



S.A.(MD).No.82 of 2024

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THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **20.03.2024**

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

S.A.(MD).No.82 of 2024
and
C.M.P.(MD)No.2087 of 2024

1. Sivakumar

2. Lekshmi Sivakumar

... Appellants

/Vs./

Sudha

... Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, to call for records relating to Judgment and Decree passed by the learned Subordinate Judge, Eraniel in A.S.No.4 of 2021 dated 04.12.2021 confirming the Judgment and Decree of learned Additional District Munsif in O.S.No.189 of 2008 dated 19.03.2014 and dismiss the suit.

For Appellants : Mr.C.Murugavel
For Respondent : Mr.K.N.Thampi



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JUDGMENT

The appellant is the defendant in the suit and the respondent herein is the plaintiff in the suit. For the sake of convenience, the parties shall be referred as Plaintiff and Defendant as per the ranking in the suit.

2. The plaintiff's father, Narayanan Pillai got the A-schedule property having an extent of 40.250 cents and Raman Pillai got the B-schedule having 45.250 cents and C-schedule having 1.500 cents was commonly allotted to pathway for having access to the properties to the A and B schedule owners respectively as per the partition deed among themselves vide Document No.1826 dated 28.05.1957 of Colachel Sub Registry. Further it is mentioned that pathway should not be obstructed on any cause. A plan is appended in the partition deed having an extent of 87 cents in old S.No.1402 of Colachel village. A-schedule is Plot No. 2, B-schedule is Plot No.3 and C-schedule is Plot No.1 in the partition deed plan. The plaintiff's father, Narayanan Pillai executed the Will in



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favour of his wife and his six children to the properties as A to G schedules in Document No.16 dated 23.06.1980. The plaintiff is Party No.6 in the Will Deed and F-schedule having 23.500 cents property in R.S.No.130/10 of Lekshmipuram Village was allotted to the plaintiff. The plaintiff's brother Jeyan is Party No.3 and C-schedule Item No.1 having 20 cents in R.S. No.130/10 and other properties allotted to Jeyan. Later on, 09.07.1992 the plaintiff's brother Jeyan had executed sale deed in favour of plaintiff in respect of 18.500 cents out of 20 cents vide Document No.1119 of 1992 of Colachel Sub Registry. In the description of property, it is specifically stated that 1-500 cents of property is provided as pathway on the East-West direction in the partition deed plan for having access to the properties based on the partition deed dated 28.05.1957. Thus, the plaintiff got 23.500 cents as per the Will deed dated 23.0.1980 and 18.500 cents as per the Sale deed dated 09.07.1982, having a total extent of 42 cents in R.S.No.130/10.

3. The first defendant is the owner of the western side property in



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R.S.No.130/9 adjacent to the plaintiff's property. Item No.1 and 2 properties purchased by the first defendant's father as power holder on 08.05.2003 from Lekshmi Pillai and others in the name of the first defendant. Item No.2 property of the first defendant is having an extent of 1.500 cents in old S.No.1402 correlated with R.S.No.130/A1 of Lekshmipuram village. The boundary description of 1.500 cents property in the sale deed mentions on the North is common pathway. As such the first defendant is having southern 1.500 cents as item No.2 as per the sale deed. And the plaintiff and other property owners are entitled to 1.500 cents as common pathway to a total extent of 3 cents and using the same without any obstruction till 26.11.2008. But the defendants without any reasonable cause claims the whole pathway right on the property and caused obstructions to the pathway right of the plaintiff. The plaintiff filed an application to the Tahsildar on 17.08.2008 to measure the property as per resurvey plan. In the resurvey plan common pathway is specifically marked and the same is used by the plaintiff's predecessors from 1957 and the plaintiff is using the same without any interruption.



