



S.A.No.591 of 2022
& C.M.P. No.11740 of 2022

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.01.2025

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.591 of 2022

and

C.M.P. No.11740 of 2022

Munisamy

... Appellant

Vs.

1.Kanagaraj

2.Aanji

3.Sampath

4.Anbalagan

... Respondents

(Respondents 2 to 3 are set *ex parte* in both the courts. Hence given up)

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 16.12.2021 passed in A.S. No.1 of 2019, on the file of the Sub Court, Tirupattur, Vellore District, reversing the decree and judgment dated 08.10.2018 passed in O.S.No.53 of 2014, on the file of the Principal District Munsif Court, Tirupattur, Vellore District.



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For Appellant : Mr.R.Subramanian
For R1 : Mr.P.A.Sudesh Kumar
RR2 and 3 : Given up
For R4 : No appearance

JUDGMENT

The appellant Munusamy is the first defendant in O.S.No.53 of 2014, on the file of the Principal District Munsif Court, Tirupattur, Vellore District. The first respondent Kanagaraj filed the said suit for a declaration that he has a right over the pathway in survey number 255/2A of Nayanaseruvu Village, Tirupattur Taluk, Vellore District, measuring 4x98.8 meters shown in plaint plan and for a mandatory injunction directing the defendants to restore the pathway in its original position.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.



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3.The case of the plaintiff in a nutshell is as follows :

The plaintiff is the owner of survey numbers 256/24C, 256/25A, 256/25B of Nayanaseruvu Village, Tirupattur Taluk, Vellore District. He has a house in survey number 256/25A. On the northern side of the plaintiff's properties there is a common pathway running through survey number 255/2A. This pathway runs from south to north and joins Natrampalli - Thagarakuppam main road. The plaintiff and his predecessors have been using the said pathway for more than 100 years. The defendants own their lands on the eastern side of the common pathway. When the plaintiff was away from his home town, the first defendant trespassed into the said pathway and also obliterated the same. Therefore, the plaintiff issued a lawyer's notice dated 16.09.2013 (Ex.A6) to the first defendant which was received by him as is seen from the postal acknowledgment card (Ex.A7). In the said notice the plaintiff has requested the first defendant to remove the encroachments made by him in the common pathway. Since there was no response from him, the plaintiff issued another notice dated 08.11.2013 (Ex.A8) to the first defendant. The said notice was returned unserved. Hence the suit.



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4. The suit was resisted by the defendants on the following grounds:

- i. All the allegations contained in the plaint are false.
- ii. The first defendant purchased a land in survey number 255/2B from one Srinivasan through a registered sale deed dated 23.09.2002 and a pathway is mentioned in survey number 255/2A. However, the plaintiff was not given any right over the said pathway.
- iii. The property of the first defendant is 3 feet down the survey number 255/2A.
- iv. Neither the plaintiff nor his predecessors in title had ever used the pathway as alleged by the plaintiff.
- v. Therefore, the plaintiff cannot claim any right over the suit pathway.



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5. On the basis of the above pleadings, the trial Court framed the following issues :

"(i) Whether the plaintiff is entitled for an easementary right in the pathway as claimed by him ?

(ii) Whether the plaintiff is entitled for a declaration as prayed for by him ?

(iii) Whether the suit is bad for non-joinder of necessary parties ?

(iv) Whether the plaintiff is entitled for a mandatory injunction as prayed for by him ?

(v) To what other relief the plaintiff is entitled?"

6. In the trial Court, the plaintiff examined himself and two other witnesses and marked Ex.A1 to Ex.A9. The first defendant examined himself and three other witnesses and marked Ex.B1 to Ex.B5. An Advocate Commissioner was appointed by the trial court and his report and plan were marked as Ex.C1 and Ex.C2, respectively. The revenue records Ex.X1 to Ex.X4 were marked through Deputy Tahsildar, Natrampalli (P.W.2).



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7. The learned trial court judge on considering the evidence on record, dismissed the suit filed by the plaintiff, vide her decree and judgment dated 08.10.2018, on the following grounds:

- i. The cart track in survey number 255/2A is meant for the first defendant, one Raja and one Annadurai.
- ii. The plaintiff has not proved that he as well as his predecessor in title were using the cart track for more than 100 years as alleged by him.
- iii. The owner of the survey number 255/2A has not been impleaded as a party to the suit.
- iv. The Advocate Commissioner's report does not speak about any cart track running from plaintiff's house to the main road.
- v. In the 'A' register (Ex.X2) survey number 255/2A is shown as 'Nilaviyal Salai' and the said pathway is only for the usage of common owners of lands.
- vi. The Advocate Commissioner in his report has stated that there is a cart track measuring 10 x 13 feet on the western side of the



