



S.A.No.139 of 2000

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.10.2023

CORAM

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

S.A.No.139 of 2000

Kalyani Pulavar

...Appellant

vs.

- 1.Maria Michael Filix (died)
- 2.Subramania Padayachi
- 3.Karuppasami Thevar (died)
- 4.Pallikonda Perumal (died)
- 5.Packiam
- 6.Shacklin
- 7.Suganthi
- 8.Shanthi
- 9.Rathi
- 10.Raj

... Respondents

(Memo dated 08.09.2015 (filed on 09.09.2015) is recorded as respondents 3 and 4 are given up, vide Court order dated 28.03.2022 in S.A.No.139 of 2000)

(R5 to R10 are brought on record as LR's of the deceased R1 as per order dated 07.09.2018 in C.M.P. (MD) Nos.2924 to 2926 of 2017)



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Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 06.07.1999 in A.S.No.115 of 1996 on the file of the Principal Subordinate Judge, Tenkasi reversing the Judgment and Decree dated 03.09.1996 in O.S.No.34 of 1992 on the file of the District Munsif, Tenkasi.

For Appellant : Mr.G.Sridharan

For Respondents : No appearance

JUDGMENT

Being aggrieved by the Judgment and Decree of the First Appellate Court namely Principal Sub Court, Tenkasi in A.S.No.115 of 1996, the first defendant namely Kalyani Pulavar has preferred this Second Appeal.

2. The suit in O.S.No.34 of 1992 was filed by sole plaintiff Maria Michael Filix on the file of the District Munsif Court, Tenkasi against (i) Kalyani Pulavar (ii) Subramanian (iii)



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Karuppasami Thevar and (iv) Pallikonda Perumal
for the reliefs mentioned hereunder.

(a) To declare that the suit second schedule pathway belongs only to the plaintiff and the defendants 2 to 4 and consequential prohibitory injunction against the first defendant.

(b) To grant an order of mandatory injunction against the first defendant to the effect that he has to close the opening made on the western side wall which belongs to the first defendant, failing which it has to be done through the process of Court.

3. The learned Trial Court after hearing both sides and upon considering the oral and documentary evidence has concluded that as the first defendant has got the pathway right and has made a 'thondu' on his own wall, the plaintiff is not entitled to any of the prayer sought for and dismissed the suit in full.



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4. Aggrieved by the same, the plaintiff preferred an appeal before the Principal Sub Court, Tenkasi and the appeal was allowed by setting aside the Judgment and Decree of the Trial Court. The suit was ordered to be decreed by granting one month time to close the opening made by the first defendant.

5. Against the said Judgment, the first defendant has preferred this appeal.

6. Parties are referred to, as per their litigative status before Trial Court.

7. The first item of the suit is a Plot with 5 5/8 feet in east-west and 15 1/8 feet in north-south with a hut facing southern side bearing Door No.16. The second item of the suit is a public pathway which runs north-south measuring 1 feet in east-west and 35 feet in north-south.



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8. According to the plaintiff, the first item of the suit property, namely, Plot was purchased by his junior maternal aunt Sิริya Pushpam Ammal from the fourth defendant Pallikonda Perumal through registered sale deed dated 30.08.1973 and she was in possession and enjoyment of the Plot as well as the adjoining pathway, namely, suit second schedule pathway. The plaintiff claims title by way of Ex.A5 Will dated 20.12.1986 executed in his favour by Sิริya Pushpam Ammal. Ex.A1 sale deed dated 30.08.1973 stands in the name of Sิริya Pushpam Ammal. He would further claim that he along with the defendants 2 to 4 who are residing to the western side of the pathway have been all along using the pathway. It is further claimed that subsequent to the death of Sิริya Pushpam Ammal in the year 1981, the Will executed by her came into effect and he has been in possession and enjoyment of the first item of the suit property and also has been using



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the suit pathway. The plaintiff would further claim that the first defendant has purchased the vacant plot towards east of suit pathway and by constructing a building thereon, the first defendant is claiming that he has got a right in the suit pathway. In the month of December 1991, the first defendant has created an opening upon the western side wall.

9. It is relevant to note that though the defendants 2 to 4 have been using the suit pathway, the plaintiff has no grievance against them. Therefore, there is no issue as regards the defendants 2 to 4.

