



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **11.07.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.NO.1331 OF 2002

1.K.Samikonar(died)

2.Sendu

3.S.Krishnan

4.S.Arumugam

5.Lakshmi

6.Mariammal

7.Murugesan :DefendantAppellants/Appellants

(Appellants 2 to 7 are brought on record as legal representatives of the deceased sole appellant as per order of this Court made in M.P(MD)Nos.1 to 3 of 2014 in S.A.No.1331 of 2002, dated 10.2.2016)

.VS.

1.Pitchaiah Konar

2.Mahalingam(died)

3.Nellai Vadivammal(died)

4.M.Brahmatchasi

5.M.Mariyammal

6.Subbulakshmi

7.M.Nalaayiram

8.Palavesam



9.M.Marudhupandi

:Plaintiffs 1,3 and 4/Responents/
Respondents

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(Memo, dated 17.11.2021 in U.S.R.No.25570 is recorded as third respondent died and the second respondent who is already on record is recorded as legal representative of the deceased third respondent as per order of this Court made in S.A.No.1331 of 2002, dated 30.11.2021)

(Respondents 4 to 9 are brought on record as legal representatives of the deceased second respondent as per order of this Court made in C.M.P(MD)No.1034 of 2022 in S.A.No.1331 of 2002, dated 26.4.2022)

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.38 of 1997, dated 19.9.2001, on the file of Subordinate Judge, Ambasamudram confirming the judgment and decree made in O.S.No.568 of 1988, dated 28.7.1997, on the file of Additional District Munsif of Ambasamudram.

For Appellants :Mrs.P.Jessi Jeeva Priya
for Mr.R.Aravinthan

For Respondent-1 :Mr.G.Sritharan
for Mr.T.M.Hariharan

Respondents 2 and 3 :Died

For Respondents :No appearance
4 to 9

JUDGMENT

The Second Appeal is directed against the judgment and decree made in A.S.No.38 of 1997, dated 19.9.2001, on the file of Subordinate Judge, Ambasamudram confirming the judgment and



decreed made in O.S.No.568 of 1988, dated 28.7.1997, on the file of Additional District Munsif of Ambasamudram.

2.The defendants in the suit are the appellants. The suit was filed for declaration of plaintiffs right over the suit second schedule lane portions and for consequential injunction restraining the defendants from interfering with the plaintiffs right of user. The suit was decreed by the trial Court by granting declaration that the suit second schedule was a common pathway and consequential injunction. Aggrieved by the same, defendants preferred an appeal and the first appellate Court affirmed the findings of the trial Court. Hence, the defendants have come by way of this Second Appeal.

3.According to the respondents/Plaintiffs, they purchased the property on the north and the south of the suit second item pathway. It was asserted by the plaintiffs that they had been using the suit first item north-south pathway and second item east-west pathway for more than 100 years and had prescribed right over the same. It was also claimed that the plaintiffs had no other alternate pathway to reach the house situated on the north of the suit item No.2, except the suit pathways. It was also claimed that there was an agreement between the plaintiffs father



Sankaranarayana Konar and defendants father Krishna Konar on 13.12.1957, whereunder, the right of the plaintiffs to use the suit pathways had been acknowledged. It was also claimed that the defendants were also entitled to drain their rain water from the roof into the second item lane of the second schedule. Thus claiming right over the suit pathways by way of long user and by necessity, the plaintiffs are constrained to file a suit for declaration and for consequential injunction.

4.The suit was resisted by the defendants by denying the right of the plaintiffs over the suit pathways. It was claimed by the defendants that the suit pathways were their exclusive lane portion and plaintiffs had no right over the same. The averments in the plaint as if the plaintiffs had been using the suit pathways for more than 100 years was specifically denied in the written statement. It was also claimed in the written statement that the plaintiffs had got an alternative pathway on the eastern side through the property of one Paramasiva Konar. On these pleadings, the defendants sought for dismissal of the suit.

5.Before the trial Court, the first plaintiff was examined as P.W.1 and one Chelliah was examined as P.W.2. On behalf of the plaintiffs, 11 documents were marked as Ex.A1 to Ex.A11. The



defendant was examined as D.W.1 and no documents were marked on the side of the defendant. The Advocate Commissioner's report and plan were marked as Ex.C1 and Ex.C2.

6.The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the disputed suit pathways were common pathways and granted the relief of declaration and injunction as such. Aggrieved by the same, the defendants preferred an appeal in A.S.No.38 of 1997, on the file of Sub-Court, Ambasamudram.The First Appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings of the Courts below, the defendants are before this Court by way of this Second Appeal.

7.At the time of admission, this Court formulated the following substantial questions of law by order, dated 16.8.2002:

1.Whether a suit for declaration of title over the suit property and for permanent injunction either as a common property or otherwise, can the Court grant a different relief of easement, by refusing the relief of declaration?

2.When the plaintiff had proceeded with his case as if that he has got a right over the suit property by holding a title, can the Court grant a relief of easement without even deciding whether it



is an easement of necessity or prescription?

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3. Is not the decree passed by the Lower Appellate Court granting a relief of easement as against the title illegal?

4. Even when the plaintiff did not ask for the relief of easement of necessity or prescription by way of an alternative one, is not a decree of the appellate Court in granting a decree of easement, is proper?

