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S.A.No.1170/2013



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	09.01.2025
Pronounced on	12.03.2025

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

SA.No.1170 of 2013

and

MP.No.1 of 2013

Kadhir Rajarathinam
S/o N.Kadhirvelu

...

Appellant

Vs.

1.M.Arumugham
S/o Muthu Gounder

2.N.Kadhirvelu
S/o Natesa Gounder

3.R.Prabhakaran
S/o Poosari

...

Respondents

Prayer :- Appeal filed under Section 100 of the code of the Civil Procedure, 1908 praying to set aside the Judgement and Decree dated 31.10.2012 made in A.S.No.4 of 2011 on the file of the Principal Sub Court, Salem- reversing the judgement and decree dated 26.10.2010 made in OS.No.833 of 2010 on the file of the Principal District Munsif Court, Salem.



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For Appellant : Mr.T.Murugamanikam, Senior Counsel
for Mrs.zeenath Begam.

For Respondent : Mr.Ramaraj for R1
: RR2 & 3 -Given up

JUDGEMENT

The second defendant is the appellant. The plaintiff has filed the suit for bare injunction in respect of Items 1 and 2 of the suit property and mandatory injunction in respect of Item 3. The suit was dismissed by the trial Court and the first appeal preferred by the plaintiff was allowed and the suit got decreed. Aggrieved over the same, the present Second Appeal has been preferred by the second defendant.

2. The short facts pleaded in the plaint are as follows:

Items 1 and 2 of the suit property belong to the plaintiff by virtue of the sale deeds dated 19.07.1978 and 18.03.1979 and the plaintiff is in possession and enjoyment of the same. The second defendant is the son of the first defendant and the third defendant is the grandson of first defendant's brother Murugesu Gounder. Originally the suit properties belonged to Kumarasamy Gounder and Ponnusamy Gounder through a



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partition deed of the year 1932. After their lifetime of Kumarasamy Gounder, his sons namely Natesa Gounder, Murugesu Gounder and Raju @ Palanisamy Gounder have partitioned the same along with the well and a channel. The 5/8th share on the eastern side situated on the northern side of the well has been allotted to the share of Kumarasamy Gounder and the remaining 3/8th share was allotted to the three sons of Kumarasamy Gounder and Ponnusamy Gounder. The three sons of Kumarasamy Gounder were enjoying the vary land as common pathway and that was specifically mentioned by Murugesu Gounder while effecting partition between his sons. Subsequently, Poosari who is one of the sons of Murugesu Gounder had sold a portion of the property in favour of Subramanian by giving him a right over 15 ft. common pathway to reach the road. The sale deed in his favour was attested by Sundaram who is the brother of Poosari.

2.1 The plaintiff had purchased the first Item of the suit property from Subramaniam by virtue of a sale deed dated 19.07.1978 with all easementary rights and one Balu s/o. Kandasamy and Manickam s/o. Raju @ Palani Gounder had attested the said sale deed as witnesses.



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2.2 The plaintiff had purchased the second Item of the suit property from Poosari and his minor son Prabhakaran through a sale deed dated 08.03.1979 and the same was attested by Manickam S/o. Raju @ Palani Gounder and the first defendant. Thus the plaintiff has acquired title over Items 1 and 2 and he has been in enjoyment of the same from the date of his purchase without any objection. The said Poosari had sold the remaining land on 08.03.1979 in favour of Antony Samy and third defendant. The son of Poosari had sold his house by mentioning 15 ft. as a common pathway. The defendants are trying to alienate 15 ft. common pathway to third parties by closing the southern side well situated in Survey No.27. The defendants have blocked 15 ft. pathway up to Ananthayi Ammal's house on the eastern side. The plaintiff requested the defendants to remove the obstruction as he has been enjoying the pathway as easementary right. The plaintiff has filed the suit for permanent injunction.

