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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.12.2024

CORAM:

**THE HONOURABLE MS.JUSTICE R.N.MANJULA**

**S.A.No.799 of 2011**

Kamatchiammal

... Appellant / Plaintiff

*Vs.*

1.Rathinavel  
2.Vellamuthu  
3.Gnanavel  
4.Saraswathi

... Respondents / Defendants

**Prayer:** Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 22.09.2010 made in A.S.No.47 of 2008 on the file of the Subordinate Court, Perambalur, confirming the judgment and decree dated 11.10.2004 made in O.S.No.384 of 1997 on the file of the District Munsif Court, Perambalur.

For Appellant : Mr.Suresh

For Respondents : Mr.R.Nalliyappan



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## **JUDGMENT**

This Second Appeal has been filed to set aside the judgment and decree dated 22.09.2010 made in A.S.No.47 of 2008 on the file of the Subordinate Court, Perambalur, confirming the judgment and decree dated 11.10.2004 made in O.S.No.384 of 1997 on the file of the District Munsif Court, Perambalur.

2. Heard Mr.Suresh, learned counsel for the appellant and Mr.R.Nalliyappan, learned counsel for the respondents and perused the materials available on record.

3. The plaintiff is the appellant. The plaintiff has filed a suit for declaration and permanent injunction and the suit has been dismissed by the Trial Court and the First Appeal filed by the plaintiff was also dismissed by confirming the judgment and decree of the Trial Court. Now, the plaintiff has filed this Second Appeal.

### **4. The short facts pleaded in the plaint are as follows:**

The lands measuring 2 Acres 30 cents in S.No.395/1, 1 acre 06 cents in S.No.395/2, 1 acre 24 cents in S.No.395/3, 0.80 cents in S.No.395/8 and



0.98 cents in S.No.395/9 in Sengunam Village belonged to the plaintiff as her self-acquired property through the registered sale deed dated 12.09.1979 executed by one Rukmaniammal (Ex.A1). Pursuant to the above sale deed, the plaintiff was in possession and enjoyment of the same. The properties in S.No.394 was originally belonged to the defendants 4 and 5 and the plaintiff learnt that the defendants 1 to 3 have taken it on exchange. Further east of the defendant's property, there is a north-south road leading to Arumadal.

**4.1.** As the properties belonged to the plaintiff and the defendants were originally belonged to the same family, a cart track has been created on the northern edge of S.No.394 from Arumadal Road and that runs east-west. That cart track has been used for agricultural purposes by the plaintiff and her predecessor in title. As the plaintiff does not have any other pathway to reach her land, the above cart track has been used as an easementary right as well. By joining the said cart track on the northern side, there is a north - south Odai measuring 4 feet. As the defendants restrained the plaintiff from using the cart track, the plaintiff has already filed a suit in O.S.No.167 of 1989 against the defendants 4 and 5. But the same was dismissed for default on 21.07.1992. The petition filed by the plaintiff to restore the same has also



been dismissed and the revision petition filed challenging the order of dismissal was also dismissed. As the suit has been dismissed only for default and not on merits, the present suit is not barred by *resjudicata*. As the obstruction is continuing, the plaintiff has filed a suit for declaration that the plaintiff is entitled to the enjoyment of the pathway running east-west on the northern side of S.No.394 belonging to the defendants and for a consequential injunction.

**5. The averments pleaded in the written statement of the defendants are as follows:**

It is true that the properties in S.No.395 belonged to the plaintiff and the properties in S.No.394 belonged to the defendants 1 to 3 and the land in S.No.394 is lying on the eastern side of the property in S.No.395. It is not true to state that those properties belonged to a common owner. There is no cart track running on the defendants' land at any point of time. The plaintiff has no right to create pathway right which is not in existence. Hence, the plaintiff's suit has to be dismissed.



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6. During the course of the trial, on the side of the plaintiff, P.W.1 and P.W.2 were examined and Exs.A1 to A7 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Exs.B1 to B8 were marked.

7. At the conclusion of the trial and on considering the evidence on record, the Trial Court has dismissed the suit and the First Appeal preferred by the plaintiff was also dismissed confirming the judgment and decree of the Trial Court. Now, the Second Appeal has been filed by the plaintiff by raising the following substantial question of law:

*"When the documentary evidence including the additional evidence produced coupled with the admission made in the oral evidence on the side of the defendants establish not only the properties belong to the one family but also Survey No.394 was used as cart track for the properties in Survey No.395, still are the Courts below right in dismissing the suit?"*

8. The learned counsel for the appellant submitted that during the First Appeal, a petition was filed to mark 'A' register which would show that both properties in S.Nos.394 & 395 belonged to a common owner Arumuga



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Udayar and others and the same has not been given with any weightage by the First Appellate Court. The appellant has filed an application to receive 'A' register as an additional document. But, the First Appellate Court has passed an order on merit by dismissing the same. Hence, the adangal does not form part of the evidence. In fact, the plaintiff has also filed a suit in O.S.No.167 of 1989 for the relief of injunction in respect of the same cart track. The said suit has been dismissed for default and a petition filed by the plaintiff to restore the same has also been dismissed. The revision petition filed challenging the above order was also dismissed. Irrespective of the said fact, the Courts below have considered the merits of the suit in view of the fact that the earlier judgment has not been considered on merit.

**9.** The appellant / plaintiff put thrust on a single point that adangal extract shows a common ownership for the S.Nos.394 and 395, at some point of time. Even it is presumed that the properties in S.Nos.394 & 395 belonged to a common owner at some point of time, that alone will not entitle the plaintiff to have any cart track right. The plaintiff needs to establish the existence of the cart track alleged to be running on the lands of



the defendants in S.No.394 and that has been enjoyed by the plaintiff and his predecessor in title, as an easementary right.

**10.** Even the plaintiff's title deed does not mention about any cart track. Neither the adangal extract show the existence of cart track. The Commissioner who had visited the suit property had filed a report stating that the lands of the plaintiff can be accessed through the other way running on the western side. When there is a pathway available to the plaintiff to reach her lands, the question of easement by necessity over the defendants' land will not arise. Even if the plaintiff could successfully prove that the lands in S.Nos.394 & 395 belonged to a common owner, that is inconsequential to the right claimed by the plaintiff with regard to the cart track allegedly running on the lands of the defendants 1 to 3 in S.No.394.

**11.** The appellant / plaintiff has neither established the existence of a cart track on the lands of the defendants 1 to 3 nor she established her easementary right over the same. The appellant / plaintiff has not established that she is in need of the above pathway in order to reach her land. On the other hand, the Commissioner's plan would reveal that there is



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a pathway on the western side of the plaintiff's land. As the plaintiff has not established the fact that there is a cart track and that she has got any right of easement over the same, the Courts below are right in dismissing the suit. Hence, I do not find any question of law much less a substantial question of law arise in this Second Appeal.

**12.** In the result, this Second Appeal is dismissed and the judgment and decree dated 22.09.2010 made in A.S.No.47 of 2008 on the file of the Subordinate Court, Perambalur is confirmed. No costs.

Speaking order

**17.12.2024**

Index : Yes

Neutral Citation : Yes

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To

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1. The Subordinate Court,  
Perambalur.
2. The District Munsif Court,  
Perambalur.



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**R.N.MANJULA, J.**

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