No.2601 and T.S.No.2600 do not belong to same owner, but belonged to different owners and therefore, there was no occasion for these owners to leave a common passage in the midst of these properties.

13. The learned counsel further submitted that, it is obvious that the plaintiff has fraudulently incorporated four boundaries in his sale deed showing a common right in the passage. The trial Court has rejected the Commissioner's report for invalid reasons. Commissioner's report and plan would clearly show that the plaintiff had encroached the property of the defendants. Findings of the Courts below on the basis of Ex.A1 that there is a common passage to the east of T.S.No.2601 is unsustainable for



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the reason that Ex.A1 is not properly appreciated. Plaintiff should prove his case on the basis of his own merits and should not find fault in the case of the defendants and seeks to prove the case from the defects in the defendants' case. Further, the Commissioner's report and photographs filed by defendants clearly show that there is no reason for the plaintiff to have access to the "F" Schedule property. When the right of the plaintiff in "F" Schedule property is denied, plaintiff should have filed a suit for declaration of title or claiming easementary right. However, no such prayer was asked. Both the Courts below had not properly appreciated the evidence. Thus, he prays for setting aside the judgment of the Courts below and for dismissal of the suit.

14. In reply, learned counsel for the respondent submitted that though it is not stated in Ex.A2 about the existence of common right in "F" Schedule by mistake, that was set right in Ex.A12 sale deed executed in favour of the plaintiff. Properties of plaintiff and defendants were originally owned by S.Abdul Rahuman. Abdul Rahuman had two sons namely S.A.Ahamed and S.A.Amjad Ibrahim. For the convenient enjoyment of the properties, they had used the "F" Schedule property as a common passage for reaching their properties, maintaining their properties etc. Plaintiff had purchased his property from the son of S.A. Ahamed. Defendants 1 to 3 have purchased from the heirs of S.A.Amjad Ibrahim.



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These properties lie abutting each other. The use of “F” Schedule property by plaintiff and defendants 1 to 3 and their predecessors in title clearly show that “F” Schedule Property is used as a common passage. Existence of common passage is mentioned in Ex.A1-settlement deed executed by Abdul Rahuman in favour of S.A.Amjad Ibrahim. This common passage is also mentioned in the sale deed executed by S.A.Amjad Ibrahim in favour of the second defendant. Even from the documents of defendants, it is clearly established that “F” Schedule Property is a common passage for the plaintiff and defendants 1 to 3, more specifically for the plaintiff and second defendant. From the Commissioner's report, it is seen that Commissioner has not properly measured the properties and therefore, the Courts below have rightly rejected the Commissioner's report. Relying on the other evidence, the trial Court has rightly decreed the suit and that was confirmed by the First Appellate Court and thus, prayed for dismissal of this second appeal.

15. I have considered the rival submissions and perused the records.

16. From the oral and documentary evidence produced, it is seen that the settlement deed in favour of defendants' vendor S.A.Amjad Ibrahim is produced as Ex.A1. The settlement deed in favour of plaintiff's



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vendor Aziz Rahuman is produced as Ex.A2. The sale deeds executed by S.A.Amjad Ibrahim in favour of defendants 1 to 3 are produced as Ex.A3 to A5. Sale deed in favour of plaintiff is produced as Ex.A12. Admittedly, there is no mention about “F” Schedule Property in Ex.A1 settlement deed. Only in Ex.A12, there is a mention about “F” Schedule Property. This introduction of “F” Schedule Property in Ex.A12, according to the learned counsel for the appellants is a fraudulent introduction. On the other hand, in Ex.A1 settlement deed executed by Abdul Rahuman in favour of S.A.Amjad Ibrahim when describing the “E” schedule property, there is a mention about half right in common passage. This is reflected in the sale deed of the second defendant in Ex.A3. There is no other building on the west of the defendants' property except the property of plaintiff and other purchasers in T.S.No.2601. Why common right in the common passage should be referred in Ex.A1 and reiterated in Ex.A3 is a moot question.