10. The plaintiff's serious contention is that there is no pathway right given either to the predecessor in title to the first defendant or to the first defendant and they never used the suit pathway. Hence the suit to declare that the



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pathway is meant exclusively for the enjoyment of the plaintiff as well as the defendants 2 to 4; for subsequent injunction preventing the first defendant from using the pathway; and mandatory injunction to close the opening made in the western side of the defendant's property.

11. Despite the service of summons, defendants 2 to 4 remained absent before the Trial Court.

12. Counteracting to the details of the plaint, the first defendant has claimed that the pathway is a common pathway. No exclusive right was granted to the plaintiff in the Will. Therefore, the plaintiff can never claim any exclusive right of pathway. In fact, the predecessor in title to the pathway, namely, Pallikonda Perumal had pathway right. The said right was conveyed to his predecessor in title



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and in turn the first defendant has got right of pathway. He further claims that based on the said right only, he has kept opening in the western side of his property. In order to prove his pathway right, he has filed a suit before the Tenkasi Munsif Court in O.S.No.634 of 1991 and it is kept pending. As the plaintiff's right to enjoy the pathway is never interrupted, he cannot seek for injunction, much less, mandatory injunction against him.

13. Based on the above said pleadings, the following issues have been framed by the Trial Court.

(i) What are the relief the plaintiff is entitled to?

(ii) Whether the contention of the first defendant that the pathway is a common pathway is correct or not?



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14. The Additional issues framed by the Trial Court are as follows.

(i) Whether the contention of the plaintiff that the suit pathway is meant only for the plaintiff and the defendants 2 to 4 is correct or not?

(ii) Whether the plaintiff is entitled for the relief of mandatory injunction?

15. At trial, the plaintiff has examined himself as PW1. Exs.A1 to A6 were marked. Sale deed executed by Pallikonda Perumal in favour of Sิริya Pushpam Ammal (certified copy) is Ex.A1. Will executed by Sิริya Pushpam Ammal in favour of the plaintiff is Ex.A5. Rough Plan is Ex.A3. On the first defendant's side, the first defendant has examined himself as DW1. Exs.B1 to B5 were marked. Sale deed executed by Arupudhamani Nadar in favour of the first defendant is Ex.B4. Pending suit, a sale deed



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was executed by Karuppasami Thevar in favour of the first defendant and the same is marked as Ex.B5. Report and Sketch of the Advocate Commissioner are Exs.C1 and C2.

16. After hearing both sides and upon considering the oral and documentary evidence, the Trial Court has held that the pathway was laid by Karuppasami Thevar and plots situated to the east and west of the pathway belong to Karuppasami Thevar and came to a conclusion that it was proved by the first defendant that he has got a right to use the common pathway and hence, dismissed the suit in toto.

17. Aggrieved, the plaintiff preferred an appeal before the Principal Sub Court, Tenkasi in A.S.No.115 of 1996. After hearing the arguments of the plaintiff and the first defendant, it was concluded by the first Appellate Court that as



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the predecessor in title of the first defendant did not have any pathway right, so also, the first defendant does not get the same and the appeal was allowed by decreeing the suit.

18. This Court admitted the Second Appeal on 05.01.2001 by framing the following substantial question of law.

"Whether the lower Appellate Court erred in law and mis-directed itself in appreciating the evidence namely Exs.B1 to B4 and whether the findings recorded are vitiated by perversity?"

19. The learned counsel for the appellant / first defendant would strenuously argue that Siriya Pushpam Ammal purchased the plot with the pathway right through Ex.A1. It is his argument



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that by way of marking all the available sale deeds namely Exs.B1 to B4, pathway right of the first defendant was clearly established during the trial and the Trial Court in a proper perspective appreciated the same and dismissed the suit. Whereas the title deeds of the first defendant namely Exs.B1 to B4 and the pathway right details were mis-conceived by the first Appellate Court and the appeal was allowed. He would stress upon the fact that through Ex.B1 sale deed, limited pathway right was conveyed to Muthaiya. It is his further argument that the said Muthaiya purchased the pathway right from the appropriate persons namely Karuppasami Thevar and his son Pandarachamy Thevar through Ex.B2 sale deed dated 08.04.1988. It was further argued that the said pathway right was conveyed to the first defendant herein through Ex.B4 dated 20.09.1991. He forcefully argued that it should



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not lie in the mouth of the plaintiff that the first defendant does not have pathway right as the first defendant has marked all the title deeds with regard to the fact that he has got pathway right.

20. Though names of the respondents 2, 5 to 10 are printed in the cause list, there is no representation on their behalf.