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8. Aggrieved over the decree and judgment passed by the trial court judge, the plaintiff filed an appeal in A.S. No.1 of 2019, before the Sub Court, Tirupattur, Vellore District. The learned Subordinate Judge, Tirupattur, after analysing the oral and documentary evidence on record allowed the appeal and decreed the suit filed by the plaintiff, vide her decree and judgment dated 16.12.2021, on the following grounds:

- i. The house of the plaintiff is situate on the southern side of the first defendant's house.
- ii. The Advocate Commissioner's report clearly shows that there is a pathway running from the main road towards southern side and it reaches the plaintiff's house.
- iii. The alternate pathway mentioned in the Advocate Commissioner's report is not in use.
- iv. The FMB sketch (Ex.X1) shows the existence of pathway in survey



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- v. The claim of easement of necessity need not be made against joint owners and therefore, owner of the land of survey number 255/2A is not a necessary party. Moreover, the plaintiff has filed the suit against the first defendant who is obstructing the pathway.

Aggrieved over the decree and judgment passed by the first appellate court, the present second appeal is filed.

9. At the time of admission the following substantial question of law was framed by my learned predecessor.

"(a) Whether the first appellate court was right in decreeing the suit filed by the plaintiff when the plaintiff has not adduced any evidence to show that he does not have any alternate pathway to reach his property and he has not also established that he has right over the pathway by way of prescription?"



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10. Heard Mr.R.Subramanian, learned counsel for the appellant and Mr.P.A.Sudesh Kumar, learned counsel for the first respondent.

11.The plaintiff claims easementary right over the alleged pathway which runs through survey number 255/2A of Nayanaseruvu Village, Tirupattur Taluk, Vellore District. Admittedly, the owner of the said pathway is one A.Dhanagopal and this is also evidenced from the copy of the 'A' Register (Ex.X2). The Deputy Tahsildar, Natrampalli (P.W.2) had deposed that 'Nilaviyal Salai' in survey number 255/2A is meant for owners of the lands and it is not a common pathway. It is pertinent to point out that the plaintiff has filed the suit for declaration of his right over the alleged common pathway running through survey number 255/2A. In the absence of the owner of the land, such a right cannot be granted in favour of the plaintiff.

12. Mr.P.A.Sudesh Kumar, learned counsel for the first respondent contended that owner of the land is not raising any objection for using the pathway and that the first defendant alone encroached upon



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the suit pathway and annexed the same with his land. If this contention of the plaintiff is accepted, it is not known as to how the owner of the land namely, A.Dhanagopal has not raised any objection especially when the land in survey number 255/2A absolutely belonged to him. The first defendant's specific contention was that his land is 3 feet down the survey number 255/2A and therefore he cannot encroach the land in survey number 255/2A.

13. In the instant case, the plaintiff claims easementary right by prescription. In the plaint he has stated that the suit property is a common pathway. Once the case of the plaintiff is that the suit property is a common pathway, he would automatically get a right over the pathway. However, it is admitted by the plaintiff that the land in survey number 255/2A belonged to one A.Dhanagopal. The plaintiff has not impleaded the said Dhanagopal as a party to the present suit. In any event, the plaintiff has not adduced any acceptable evidence to show that he as well as his predecessors in title have been using the suit pathway for more than 100 years as alleged by him. The plaintiff and the owner of the survey



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number 255/2A are admittedly total strangers to each other and they did not derive their respective title to their lands under common ownership. The plaintiff has not also established that his right over the pathway is apparent and continuous and necessary for enjoying his property. This is more so because the Advocate Commissioner in his report had clearly stated that there is another pathway for the plaintiff to reach the main road. Thus the plaintiff has not proved any of his contentions mentioned in the plaint and the trial court had rightly dismissed the suit filed by the plaintiff. On the other hand, the first appellate court had decreed the suit in favour of the plaintiff even though the plaintiff has not impleaded the owner of the land of survey number 255/2A as a party in the suit. In the absence of the owner, a declaration of the plaintiff's right over the alleged pathway in survey number 255/2A cannot be granted and therefore, the decree and judgment passed by the first appellate court is perverse. In view of all these reasons, the substantial question of law is answered in favour of the appellant.



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14. In the result,

- i. the Second Appeal is allowed. No costs. Consequently, connect Civil Miscellaneous Petition is closed.
- ii. the decree and judgment dated 16.12.2021 passed in A.S. No.1 of 2019, on the file of the Sub Court, Tirupattur, Vellore District, is set aside.
- iii. the decree and judgment dated 08.10.2018 passed in O.S.No.53 of 2014, on the file of the Principal District Munsif Court, Tirupattur, Vellore District, is upheld.
- iv. the suit in O.S.No.53 of 2014 on the file of the Principal District Munsif Court, Tirupattur, Vellore District, is dismissed with costs.

10.01.2025

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
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To

1. The Sub Court, Tirupattur, Vellore District.
2. The Principal District Munsif, Tirupattur, Vellore District.
3. The Section Officer, VR Section, High Court, Madras.



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R. HEMALATHA, J.

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