



S.A. No.1112 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.08.2024

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A. No.1112 of 2008

and

M.P.No. 1 of 2008

1. Ayisamy Gounder

2. Nallammal

3. Lakshmi

4. Ramadurai

... Appellants

Vs.

1. Sundaram

2. Duraisamy

.. Respondents

PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 12.12.2005 made in A.S.No. 36 of 2005 on the file of Subordinate Judge, Dharapuram confirming the judgment and decree dated 03.03.2005 in O.S.No.248 of 2002 on the file of District Munsif Court, Dharapuram.



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For Appellants : Mr. N.Damodaran

For Respondents : Mr.R.Asokan for R1

No appearance for R2

JUDGMENT

The appellants herein are the plaintiffs, who have filed a suit in O.S. No. 248 of 2002 on the file of District Munsif Court, Dharapuram against the defendants, praying for the relief of declaration in respect of first item of suit property and for the relief of permanent injunction in respect of second item of property shown as “A,B,C,D’ “E,F,G,H” “I,J,K,L” marked in red, the pathway said to be claimed as 20 ft. common pathway on the east to west, in which the defendants caused interference.

2. For the sake of convenience, the parties are denoted as per the ranking in the suit.

3. Both of the defendants are co-sharers of plaint schedule contested the suit stating that as per the partition deed dated 14.06.1972, the said “A,B,C,D’ “E,F,G,H” “I,J,K,L” pathway is a common pathway to



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all the three sharers. But, the plaintiffs came forward with the suit as if they are having exclusive right, but they have not properly described the existence of pathway with correct extent. Considering that objections, the trial court dismissed the entire suit holding that prayer is not pleaded properly. So also, the suit property was also not properly measured. Against which, the plaintiffs preferred an appeal in A.S.No. 36 of 2005 before the Sub-Court, Dharapuram, wherein the first appellate judge independently analysed the evidence on record and finally held that the Appeal Suit is not maintainable by relying the report of Commissioner, wherein there is no existence of 20 ft. pathway as claimed by the plaintiffs. On the other hand, there is a cart track as per the Commissioner report comes around 11 ft., thereby the findings of trial judge is confirmed. Challenging the concurrent findings of the courts below, the plaintiffs preferred this Second Appeal.

4. The learned counsel for appellants argue that the courts below failed to take note of the fact that the admission on the side of defendants about the existence of cart track on the southern boundary of property owned by them, in which the plaintiffs have right to use the same, but



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instead of decreeing the suit and without proper appreciation of facts, the trial court erroneously dismissed the suit. Hence, he prayed to set aside the findings of the courts below.

5. The learned counsel appearing for the defendants argue that as per the Commissioner's report, 'C' schedule was allotted to the plaintiffs, but as per the partition and division of property, there is a common pathway on the southern side of property was allotted to them, in which all the three sharers were given permission to use the same as pathway for their ingress and egress. But contrary to the terms of partition, the plaintiffs filed a suit as if they alone having exclusive right in the said cart track. Therefore, both the courts below have not accepted the plaintiffs claim. Further, he has also pointed out that as per the description found in the suit property, they claimed 20 ft common pathway, but no such pathway is in existence and the same is not found in commissioner report. It is found that only 11 ft. pathway is in existence, besides as the plaintiffs are also having direct access from the Tar road, which is existed on the eastern side of property. Therefore, both the courts below rightly



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denied the claim of plaintiffs, which needs no interference. Hence, they prayed to dismiss this Second Appeal.

6. On perusal of records, in respect of 'A' schedule property, plaintiffs claimed declaration of the property, which was allotted to them in the year of 1972. The defendants have no objection in respect of the said relief, since the suit property was allotted to them. The objection raised by the defendants only in respect of 'C' schedule property, which is claimed as 20 ft. common pathway, but as per the Commissioner's report, Ex.B2, the existence of pathway is only 11 ft. and in that description of pathway, 3 sharers are entitled to use, but there is no exclusive right to the plaintiffs. Furthermore, the plaintiffs were also given another pathway of Tar Road on the eastern side also reveals from the Commissioner report. By way of filing the suit, the plaintiffs indirectly restraining the right of defendants, which cannot be permitted, since because exclusive right was given all the three sharers in the partition deed. Furthermore, there is another extent was allotted on the eastern side of property, in which the defendants are not entitled to use the common



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cart track to reach their land in Survey No.372/3, which was allotted to them in the said report. However, there is no such restriction was found in the said partition deed. Furthermore, the said pathway is only a common pathway through which, the defendants are entitled to reach the Survey No.373/2. Therefore, by filing the suit, the plaintiffs wanted to get indirect restriction of the defendants, which is not permissible. Therefore, both the courts below rightly dismissed the suit, which needs no interference. However, all the three sharers are entitled to use 11 ft. common pathway as per the commissioner's report. Ex.C1 and C2 shall form part and parcel of this Judgment. Accordingly, this Second Appeal is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

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Index : Yes / No
Internet : Yes / No
Speaking/Non-speaking order
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To

The Sub-Judge, Dharapuram.

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T.V.THAMILSELVI, J.

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