3. The averments made in second defendant's written statement are as under :

It is true that the plaintiff had purchased Items 1 and 3 of the suit properties through two sale deeds dated 19.07.1978 and 08.03.1979. The



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suit is not maintainable without any prayer for declaration. There is a well in Survey No.37 and in which certain rights were given to Kumarasamy Gounder under the partition deed of the year 1972. It is false to state that vary land was enjoyed as a common pathway and the plaintiff is entitled to use 15 ft. width road. There is a common pathway with a width of 6 ft. on the northern side of Anandayi Ammal's house and the plaintiff has right of way over the same. The partition deed of the year 1974 is between Murugesu Gounder, Poosari and Sundaram. In the said partition deed, 15 ft. width pathway is not shown.

3.1 The recitals of the sale deed of Subramaniam does not bind the defendant as he is not a party to the same and it is a self serving document. Since the vendors of vendor of the plaintiff themselves got no right over the 15 ft. width pathway, the plaintiff could not derive any title over the same. The defendant is not an attester to the sale deed dated 08.03.1979.

3.2 The well in Survey No.37 is in a dilapidated condition with no water. The authorities have given notice to the father of the defendant to close the well and as such it was closed long back and it is known to the



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plaintiff. It is false to state that a fence has been put around the 15 ft. pathway only before a month from the date of the suit. The fence is in existence for a long time.

3.3 The father of the defendant had obtained a lease deed from the legal heirs of the co-owners and settled the same in favour of the second defendant. The plaintiff is not entitled to the relief as prayed for. Hence the suit should be dismissed.

3.4 During the course of trial on the side of the plaintiff four witnesses were examined as P.W.1 to P.W.2 and Exs.A1 to A54 were marked. On the side of the defendants four witnesses were examined as D.W.1 to D.W.4 and Exs.B1 to B13 were marked and the Commissioner's plan and report has been marked as C1 to C3.

4. On the basis of the above pleadings, the learned trial Judge re framed the following issues on 07.10.2010:

“1. தென்வடலாக செல்லும் 15 அடி அகல தடம் என்பது பொதுதடம் என்பது உண்மையா? அவ்வாறு பொது தடம்



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என்றால் அதை பயன்படுத்தும் உரிமை வாதிக்கு உள்ளது
என்பதும் உண்மையா?

2.வாதி தாவாவில் கோரியுள்ள நிரந்தர உறுத்துக்கட்டளை
பரிகாரம் அடைய தக்கவரா?

3.வாதி தாவாவில் கோரியுள்ள நிரந்தர உறுத்துக்கட்டளை
பரிகாரம் அடைய தக்கவரா?

4. வாதி அடையத்தக்க பரிகாரம் என்ன? “

5. At the conclusion the trial and considering the materials available on record, the trial Court had dismissed the suit and the first appeal preferred by the plaintiff was allowed and the judgment of the trial Court was reversed. Now the second defendant has preferred the second appeal by raising the following substantial questions of law:

"(i) Whether in law, the first appellate court is right in allowing the appeal when the plaintiffs and his predecessors have not been given any right to use the suit property through (Ex.A3) partition deed?

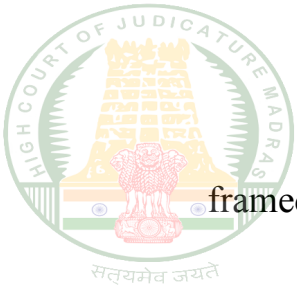
(ii) Whether in law the Court below is right in decreeing the suit in the absence of any relief for declaration?"



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6. The learned counsel for the appellant submitted that the plaintiffs' vendors' vendor has got the Items 1 and 2 of the suit property by virtue of the partition deed dated 30.09.1974, which is marked as Ex.A3. In the said partition deed the properties have been allotted to 'B' schedule and in the II Item of B Schedule, 15 ft. pathway is shown as the western boundary and no right has been given in the pathway. Ex.A4 which is the sale deed of plaintiff's predecessor in title also does not make any mention about any right over the pathway but the pathway has been shown only as the boundary in the details of the property. Ex.A5 is the sale deed of the plaintiff dated 19.07.1978 in respect Item 1 of the suit property and the same also shows that 15 ft. pathway is only a boundary. However, for the first time there is a subsequent mention in the property details about a right over the common pathway reaching to Paramanur main road. The sale deed of the plaintiff dated 08.03.1979 in respect of Item II of the suit property which is marked as Ex.A6 would also show the right over the 15 ft. pathway is the details of the property. In the plaint filed by the plaintiff he has stated that he has an easementary right over the pathway but such right has not been conferred in the title deeds of his vendors' vendor. Even the trial Court has not framed any issue as to the easementary right but the issue has been