8. The learned counsel for the appellant by taking this Court to Ex.A5, agreement between the father of the plaintiffs and defendants relied on by the plaintiffs, submitted that boundary description found in Ex.A5 is not relating to the suit. Hence, according to the counsel, the findings rendered by the Courts below on the basis of Ex.A5 is vitiated by non-consideration of evidence available on record. It is further submitted by the learned counsel that the Courts below ought not have granted the relief on the basis of easementary right when the suit was filed for declaration of right over the suit lane.

9. The learned counsel for the first respondent by taking this Court to the discussion of the Courts below submitted that both the Courts below on appreciation of oral and documentary evidence available on record, came to the conclusion that the suit



lane portion was a common property and granted the decree as such and the said factual finding need not be interfered with in the Second Appeal.

10.It is the specific case of the plaintiffs that the suit north south pathway and east west pathway described as item No.1 and 2 respectively in the second schedule of the plaint have been used by them for more than 100 years. It was also asserted by the plaintiffs that in respect of the common right available to the parties, an agreement was reached between the father of the plaintiffs and defendants on 13.12.1957.The said agreement was marked as Ex.A5. A perusal of Ex.A5 would suggest that the plaintiff's father Sankaranarayana Konar and defendant's father Krishna Konar were given the right to use the north south pathway and east west pathway.

11.The main question to be decided is whether the pathways referred to in Ex.A5 are suit pathways as claimed by the Plaintiffs.

12.In Ex.A5 north south pathway has been described with the following four boundaries:

South of Krishna Konar's Property



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North of east west road

east of Subbiah Pandithar's property

west of second item land and Pavanasa Konar's house.

13.If the description found in Ex.A5 compared with Advocate Commissioner's report and plan, the boundary description mentioned above tallies with the boundary description of the suit item No.1. As per the Advocate Commissioner's report east west road lies on the southern side of the item No.1 of the suit second schedule. On the northern side, the property of the defendants is situated. The suit property was described as property of defendant's father Krishna Konar under Ex.A5. On the eastern side of item No.1 east west pathway and plainiffs house are situated. In Ex.A5, eastern boundary description was mentioned as west of second item Mudukku and Pavanasa Konar's house. The said Pavanasa Konar's house was purchased by the plainitiffs and the same is shown as house of Mahalingam with D.No.101 in the Advocate Commissioner's plan. In Ex.A5, the western boundary was mentioned as Subbiah Pandithar's property and the same has been purchased by the defendants and it was described as defendants cattled shed in the Advocate Commissioner's plan. Therefore the four boundaries mentioned in Ex.A5 for the north south pathway described thereunder tallies with boundaries of



item No.1 of suit second schedule property, as given in Advocate Commissioner's report.

14.Likewise, the east west pathway mentioned in Ex.A5 described with the following boundaries:

East of first item Mudukku
south of Krishna Konar and Ulagammal's Property
west of Paramasiva Konar's property
north of Pavanasa Konar and Sornamuthu Konar's property

15.If the boundary description of the east west pathway mentioned in Ex.A5 compared with item No.2 of suit second schedule property, the same also tallies with four boundaries mentioned in the Advocate Commissioner's report. In Advocate Commissioner's report also, western boundary was shown as north south pathway, eastern boundary was shown as Paramasiva Konar's property. In Advocate Commissioner's report, the property purchased by the plainfiff's from Pavanasa Konar and the property of Murugan who purchased the same from Sornamuthu Konar were shown as southern boundary. In the northern side, the property of the defendants and second plaintiff's house were shown as boundaries in Advocate Commissioner report. In Ex.A5,



northern boundary was mentioned as Krishna Konar's property and Ulagammal's property. The second plaintiff purchased the house in Door No.102-A from Ulagammal and Krishna Konar's, son is the present defendant. In such circumstances, the boundary description mentioned in Ex.A5 tallies with the boundaries available on ground as per Advocate Commissioner's report for second item of suit second schedule property. Therefore, the findings rendered by the Courts below that Ex.A5 supports the case of the plaintiffs that they have been using the pathways for quite a long time is based on proper appreciation of evidence available on record. It is also pertinent to mention that in the title documents filed by the plaintiffs Ex.A2 and Ex.A3 also the suit pathway portions have been mentioned as common pathways between the parties. Though the defendants claimed that they have got exclusive right over the suit pathways, they have not chosen to produce any document to prove their exclusive right over the suit pathway portions. When the defendant was examined as D.W.1, he was questioned about his title documents and he answered that he did not know reason for his failure to produce the title documents before the Court. Therefore, the First Appellate Court has taken adverse inference against the defendants for their failure to produce the title documents. If the title documents of the defendants were produced before the Court, boundary description



found in those documents can also be compared with the documents produced by the plaintiffs. Therefore the defendants are guilty of suppression of material evidence available with them. The First Appellate Court has taken adverse inference for the failure of the defendants to produce the title documents. Therefore, the findings reached by the Courts below that suit pathways described in second schedule are common pathways and the defendants were not entitled to interfere with the right of user available to the plaintiffs is based on proper appreciation of evidence available on record. The Courts below have granted declaration that the suit pathways were common pathways of the plaintiffs and the defendants and it did not grant any easementary right. In such circumstances, all the questions of law framed at the time of admission are answered against the appellants and as such, this Court finds no perversity or illegality in the concurrent findings reached by the Courts below.

16. Accordingly, the Second Appeal stands dismissed. No costs.

11.07.2024



Index:Yes/No

Internet:Yes/No

NCC:Yes/No

vsn

To

- 1.The Subordinate Judge,
Ambasamudram.
- 2.The Additional District Munsif,
Ambasamudram.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

vsn

JUDGMENT MADE IN

S.A.No.1331 of 2002

11.07.2024