



S.A.No.516 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 06.02.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.516 of 2021
and
C.M.P.No.10420 of 2021

1.Muthusamy Udayar (Died)
2.Sivagamy
3.Poomaalai
4.Padma

... Appellants

Vs.

Marudhamuthu Udayar

... Respondent

[Sole Appellant died, A.2 to A.4 brought on record as LRs of the deceased sole appellant vide Court order dated 03.08.2022 made in C.M.P.No.12440 of 2022 in S.A.No.516 of 2021]

Prayer:- Second Appeal is filed under Section 100 of C.P.C against the judgement and decree of the Subordinate Judge's Court at Kallakurichi, dated 23.03.2018 in A.S.No.78 of 2010 partly reversing the judgement and decree of the II Additional District Munsif Court at Kallakurichi dated 28.09.2010 in O.S.No.395 of 2006.



For Appellant : M/s.P.Valliappan, Senior Counsel for
Mr.N.Loganathan

For Respondents : M/s.N.Manokaran

JUDGEMENT

The plaintiff whose decree for permanent injunction had been modified by the Lower Appellate Court is the appellant before this Court. The facts are briefly set out herein below and the parties are referred to in the same ranking as before the Trial Court.

2. The plaintiff had filed the suit O.S.No.395 of 2006 on the file of the II Additional District Munsif, Kallakurichi seeking a permanent injunction in respect of a cart track measuring 15 links east-west and 318 links north-south running through R.S.Nos.280/4 and 516/11 which was bounded on the west by plaintiff and Ponnusamy's patta land, east by defendant's patta land, south by the main road and north by Marudamuthu's patta land.



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3. It is the case of the plaintiff that the suit cart track and the other properties were originally owned by the defendant's father, Ramar Udaiyar and his brothers, Annasamy and Natesa Udaiyar. The brothers had effected a partition under a registered partition deed dated 05.10.1965. In the said partition deed, there is a reference to the suit cart track and its measurement is shown as 15 links. After the partition, the parties were in peaceful possession and enjoyment of their respective shares and were using the suit cart track as an access to reach their respective lands.

4. Thereafter, Annasamy Udaiyar one of the brothers had sold some of the items of properties to his brother Natesa Udaiyar under a registered sale deed dated 05.05.1985. Thereafter, Natesa Udaiyar had sold these properties to the defendant under a registered sale deed dated 10.12.1985. The defendant in turn had sold it to the plaintiff under a registered sale deed dated 27.05.1982. Under this sale deed, the



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plaintiff had purchased two items of the property, namely, the property comprised in R.S.No.280/1 and 280/4 together with the usage of the cart track. The plaintiff would submit that the suit property (cart track) is the only access to reach his land. This was being used by him from the date of his purchase. However, on account of a recent enmity, from 05.06.2006 the defendant was preventing the plaintiff's usage of this cart track. Therefore, the plaintiff had come forward with the present suit in question.

5. The defendant had filed a written statement inter alia admitting that under the partition deed, the cart track measuring 15 links had been allotted to all the 3 sharers. The defendant would also state that under the partition deed it had been clearly mentioned that the pathway was available only for the parties to the partition deed and in case any one of them sold the property to a third party such third party would not have an access to this pathway. That apart, the defendant had stated that although in the deed it has been stated that the pathway is



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measuring 15 links, however, the parties had formed a pathway measuring 12 links east-west and enjoying this pathway. In fact, it was only a pathway measuring 12 links that had been formed is evident from a sale deed executed in favour of one Ponnammal by the sharers. It is wrong to state that the defendant had conveyed the right of way when he had sold the property comprised in S.Nos.280/1 and 280/4 to the plaintiff. The defendant would submit that the pathway that had been conveyed to the plaintiff was another pathway (i.e; the pathway shown in the plaint plan beyond the point C proceeding westwards then turning north and once again turning west). Therefore, the defendants sought for a dismissal of the suit.

6. The Trial Court had framed the following issues:-

- 1. Whether the plaintiff was in enjoyment of the suit property?*
- 2. To what other relief the plaintiff was entitled to?*



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7. The plaintiff had examined himself as P.W.1 and another witness was examined on his side as P.W.2 and Ex.A.1 to Ex.A.5 were marked. The defendant had examined himself as D.W.1 and one Sakthivel as D.W.2 and Ex.B.1 alone was marked on the side of the defendant.

8. The Trial Court had decreed the suit on the ground that the restriction placed in the partition deed dated 05.10.1965 which prevented the usage of the pathway by third parties to whom the property would be sold was illegal. Challenging the said judgement and decree the defendant had filed A.S.No.78 of 2010 on the file of the Sub Court at Kallakurichi.

9. The defendant/respondent herein had taken out an application to appoint an Advocate Commissioner. The Advocate Commissioner had deposed that the pathway described as A B C D in his plan which branches out from the common pathway and runs from south to north



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and turns westward. However, since that pathway is not in issue he has not described the said pathway.

10. The Lower Appellate Court on considering the evidence available on record had modified the judgement and decree of the Trial Court. The Lower Appellate Court had taken note of the fact that the defendant had submitted that he has no objection to the plaintiff using the pathway within the measurements as given in the Advocate Commissioner's Plan Ex.C.2. The Advocate Commissioner had opined that the pathway on measurement was not measuring 15 links east-west from the start to the end. On the contrary, the measurements varied from 12, 14 to 15 links at various places. Therefore, the learned Appellate Judge had partly allowed the appeal by stating that the defendant shall not interfere with the plaintiff's usage of the pathway which has been described in the Advocate Commissioner's Report Ex.C.1 and Plan Ex.C.2. Challenging the said judgement and decree the plaintiff is before this Court.



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11. Heard the counsels on either side.

12. Admittedly, on site the pathway does not measures 15 links throughout its stretch starting from the points A B to the point C D. The Advocate Commissioner's Report would show that at the points A B the pathway measures east-west 13 links, at the point E it measures 12 links, at the point F it measures 14 links, at the points G and H it measures 15 links and at the points I J once again the measurement is only 12 links.

13. The suit is one for an injunction restraining the usage of the pathway. Though the plaintiff had sought for the injunction in respect of the pathway measuring east-west 15 links, on site it is not available. Further, the plaintiff has not sought for restoration of the pathway to the extent of 15 links. Under Ex.B.1 dated 27.02.1972, this pathway has been described as one measuring 12 links. Therefore, it is clearly



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evident that right from the year 1972 the pathway measured only 12 links east-west.

14. In the light of the above, the Lower Appellate Court has rightly modified the judgement and decree of the Trial Court and I see no reason to interfere with the same. Further, the plaintiff/appellant has not made out any substantial question of law warranting the interference of this Court. Accordingly, the Second Appeal stands dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

06.02.2024

Index: Yes/No
Speaking order/non-speaking order
Neutral Citation: Yes/No
shr



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To

1. The Subordinate Judge's Court at Kallakurichi.
2. The II Additional District Munsif Court at Kallakurichi.
3. The Section Officer,
V.R.Section,
High Court, Madras.



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P.T.ASHA, J.,

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