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SA(MD)No.167 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 10/06/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

SA(MD)No.167 of 2024

and

CMP(MD)No.3933 of 2024 and 6353 of 2024

P.Latha : Appellant/3rd Appellant/
3rd Defendant

Vs.

1.R.Gomathi : 1st Respondent/Respondent/
Plaintiff

2.P.Poornam : 2nd and 3rd respondents/
3.V.Perumal : 2nd and 3rd Appellants/
1st and 2nd Defendants

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code to set aside the decree and judgment dated 20/04/2021 made in AS No.62 of 2019 by the Sub court, Eraniel, in confirming the decree and judgment, dated 20/08/2018 made in OS No.97 of 2013 by the District Munsif-cum-Judicial Magistrate, Eraniel.

For Appellant : Mr.A.Vadivel

For 1st Respondent : Mr.S.C.Herold Singh

For R2 and R3 : No appearance



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JUDGMENT

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This second appeal is filed seeking an order to set aside the decree and judgment, dated 20/04/2021 passed in AS No.62 of 2019 by the Sub court, Eraniel, confirming the decree and judgment, dated 20/08/2018 passed in OS No.97 of 2013 by the District Munsif-cum-Judicial Magistrate, Eraniel.

2.Plaint averments in brief:-

The suit in OS No.97 of 2013 was filed by the first respondent herein namely K.Gomathi seeking the relief of declaration that she acquired right of way over the plaint 'B' schedule property for ingress and egress to the plaint 'A' schedule property from the panchayat road on the southern side, consequently mandatory injunction directing the 3rd defendant namely the appellant herein to remove the obstructions made in the plaint 'B' schedule property, permanent injunction restraining the defendants from making obstruction in 'B' schedule properties and for costs with the following averments:-

The property mentioned in 'A' schedule originally belongs to the plaintiff. The plaintiff purchased 'A' schedule on 28/11/2022 through a registered sale deed. On the date of the sale deed itself, the possession was



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handed over to him. Ever-since, she is in possession and enjoyment and put up fencing in the 'A' schedule property. 'B' schedule is a portion of the property which belongs to the third defendant. That portion belongs to the second defendant. The defendants 1 and 2 are husband and wife. Due to some difference of opinion, the first defendant filed a suit in OS No.159 of 1999 against the second defendant before the Principal District Munsif-cum-Judicial Magistrate, Eraniel for maintenance and for creating a charge over the 'B' schedule properties.

3. That suit was decreed as prayed for with costs on 07/08/2009. The first defendant filed an execution petition for sale of the 'B' schedule property and other properties. The third defendant, who is the daughter of the defendants 1 and 2 purchased 'B' schedule property. 'B' schedule property is the pathway to the 'A' schedule property. Prior to the sale deed in favour of the plaintiff, the first defendant was using the 'B' schedule property to reach the 'A' schedule property. In the sale deed itself, there is a recital to that effect. More over, it is also in their enjoyment for more than several years. 'B' schedule is the only pathway to reach the 'A' schedule property from the panchayat road. So the



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defendants cannot make any obstruction in the 'B' schedule property. On 01/01/2013, they made obstructions by fencing stones and cattle shed. The plaintiff made a complaint to the Eraniel Police Station on 02/01/2013. The police also instructed to remove the obstructions. In spite of that, the defendants are not removing the same. So the suit is laid.

4.The defendants 1 and 3 filed joint statement. The second defendant filed a separate written statement.

5.The first and third defendants stated that the first defendant purchased the property from Thangam Nadar. He was using the pathway in the portion belongs to Thanam Nadar. Even after purchasing 'A' schedule property, the first defendant was using the Thangam Nadar's property to reach the 'A' schedule property. 'B' schedule property is not the pathway to reach 'A' schedule and it does not reach the 'A' schedule property.

6.The second defendant has stated that on the north of 'B' schedule property Narayanasamy temple is situated. On the southern side a building and the second defendant's property are situated. There is a fencing between 'A' and 'B' schedule properties.



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7.Before the trial court, 6 issues were framed. On the side of the plaintiffs, 2 witnesses were examined and 5 documents marked. On the side of the defendants, 2 witness were examined and no document was marked. The Commissioner's report and plan were marked as Ex.C1 & Cs.

8.The trial court has recorded a finding of fact that there is a clear recital with regard to 'B' schedule property in Ex.A2. So, the defendants cannot make any obstructions and denial to enjoy the plaintiff to 'B' schedule property. So, decreed the suit as prayed, finding that the obstruction was made by the defendants.

9.Against that, appeal was preferred by the defendants in AS No.62 of 2019 on the file of the Sub Court, Eraniel. It concurred with the findings recorded by the trial court and dismissed the first appeal.

10.Against which, the third defendant filed this second appeal.

11.At the time of hearing both parties, the following substantial questions of law were framed.



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(1)When the plaintiff herself admitted in the cross examination that she has two pathway, whether the courts below are correct in granting the decree for right of pathway in favour of the plaintiff on the 3rd Defendant's individual property?

(2)When the 3rd Defendant purchased the "B" schedule property and its whole extent from the Court's auction as well as third parties for valid consideration, can the plaintiff claim the pathway right in its through execution of 1st defendant sale deed without any title was in her name?

12. Along with the appeal, CMP(MD)No.6353 of 2024 is filed by the appellant under Order 41 Rule 27 CPC seeking permission of this court to produce additional documents mentioned in the petition stating that even though, the documents were available, he could not produce the documents due to inadvertent mistake. No counter was filed by the respondents in this petition. It was heard along with the main appeal.