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4. On 27.11.2008, the second defendant, wife of first defendant with the influence of men in the locality trespassed into the property and dug foundation to cause obstruction is a common pathway used by the plaintiff. Hence the plaintiff preferred police complaint 27.11.2008 against the second defendant. The police visited the spot and directed the second defendant not to make any construction in the common pathway. But on the same night with the influence of second defendant and her men put up the granite foundation to close the pathway. Agreed over the same the suit was filed.

5. The suit was filed to declare the prescriptive right of pathway over B schedule property and mandatory injunction to demolish the construction in B schedule common pathway. If the defendants / appellants fail to do so, the court may order for demolish and realise the cost from the defendants. Also declare the title and possession of the plaintiffs over the plaint schedule property and injunction restraining



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from disturbing the rights of the plaintiffs discharging act of ownership over the B Schedule property. The defendants had filed written statement but had remained exparte thereafter. Hence the Trial Court after perusing the evidence, based on the documents filed by the plaintiff had decreed the suit. Aggrieved over the same, the defendants had preferred First Appeal. In the first appeal the Court had held that the defendant had not filed any documents to rebut the claim of the plaintiff. Further it is held that the defendant had not filed any petition to receive any documents on behalf of the defendants, hence the defendants are not serious in litigating their rights. Thereafter based on the documents the First Appellate Court had held that the plaintiff is entitled to the common pathway which the plaintiff and her ancestors were enjoying for the past 52 years and had confirmed the judgment of the Trial Court and dismissed the appeal filed by the defendants. Aggrieved over the same, the defendants had preferred the present second appeal.

6. Admittedly the plaintiff has right over the property to the extent



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of 40.250 cents. However, the plaintiff is claiming right over larger extent to the tune of 42 cents (23.500 cents through Will dated 23.06.1980 and 18.5 cents as per Sale Deed dated 09.07.1992). But as per the documents, the plaintiff's father is entitled to only 40.250 cents as per (C-schedule and F-Schedule of partition deed). Even according to the defendant the plaintiff is only entitled to 40.250 cents and one of the substantial question of law in the second appeal is that whether the courts below right in decreeing the suit of a large extent than that of Ex.A1 through which Narayana Pillai predecessor in title have only 40¼ cents. But in the present case, the defendants had encroached in the said 40.250 cents, a portion of 0.406 square links, which is evident from the Advocate Commissioner's report. Moreover, the claim of the plaintiff is that before filing a suit, the said property was kept open. But the defendants had put up a common wall stealthily overnight, in spite of objection from the plaintiff. In fact, the plaintiff had preferred police complaint and the police had advised the defendant not to obstruct the common pathway. Further the Learned Counsel appearing for the



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plaintiff submitted that even though, the defendants had filed a written statement, their Counsel was present during the Trial, but the defendants had not participated in the trial and suffered the decree.

7. Pending second appeal this Court tried for an amicable settlement. Since it is the matter of 0.406 square links, this Court had directed the parties to settle the issue amicably. However, the parties had not settled the issue. Therefore, this Court proceeded to hear the case on merits.

8. This Court has perused Exhibits A-1, A-2 and A-3. On perusing the same, the boundaries with extent stated therein, coincides with the Advocate Commissioner's report. The Advocate Commissioner's report has categorically stated the measurement of plaintiff's property as 39.844 cents. In such circumstances the remaining portion is encroached by the defendants. If the encroached area is added, the plaintiff's property would be 40.250 cents. As per measurement in Exhibit A-1, A-2 and A-3 the



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plaintiff is entitled to an extent of 40.250 cents and if the encroached portion is added then the plaintiff gets the 40.250 cents. Therefore, this Court is of the considered opinion that the appellants/defendants have encroached the portion which belongs to the plaintiff.

9. Further, the substantial question of law which is raised are only questions of fact and there is no substantial question of law.

10. Therefore, this Court is not inclined to admit this case and the second appeal is dismissed confirming the judgment and decree passed by both the Courts. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No
NCC : Yes / No
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TO:

1. Subordinate Court, Eraniel.
2. Additional District Munsif Court, Eraniel.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

jbr

Judgment made in
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