17. Taking into consideration the above said facts, the trial Court found that “F” schedule property should have been the common passage for both the owners for the reason that the properties of the plaintiff and defendants were originally owned by S.Abdul Rahuman and then his sons. The learned trial Judge also found that when there is a mention about the common passage in Ex.A3-Sale deed, there is no



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mention of common passage in sale deed in favour of defendants 3 and 1, in Exs.A4 and A5. It was also found from the evidence of defendants that there was no change in the physical features of the property for the last 50 years.

18. Written statement mentions that the structures available now are old structures and there is no alteration effected by the defendants. It is pleaded in the written statement that “since the defendants do not extend permission to him, as his predecessor in interest had, from the vendor of these defendants, plaintiff had come forward with the vexatious suit”. It means the predecessor of the plaintiff was using the 'F' schedule property as a common passage and now the defendants are not permitting the plaintiff from using it as common passage. But, the fact remains that plaintiff's vendor was using the 'F' schedule property as a common passage. Therefore, even in the absence of recital in Ex.A2 with regard to the common use of 'F' schedule property, by virtue of long usage from the existense of 'F' schedule property, user by the plaintiff's predecessor and by Ex.A12 sale deed, plaintiff has a right to use 'F' schedule property in common with defendants for the beneficial enjoyment of his property. Even otherwise, plaintiff is entitled to claim right in 'F' schedule property as easement of necessity.



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19. Coming to the Commissioner's report and plan marked as Ex.C1 and C2, the Advocate Commissioner found that the steps leading to the plaintiff's property is built in T.S.No.2600 and that, the plaintiff had encroached 97.85 sq. ft. in T.S.No.2600. Similarly, defendants had encroached 31.28 sq. ft. in T.S.No.2601. This Commissioner's report was rejected by the Courts below for the reason that the Commissioner had started measuring the properties leaving four feet from arrow mark in the house of one Manimaran. That apart, learned trial Judge found that even in 1981 settlement deed, it was mentioned that there were steps in the eastern wall in T.S.No.2601. When the properties are measured leaving four feet space, certainly the report of the Advocate Commissioner on the basis of Surveyor's findings that there was encroachment by the plaintiffs and defendants cannot be accepted. Therefore, rejection of commissioner's report and plan by the trial Judge cannot be faulted.

20. The photographs produced by defendants show that both the properties situate very close to each other. Both the properties originally owned by a common owner and then gifted to two sons. Therefore, it is quite possible and probable that both have used "F" Schedule property as a common passage. Though it is not referred in Ex.A2, it was referred in Ex.A1, Ex.A3 and Ex.A12. In the said circumstances, this Court finds that judgment of the trial Court granting decree of permanent injunction



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and mandatory injunction, confirmed by the Appellate Court need no interference.

21. In such view of the matter, this Court answers the substantial questions of law as follows:

(1) the Courts below have not committed mistake for the reason that from proper appreciation of evidence, it was found that the plaintiff has a right of common enjoyment of "F" Schedule property.

(2) Though Ex.A2 does not mention about the existence of common passage, there is a mention of common passage in Ex.A12 and in Exs.A1 and A3. Common enjoyment is also proved by other evidence, namely evidence of P.W.1 and the common enjoyment discussed above. Therefore, this Court finds that the Courts below have not committed any error in finding that there is existence of common passage ie., 'F' schedule property.

(3) Plaintiff has proved from his evidence with regard to enjoyment of common passage and that had been confirmed through recitals in Exs.A1, A3 and A12. Therefore, no error is committed by relying on the documents of the defendants.



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(4) When the right to enjoy the common passage is established, it is not necessary to seek the relief of declaration of title or easementary right and mere suit for injunction would be suffice in the nature, facts and circumstances of plaintiff's case.

21. In fine, this Court confirms the judgment made in confirming the judgment and decree, dated 21.09.2021, made in A.S.No.18 of 2019 on the file of the Sub-Court, Periyakulam, confirming the judgment and decree dated 26,08.2019 made in O.S.No.75 of 2013 on the file of the District Munsif Court, Periyakula and thus, this second appeal is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

30.11.2023

pm

Index:Yes/No

NCC:Yes/No

To,

1.The Sub-Court,
Periyakulam.

2.The District Munsif Court,
Periyakulam.



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



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G.CHANDRASEKHARAN, J.

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