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13.A simple short plaint and judgment of the trial court.

14.The appellate court considered the documents and evidence in an extensive manner and recorded a finding of fact concurred with the trial court.

15.Now let us straightway go that point.

16.As mentioned in the substantial question of law, the main argument of the appellant is that she purchased the 'B' schedule property through court auctions sale for valid consideration. In that court auction sale, no right of pathway was mentioned to the plaintiff's 'A' schedule property. So that document is not binding on her. The plaintiff cannot claim any pathway right over the 'B' schedule property. That is the main argument/defence by the appellant.

17.Let us go to the findings of the facts recorded by the trial court on that aspect.

18.There was total denial on the part of the defendants that 'B' schedule was never the pathway to reach the 'A' schedule. Ex.A2 is the document of sale



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executed by the first defendant in favour of the plaintiff. The first defendant has stated that 'A' schedule property was purchased by her from one Sundarabai and the pathway belongs to her and her husband. She became entitled to the property by way of court decree. She is in enjoyment of the pathway also. She sold the property to the plaintiff to meet out the expenses incurred by her for performing the marriage of the appellant. In the description of property, it is mentioned that the property measuring 2.5 Acre is situated in New Survey No.163/12B. The correct measurement is 2,202.46 sq. feet. The pathway to this portion is situated on the south measuring about 8 feet upto panchayat road. In the description of four boundaries, eastern boundary is noted as 8 feet pathway and her vacant site. So, it is seen that the first defendant sold the right of the 'B' schedule property by virtue of the sale deed. Now the appellant/3rd defendant says that she purchased 'B' schedule property through court auction purchase. Wherein no such right of pathway to 'A' schedule was mentioned. But that document was not produced before the trial court.

19. Now we will see the judgment of the first appellate court on that aspect. It also concurred with



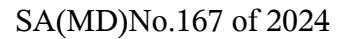
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the finding of facts recorded by the trial court on that aspect. Since there is a clear recital in Ex.A1, unless the appellant is able to show that the first defendant was not having any right over the 'B' schedule to sell, then the appellant cannot sustain this ground.

20.As mentioned above, CMP(MD)No.6353 of 2024 is filed seeking leave of this court to produce certain documents namely sale certificate issued by the District Munsif Court, Eraniel, dated 16/03/2006 in EP No.34 of 2002 in OS No.159 of 199 and the sale deed, dated 11/03/2013. These are the vital documents on the side of the appellant. Why those documents were not produced either before the trial court or before the appellate court, no proper reason is mentioned. It has been simply stated that they omitted to mark those documents inadvertently.

21.One of the cardinal principles to be taken into consideration by the appellate court is that the documents sought to be produced are having character of helping the appellate court to record a just decision. On that score, even though, there is no proper explanation on the part of the appellant, I am of the considered view that document No.1 can be taken into account for arriving at the conclusion.



23.As mentioned above, the appellant is the daughter of the respondents 1 and 2. So probably, the appellant might have known the existence of the pathway in the property purchased by her even at that time. Simply because, the existence of pathway and sale in favour of the plaintiff is not mentioned in the sale certificate, she cannot disown the knowledge. The sale in favour of the plaintiff was on 28/11/2002. The sale of 'B' schedule property was held on 09/01/2006 much after the sale deed in favour of the plaintiff for 'A' schedule property. It was confirmed on 16/03/2006. Having known the existence of the pathway in 'B' schedule property, the appellant has purchased the property. So now she cannot say that she has no knowledge about the existence of the pathway in the property purchased by her.

24. Even if we can take the Document No.1 into consideration, the case of the appellant does not improve. The 2nd document is the sale deed executed in



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favour of the appellant by one Velappan. What is the relevancy of the document is not mentioned in the petition. So, that document cannot be taken into account without proper averments in the plaint. **So, CMP (MD) No. 6353 of 2024 is partly allowed** and the document No.1 is marked as Ex.B1.

25.Coming back to the issue, another argument advanced by the appellant is the alternative pathway is available to the plaintiff. But when the pathway right is purchased by the plaintiff through the sale deed, even if alternative pathway is available, the right cannot be disputed. So that point is also not available to the appellant herein.

26.With regard to the obstructions, the trial court recorded a finding of fact on the basis of the Commissioner's report. The Commissioner has shown the 'A' schedule as 'ABCD' in the sketch, which is situated in Survey No.163/12B. It is fenced on four sides. There is obstruction in the 'B' schedule property. The obstructions are noted as 'IJKL' in new survey No.165/9 and 'MNOP' in new survey No.165/9. In both areas obstructions were noted. Since 'B' schedule is the pathway to the 'A' schedule property, the obstruction



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made by the appellant must be removed. The findings of facts recorded by the trial court as confirmed by the appellate court are in proper manner. It requires no interference by this court.

27. So the first substantial question of law is answered that the availability of the alternative pathway does not affect the right of the plaintiff in 'B' schedule property.

28. The second question of law is answered that Ex.A2 is binding upon the appellant.

29. For all the reasons stated above, the second appeal is liable to be dismissed and accordingly **dismissed with costs**, confirming the judgments and decrees of the courts below. Consequently, connected Miscellaneous Petition is closed.

14/06/2024

Index: Yes/No
Internet: Yes/No
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To,

1.The Subordinate Judge,
Eraniel.

2.The Principal District Munsif Court,
Eraniel.

2.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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