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S.A.No.87 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **13.03.2024**

CORAM

THE HONOURABLE Ms. JUSTICE **P.T.ASHA**

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1. Mani
Ranjith (deceased)
2. Geetha
3. Dharpana Sree (Minor)
4. Kanishka (Minor)
5. Dheekshana (Minor)
6. Rupesh
7. Jeyakodi
Parvathy (deceased)
8. Natesan (died)
9. Sivakumar
10. Raghu
11. Jagajeevan
12. Elavarasan
13. Unnamalai

... Appellants

-Vs-

Baskar

... Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure Code, 1908, to set aside the judgement and decree dated 03.10.2019 in A.S.No.21 of 2015 on the file of the Subordinate Court, Kallakurichi, confirming the judgment and



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decree dated 16.09.2014 in O.S.No.218 of 2011 on the file of the Principal District Munsif Court, Kallakurichi.

For Appellants : Mr.V.Sivalingam

For Respondent : Mr.N.Manoharan

JUDGMENT

The above second appeal is filed challenging the judgment and decree passed in A.S.No.21 of 2015 by the learned Subordinate Judge, Kallakurichi, in and by which, the learned Judge has confirmed the judgment and decree passed by the learned Principal District Munsif, Kallakurichi, in O.S.No.218 of 2011.

2. The suit in O.S.No.218 of 2011 was filed by the respondent herein seeking permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit property. The suit property is an extent measuring 0.2 1/2 cents comprised in S.No.48/9C and it is a portion



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of a larger extent measuring 0.30.0 ares and 0.74 1/2 cents. The property is described as being bounded on the north by the lands of the plaintiff, on the south by hill pathway, on the west and east by the lands of the defendants.

3. The said suit was resisted by the fifth defendant *inter alia* contending that the suit property is not a pathway, but, is the front yard of the defendant. That apart, no right of pathway has been given to the plaintiff through the said land. The Advocate Commissioner who has inspected the suit property has also not described the suit property as a pathway. The plaintiff, taking advantage of the fact that the property is a vacant site, has attempted to create a pathway there.

4. The suit was decreed by the Trial Court, against which, the defendants had preferred an appeal in A.S.No.21 of 2015 on the file of the Subordinate Court, Kallakurichi. The learned Sub Judge also confirmed the judgment and decree of the Trial Court and



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dismissed the appeal.

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5. Aggrieved by the said judgment and decree, the defendants have come forward with this second appeal.

6. The respondent had entered caveat and therefore, this Court heard the learned counsel on either side and perused the materials available on record.

7. The above second appeal has a brief prelude to it. The appeal was originally filed by the learned counsel, R.Bharath Kumar.

8. Originally, the appeal was filed with a delay of 1,045 days. The said delay was also condoned by order of this Court dated 09.01.2024 after hearing both the parties by imposing conditions. Thereafter, the appeal was numbered and when the matter was listed for admission, the learned counsel appearing for the appellant



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informed this Court that he has returned the brief and the party was also present before this Court. The party was, therefore, informed that the matter would be called for admission on 19.02.2024 and he has to engage a counsel by then.

9. When the matter came up for admission on 19.02.2024, Mr.V.Sivalingam, learned counsel submitted that he has got instructions to appear on behalf of the appellants and he had also informed this Court that the 8th appellant has passed away. Since the legal representatives of the deceased Natesan were already on record, this Court directed him to file a memo to that effect. Accordingly, a memo dated 27.02.2024 was filed and the death of the 8th appellant was recorded and the appellants 9 to 13 were recorded as the legal representatives of the deceased 8th appellant.

10. The learned counsel for the respondent/plaintiff herein has submitted that he has no objection to the first appellant/first defendant in O.S.No.218 of 2011 from drawing water from the common well to irrigate the property subject matter in the second



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appeal and that he would not obstruct the enjoyment of the cart track described in schedule in O.S.No.218 of 2011. He has, therefore, filed an affidavit of undertaking to that effect.

11. Originally, the learned counsel had filed an affidavit dated 06.02.2024. Since the respondent has added conditions which were not mentioned orally before this Court, this Court had directed the learned counsel for the respondent to file an appropriate affidavit of undertaking as undertaking. Accordingly, an affidavit of undertaking came to be filed on 07.03.2024 which was the affidavit signed by the respondent/plaintiff on 12.02.2024, wherein, the respondent has stated as follows:

“I submit that there is a common well in S.F.No.48/9-B meant for the plaintiff (myself) and D1 in O.S.No.218 of 2011. I will not prevent D1- R.Mani during his turn to take water from the said common well to irrigate the suit property in S.F.No.48/9-C, but the appellants shall not obstruct my right of enjoyment of the suit cart track in



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O.S.No.218 of 2011. Apart from the above right, D1- R.Mani shall not take water from the well in other survey number through the suit property to irrigate his other lands.”

12. On 07.03.2024, the learned counsel for the appellants was directed to get instructions on the above undertaking and the matter was adjourned to today. Today, when the matter had come up, there was no counter to the affidavit filed on the side of the respondent. The undertaking affidavit is therefore, taken as accepted.

Accordingly, this second appeal stands disposed of in terms of paragraph no.3 of the affidavit of undertaking signed by the respondent/plaintiff on 12.02.2024 which has been extracted *supra*. The terms of affidavit of undertaking dated 07.03.2024, signed by the respondent, shall form part and parcel of the decree. No costs.

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Internet : Yes

Index : Yes/No



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Speaking order/Non-speaking order

ssa

To

- 1.The Subordinate Judge,
Civil Judge (Senior Division), Kallakurichi.
- 2.The Principal District Munsif,
Civil Judge (Junior Division), Kallakurichi.
- 3.The Section Officer,
V.R.Section, High Court, Madras.

P.T.ASHA, J.,

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