



S.A(MD)No.526 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :30.10.2023

CORAM

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

S.A(MD)No.526 of 2023

and

C.M.P(MD)No.12382 of 2023

1.S.Nesaiyappan

2.N.Mohankumar

3.N.Vijayakumar

... Appellants/Appellants/Defendants

Vs.

S.Serumani

... Respondent/Respondent/Plaintiff

PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree, dated 13.11.2021 made in A.S.No.60 of 2015 on the file of the learned Subordinate Judge, Padmanabapuram confirming the judgment and decree dated 03.08.2015 made in O.S.No.190 of 2020 on the file of the learned Additional District Munsif Court, Padmanapuram.

For Appellants :Ms.M.Athilakshmi
For Respondent :Mr.G.Aravinthan



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JUDGMENT

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This second appeal is filed challenging the judgment and judgment and decree, dated 13.11.2021 made in A.S.No.60 of 2015 on the file of the learned Subordinate Judge, Padmanabapuram confirming the judgment and decree, dated 03.08.2015 made in O.S.No.190 of 2020 on the file of the learned Additional District Munsif Court, Padmanabapuram.

2. The respondent as a plaintiff filed a suit in O.S.No.190 of 2020 seeking the following reliefs:

(a) *Declaration of easementary right of pathway over the northern ½ cents six links width of path way on the B-Schedule Property.*

(b) *Mandatory injunction directing the defendants to remove the construction made in B-Schedule Property obstructing the passage to A-Schedule Property which is a compound wall and latrine in B-Schedule property.*

(c) *Permanent injunction restraining the defendants from obstructing the passage of the plaintiff through northern side of the B-Schedule Property to reach the A-Schedule Property; and for cost and other reliefs.*



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3. The case of the plaintiff in brief is that the plaintiff schedule properties and other properties originally belonged to Subramanian Nadar, who is the father of plaintiff and first defendant. He executed the settlement deed on 19.03.1982. As per this deed, he divided the properties into three schedules. B-Schedule property was allotted to first defendant and it is shown as B-Schedule property in the plaint. In the north-western portion of B-schedule property, the land measuring an extent of $\frac{1}{2}$ cent was reserved and allotted for graveyard for Subramanian Nadar and his wife Ponnu Nadachi, which is shown as A-schedule property in the plaint. B-Schedule Property is the only access to A-Schedule property. Plaintiff is entrusted to look after and maintain the A-Schedule property. After the death of Subramanian Nadar in 1999, his body was buried in plaintiff A-Schedule Property and a coconut tree was planted for his remembrance. The mother of the plaintiff and first defendant namely Ponnu Nadachi was aged 90 years and after her death, her body was also buried in A-schedule property. In 2008, 1st defendant constructed a compound wall and latrine in B-schedule property by obstructing the access to A-schedule property. In such circumstances, the suit was filed for the aforesaid reliefs.

4. In the written statement filed by the defendants, it is submitted that the 1st defendant constructed a compound wall in



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B-schedule property, which was allotted to him in 1982 document. He has also constructed a new house for residential purpose. 1st defendant never obstructed the passage to reach the graveyard at any time. First defendant never constructed a compound wall beyond the limit of B-Schedule Property. The graveyard portion is lying within the 1st defendant's property and it is used in common. There is a gate in B-schedule property to reach A-Schedule property through B-schedule property.

5. On the basis of the above said pleadings, the trial Court framed the following issues:

“(i) Whether the plaintiff is entitled for the relief of mandatory injunction?”

“(ii) Whether the plaintiff is entitled for the relief of permanent injunction?”

“(iii) Whether the plaintiff is entitled for the relief of declaration? ; and

“(iv) For what other relief and cost, the parties are entitled to?”



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6. During the course of trial, P.W.1, D.W.1 and C.W.1 were examined. Exs.A1 to A5 and Exs.C1 & 2 were marked.

7. On the basis of oral and documentary evidence, the trial Court found that there is a small gate on the eastern side of B-Schedule property and this gate prevents the plaintiff and his other brother to reach A-Schedule property. Thus, granted the relief of mandatory injunction for removal of the gate. Similarly, in view of the clear-cut recital in Ex.A1 and in the evidence of the parties, it was found that A-Schedule Property is the graveyard of plaintiff and first defendant's parents; plaintiff cannot be prevented from reaching A-schedule property and decreed the suit as prayed for. Challenging the said judgment and decree, the defendants preferred an appeal.

8. The first appellate Court confirmed the findings of the trial Court. Against which, this second appeal is filed.

9. The points arise for consideration in this second appeal are,

*“ (i) Whether any substantial question of law is involved for entertaining this appeal? ; and
(ii) Whether the judgments of the Courts below can be sustained?”*



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10. Heard the learned counsel appearing for the parties and perused the materials available on record.

11. This second appeal is filed by the defendants. It is the submission of the learned counsel for the appellants that the appellants had never obstructed the respondent/plaintiff from reaching A-Schedule Property through B-Schedule Property. There are two gates on the eastern side of B-Schedule property. One big and one small on the eastern compound wall. Small gate was not originally installed. Only to facilitate the respondent and his family members to reach A-Schedule Property, this gate was installed during the pendency of the suit. The appellants/defendants have no objection for the plaintiff and his family members to use this small gate to reach A-Schedule Property. Thus, he prays that, the said part of the judgment which granted the relief of mandatory injunction for removal of the gate to be set aside and in all other aspects, the appellants have no grievance over the judgment of the Courts below.

12. In response, learned counsel for the respondent/plaintiff submitted that a small gate is not in line with the pathway, which leads to A-Schedule Property. It is better that it can be fixed at the extreme



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north eastern part of the compound wall.

13. In the light of the position taken by the appellants/defendants in the written statement that they have no objection for the respondent/plaintiff to use B-Schedule Property to reach A-Schedule Property and now, the following substantial question of law arises for the consideration of this Court.

“Whether the judgment of the Courts below can be sustained in the light of admission made by the appellants aforesaid?”

14. This Court considered the rival submissions, the Commissioner's Report and Ex.A3-photo produced.

15. It is seen from Ex.A3-Photograph that just abutting the northern property and close to north eastern corner of first defendant's property, there is a big tree. Therefore, this Court is of the view that without removing the tree it is not possible to use the north eastern corner of B-Schedule Property to reach the A-schedule property. Admittedly, the suit was not filed for removal of the tree, which is in existence for several years. This Court finds from Ex.A3-Photograph



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that within four feet from southern wall of third party owner, the small gate is in the eastern compound wall of B-Schedule property available. Instead of removing the small gate and shifting, the plaintiff and his family members can use this small gate to reach the A-Schedule property. It is unnecessary to shift the gate to the extreme north-eastern corner of the compound wall.

16. In this view of the matter, the judgment of the Courts below are confirmed in all aspects except with regard to the grant of mandatory injunction for removal of small gate in B-Schedule Property. Rather the said gate can be used for ingress and egress by the plaintiff and his family members to reach A-Schedule Property. This Court suggests that the parties can buy a lock with two keys. Each party can retain one key for the use of the gate. Thus the substantial question of law is answered.

17. Accordingly, this Second Appeal is allowed in part. No Costs. Consequently, connected miscellaneous petition is closed.

30.10.2023

pm

Index:Yes/No

NCC:Yes/No



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To,

- 1.The Subordinate Judge,
Padmanabapuram.
- 2.The Additional District Munsif Court,
Padmanapapuram.
- 3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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