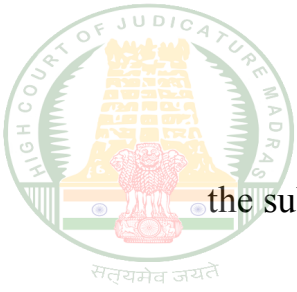


framed only as to the right to use the pathway.

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6.1. Though the trial Court has dismissed the suit, the first appellate Court had relied on the development made in the subsequent title deeds to render a finding as to the entitlement of the plaintiff's right over the suit pathway. The first appellate Court had relied on Ex.P58 dated 22.10.2010 which is a corporation plan obtained subsequent to the judgment of the trial Court. Though in the pleadings the plaintiff had pleaded easementary right, in the cause of action he has stated that he has a right which is self contradictory. For seeking the relief of mandatory injunction the plaintiff ought to have been concrete in claiming his right and it should be established. But the first appellate Court has overlooked the above requirement and allowed the appeal.

6.2. Reliance was placed on the judgement of the High Court of Karnataka in ***G.R.Krishna Murthy Vs. S.Razaack reported in ILR 1982 Karnataka 579*** wherein it is held that the relief of mandatory injunction can be prayed only by establishing the right by seeking a relief for declaration. The right which is not available to the original owner cannot be derived by



the subsequent purchasers under Section 7 of the Transfer of Property Act.

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7. The learned counsel for the respondent submitted that so far as the lands are concerned, there is no dispute between the parties and it was originally owned by Poosari. In the original partition dated 26.02.1932 which is marked as Ex.A1, it has been mentioned that each sharer has got the right to pathway to reach their respective shares of the land. In an another partition deed Ex.A2 dated 11.08.1940, they have undertaken to leave space for the lands and that has been agreed between the parties.

7.1. The learned counsel for the respondent submitted that so far as the plaintiff is concerned he has purchased only a small portion as Items 1 and 2 and hence he claims easementary right though his predecessor in title might have entitlement. The first appellate Court has considered all these points in depth and decreed the suit.

8. Heard Mr.T.Murugamanikam, learned senior counsel for the appellant and Mr.Ramaraj, learned counsel for the first respondent and perused the material available on record.

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Discussion:

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9.The suit properties, along with a larger extent and other properties, originally belonged to the common ancestor, Kumarasamy Gounder and Ponnusamy Gounder, through a registered sale deed of the year 1932, Ex.A1. After the lifetime of Kumarasamy Gounder, his sons, namely Natesa Gounder, Murugesu Gounder, and Raju @ Palanisamy, have partitioned the properties through a partition deed dated 11.8.1940. In the said partition deed, apart from the rights and entitlements given to each sharer under the respective schedules, it has been agreed between the sharers that an extent of 20 cents of land has been segregated and left exclusively for the purpose of a common pathway. This was with the futuristic vision if the sharers at any future point of time have thought of dividing the lands into house plots, after having allotted the said 20 cents for the common benefit, especially for a common pathway which has been agreed upon between themselves that the said pathway should be used by the sharers in order to reach their respective shares and the well.

10. It is reiterated that the above benefit is irrespective of the specific mention of the right under each of the schedule of the properties allotted to



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the sharers. The sons of Murugesa Gounder, namely Poosari and Sundaram, have partitioned the properties by virtue of the Ex.A3 partition deed. The properties subject to the partition deed Ex.A3 have the properties allotted to the share of Murugesa Gounder in the partition deed to 1940, which is marked as Ex.A2.