21. On the other hand, the appellant / first defendant claims that based on Exs.B1 to B4, he has got right to use the pathway. Exs.B1 to B4 are the sale deeds connected to the first defendant's plot which is situate to the east of the common pathway. Ex.B1 is the certified copy of sale deed dated 16.02.1988 executed by Arumugachamy Thevar and his vagayara in favour of Muthaiya Mudhaliyar, s/o. Vallinayaga Muthaliyar



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in respect of vacant Plot 10 x 32 feet in S.No. 219/6 along with the incidental rights to keep the window over the western side and right to use the pathway of Pandarachamy Thevar and Arumuga Thevar to whitewash the wall. Ex.B2 is the certified copy of the sale deed dated 08.04.1988 executed by Karuppusami Thevar and his son Pandarachamy Thevar in favour of said Muthaiya in respect of pathway right. The Said Muthaiya sold the Plot which is situate to the east of the pathway on 02.06.1989 through Ex.B3 sale deed to one Arpudhamani Nadar along with the pathway right. The above property along with the pathway right was purchased by the first defendant on 20.09.1991 through Ex.B4 sale deed. Ex.B5 sale deed came into being during the pendency of the suit. Hence, it needs no consideration.



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22. According to the first respondent / plaintiff, his junior maternal aunt purchased the plot to the west of the suit property from the fourth defendant Pallikonda Perumal through a registered sale deed dated 30.08.1973 along with the pathway right. He claims pathway right in respect of suit second schedule pathway based on Ex.A5 Will executed by his junior maternal aunt Siriya Pushpam Ammal. As rightly pointed out by the learned counsel for the appellant / first defendant, in the suit second schedule pathway, it is mentioned as common pathway (பொது நடைபாதை).

23. The suit mainly revolves upon the pathway issue. The first respondent / plaintiff claims pathway right through Ex.A5 Will. The pivot point is whether the defendant has got right to use the pathway - namely second schedule property. However, the appellant / first



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defendant has filed all the title deeds in respect of the pathway right. A deep analysis of Exs.B1 to B4 as mentioned *supra*, depict the fact that the vendor in Ex.B1 gets a limited right in the pathway at the first instance. Thereafter, through Ex.B2, the said Muthaiya purchased the common pathway right from the respective persons namely Karuppusami Thevar and his son Pandarachamy Thevar. Therefore, the predecessor in title, namely, Muthaiya had got pathway right which was later conveyed to one Arpudhamani Nadar through Ex.B3. The appellant / first defendant purchased the Plot as mentioned *supra* through Ex.B4 from the said Arpudhamani Nadar along with the pathway right.

24. Rough Sketch filed by the first respondent / plaintiff was marked as Ex.A3. This was not disputed by the appellant / first



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defendant. An Advocate Commissioner was appointed to inspect the suit property and he has also filed his report along with rough sketch which are Exs.C1 and C2. There is no serious objection for the Commissioner Report and Plan.

25. It was made vividly clear by the appellant / first defendant that he purchased a Plot to the east of the suit pathway along with the pathway right as discussed *supra*. Even in the plaint, the suit second schedule pathway, was mentioned as common pathway. It is not the case of the first respondent / plaintiff that the pathway is exclusively meant for the usage of particular persons. When the first respondent / plaintiff used the word in the plaint that the pathway is a common pathway, he is estopped from contending that it is a pathway meant for specific persons. More so, the appellant / first



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defendant has given the details of all the sale deeds pertaining to the issue in the suit. The pathway right was conveyed by the predecessors in title of the appellant / first defendant through Exs.B1 to B3 and the appellant / defendant has purchased a Plot situated to the east of the pathway along with the pathway right by way of Ex.B4. As the first respondent / plaintiff has utterly failed to prove his case and on the other hand, the appellant / first defendant has proved his case through Exs.B1 to B4, this Court is left with no option, but to non-suit the plaintiff.

26. In the result, the substantial question of law framed by this Court is answered in favour of the appellant / first defendant.

27. For the reasons stated *supra*, the suit stands dismissed and the Judgement and Decree of the first Appellate Court in A.S.No.115 of 1996



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on the file of the Principal Subordinate Judge,
Tenkasi is set aside. The Second Appeal stands
allowed. There is no order as to costs.

18.10.2023

NCC:Yes/No
Index:Yes/No
Speaking/Non-speaking order

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To

- 1.The Principal Subordinate Judge, Tenkasi
- 2.The District Munsif, Tenkasi.
- 3.The Section Officer,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.



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R.KALAIMATHI, J.

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