11. The specific contention of the learned counsel for the appellant is that the 1944 partition deed did not make any specific mention about the 15 ft pathway left for the road, but that had occurred only in the subsequent sale deeds of the plaintiffs. One of the sharers of the partition deed Ex.A3 dated 30.7.1974 is Poosari, who is the son of the Murugesa Goundar. So far as the properties allotted to the Poosari are concerned, apart from the boundary details mentioning the pathways running adjacent to the properties allotted in the partition, the right of a pathway and easementary right has also been granted, by making an exclusive mention about the same. The predecessor in title had already left 20 cents of land to be used as a pathway for the convenient enjoyment of the sharers to use their properties. The said allotment has been made not only for their convenient enjoyment, but also considering the future, in case the sharers divide the lands into small plots.



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12. So the opinion of the appellant that Ex.A3 did not have any mention about the entitlement of the pathway itself is based on a wrong notion or a defective construction of the earlier entitlement and the rights enjoyed by the sharers of the suit property. On 25.9.1974, Poosari, son of Murugesu Goundar, sold a portion of his property in the schedule of properties [Ex.A4], where the 15ft. road has been shown as common. But the appellant appears to have made a more clear details, which the earlier deeds of conveyance omitted to make. Admittedly, there is a well in S.No.37, and the earlier partition deed, especially Ex.A2 has made a specific allotment of 20 cents of land not only for the purpose of using this as a pathway but also to use it conveniently to reach the well. The above arrangement has been made just in case the properties are divided into small pieces in future and to ensure to have a convenient pathway. Subramaniam, in whose favour, Poosari has sold the suit property through Ex.A4, is the vendor of the plaintiff. Subramaniam has sold the suit property to the plaintiff through Ex.A5 dated 19.7.1978, and in that 15 ft North-South pathway has been shown as a common pathway. Apart from that there is also another East-West pathway adjoining the south side landowner



Ananthayi Ammal.

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13. The learned counsel for the appellant submitted that plaintiffs have their right pathway only in the 6 ft pathway adjoining Ananthayi Ammal land, and it does not have any right on the 15 ft pathway lying on the West side of the first item of the suit property. The plaintiff has purchased item No. 2, a suit property, from Poosari himself. The appellant submitted that the plaintiff has stated that he is claiming his easementary right over the suit pathway and that will not arise, when the plaintiff has an alternate pathway available on the south side of his property adjoining Ananthayi Ammal's lands. Even though the appellant has employed the word '*easementary right*,' the title deeds of his predecessors would confirm that they had entitlement over the pathway, as they had allotted a portion of their lands for the specific purpose of utilizing it as a pathway for the common enjoyment of all the sharers.

14. Since the plaintiff has got a small bit of land, it tallies with the vision of his predecessors in title, who thought it fit to leave a portion of the land to be used as a pathway when the lands are split and divided into house



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plots. So it is not correct on the part of the appellants to state that in Ex.A4 and Ex.A5, the sale deeds the word '*common*' has been included without any prior entitlement for the plaintiff's predecessor in title. Even in Ex. A3, which is sale deed of the year 1974 it has been mentioned that the property is subject to partition and allotted to the sharers subject to the pathway rights available in the properties. The said property is the same which has been subjected to partition in the year 1940 by virtue of Ex.A2. The lands were divided subsequently by individual shares among themselves and conveyed them to third parties. No doubt, the conveyance of those properties accompanies the right to use the pathway as well.

15. As the right-to-use pathway has arisen out of the common allotment of land for the purpose of pathway, it is not only a mere right to use, but a right to common entitlement for all the sharers of the suit property. To put it in a nutshell, what was being used as a pathway by the predecessor of the plaintiff in title cannot be allotted to any individual sharer as though the said portion belonged to any individual exclusively.

16. In the instant case, the Commissioner also noted the physical



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features when he visited the suit property and observed that the suit pathway had been obstructed. During his second visit he had noted the features had been altered further. He has stated that 3 ft which was left in the suit pathway during his first visit was also blocked during his second visit, and hence it is clear that the obstruction was caused by the defendants only at a time when the suit was filed and the suit pathway was in existence and has been used as a pathway, prior to the date of the cause of action pleaded by the plaintiff.

17. As the plaintiff's predecessor had a common title and enjoyment in the pathway and that has been mentioned and borne by the title documents, the inclusion of the word 'common' in the individual sale deeds, namely Exs.A4, A5 & A6, cannot be considered as an addition or enlargement but only an added clarity. So there is no fairness on the part of the appellants to deny the rights of the common pathway entitlement and the rights of the plaintiff and his vendors.

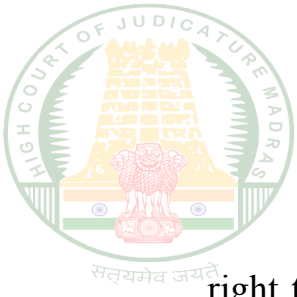
18. When the trial Court has not made a comprehensive appreciation but confined to the boundary details and arrived at a conclusion as though



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the common pathway has been made only as a boundary and there is no right of usage for the plaintiffs over the suit pathway. Even in that observation, the trial Court ought to have given consideration to the fact that there existed a 15 ft pathway and it was not described as a bit of land belonged to any individual. As the earlier partition deed of the plaintiff's vendor ancestors, namely Ex.A2 resolves the riddle about the existence of the pathway by showing a separate allotment of an extent of 20 cents of land for the exclusive purpose of pathway, it is right on the part of the First Appellate Court to appreciate the same and arrive at a right conclusion.

19. It is further submitted that the plaintiff's entitlement to use the pathway is in dispute, and hence, without the relief of declaration, the plaintiff cannot maintain a suit for injunction and especially a relief of mandatory injunction. Even though the plaintiff has pleaded caution about the easementary right, in reality, his predecessors in title had the entitlement to use the pathway as a matter of right, and hence it is not necessary for the plaintiff to claim a relief of declaration. Hence, the above contention of the appellant that the plaintiff sought a relief of declaration does not hold good.



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20. The evidence on record has not only proved the entitlement and right to use the suit pathway but also the fact that it was obstructed by the defendants. The oral evidence of the plaintiffs is supported by their documentary evidence as well. The commissioner's report and plan added more strength to the case of the plaintiff. Even the Ex.A58 corporation plan, which has been marked as an additional document, would also give clarity about the existence of the suit pathway. But it is submitted by the learned counsel for the appellant that Ex.A58 is a document arose after the suit, and hence that cannot be relied upon. Even though the date of Ex.A58 might be subsequent to the suit, the fact remains that the features shown in Ex.A58 have been proved to be in existence through the plaintiff's other material evidence placed before this Court.

21. Hence, the very submission of the learned counsel for the appellant that Ex.A3 partition deed does not make a mention about 'the right to use' itself is wrong, because Ex.A3 partition deed says about the usual pathway rights, which are inclusive of whatever pathway right is granted to the vendors of Ex.A3 in the family partition entered between his father and his family members through Ex.A2. Hence, the substantial questions of law



are answered against the appellants.

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22. As the first Appellate Court had rectified the short-sighted appreciation made by the Trial Court and arrived at a conclusion by making a comprehensive analysis of the materials available on record. I do not find any reason for interference.

In the result, the second appeal is **dismissed**. The Judgement and Decree passed by the Principal Sub Judge, Salem in A.S.No.4 of 2011 dated 31.10.2012 is confirmed. No costs. Consequently, the connected miscellaneous petition is also closed.

12.03.2025

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Internet : Yes
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R.N.MANJULA, J.

jrs

To

- 1.The Principal Sub Court, Salem
2. The Principal District Munsif Court, Salem

Pre-delivery Judgement in
SA.No.1170 of 2013
and
MP.No.1 of 2013

12.03.2025

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