

S.A.(MD).No.182 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
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Reserved on	:	27.02.2025
Pronounced On	:	.07.2025

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

S.A.(MD)No.182 of 2018
and
C.M.P.(MD).No.4802 of 2018

Rajendran

Appellant

Vs.

1.Malarkodi

Ramasamy (Died)

2.Angammal

Respondents

PRAYER:- Second Appeal has been filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree passed by the Sub Court, Thuraiyur in A.S.No.9 of 2017 dated 05.01.2018 partly reversing the judgment and decree passed by the District Munsif Court, Thuraiyur in O.S.No.160 of 2002 dated 24.02.2017 by allowing this Second Appeal.



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For Appellant :Mr.R.Gowrishankar

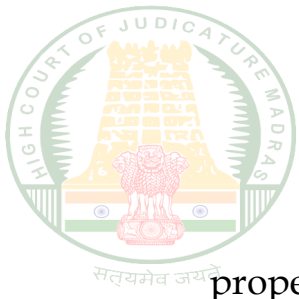
For Respondents :Mr.V.Meenakshi Sundaram for
Mr.K.Muthumalai for R1

:No appearance for R2

J U D G M E N T

The 2nd Defendant in O.S.No.160 of 2002 on the file of the District Munsif Court, Thuraiyur has filed this appeal challenging the judgment and decree passed in O.S.No.160 of 2002, partly confirmed in A.S.No.9 of 2017 by the learned Subordinate Judge, Thuraiyur.

2.The first respondent has filed a suit in O.S.No.160 of 2002, for the relief of declaration of the A scheduled property as her property and also for permanent injunction, restraining the defendant from interfering with the peaceful possession and enjoyment of the A scheduled property. She also sought for the relief of mandatory injunction, relating to the B scheduled

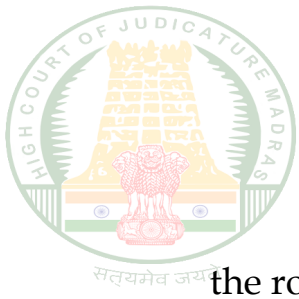


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property. In the plaint, it is stated that he is the owner of the property situated in survey No.748/2015 and the second defendant had encroached the road marked portion and constructed a kitchen and others structures in the B scheduled property, thereby, she sought for mandatory injunction restraining the defendants from using the pathway right over the said property.

3. According to the plaintiff, the said property, which is in occupation of the appellant is situated in the cement road, which is existence from time immemorial. The plaintiff had annexed the plan along with the plaint. The red marked portion is shown as the encroached portion and the appellant had filed the written statement stating that the description of the property mentioned in the suit scheduled property is not correct and also he is the owner of the property situated in the survey No.786/2015 and hence, he has not encroached any of the property situated in the road marked portion and the property is situated in the tail end part of



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the road proceeding from the West to East.

4. According to the appellant, even in the sale deed, it is clearly stated that the road is situated in the end part. The property of the appellant is situated in the end part of the road. Hence, he sought for the dismissal of the suit.

5. The learned trial judge, after considering the pleadings, framed the necessary issues and found that the suit is liable to be dismissed. Challenging the same, the plaintiff filed the first appeal in A.S.No.9 of 2017, before the learned Subordinate Judge, Thuraiyur. The learned appellate Judge after considering Ex.A5 and other documents, decreed the suit by holding that the appellant has encroached the road marked portion and granted decree for mandatory injunction. Aggrieved over the same, the defendant filed the the persent appeal before this Court. This Second appeal is admitted in the following substantial questions of law:



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(1) Whether the 1st appellate court is right in decreeing the suit based on the cross examination of the appellant when the evidence of plaintiff as well as the Ex.C1 and Ex.C2, the Advocate Commissioner's report and sketch have not proved the alleged encroachment in "B" scheduled pathway and whether the same amounts to shifting entire burden on the defendants even though the plaintiff has failed to prove her case?

(2) Whether the 1st Appellate Court is right in reversing the well considered judgment of the trial Court based on the weakness of the case of the Defendants?

(3) Whether the 1st Appellate Court is right in concluding that the pathway runs between the houses of the plaintiff and 2nd defendant, when the 2nd defendant's plot is the corner plot?

(4) Whether the 1st Appellate Court is right in decreeing the relief of Mandatory injunction without considering the Ex.C2, the Advocate Commissioner's Report and Sketch would not show the alleged encroachment in the B" Scheduled Pathway?

(5) Whether the 1st Appellate Court is right in



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comparing the four boundaries of Ex.A5, the sale deed of adjacent house with Ex.A3, the sale deed of plaintiff's A" Scheduled house even though the Ex.A3 is a street ending corner plot?

6.The Learned Counsel for appellant would submit that even under Ex.A1 marked by the plaintiff to show her title it is seen that there is a pathway, in the property situated at the end of the road. In the Commissioner's report it is clearly stated that the property of the appellant was situated in the end part of the cement road running from the West to East. The same was admitted by other witnesses also.

7. From the Commissioner's report, it is clear that the property is situated in far away from the cement road and the property is the absolute property of the defendant. But, the learned 1st appellate Judge without considering the same, allowed the appeal and decreed the suit and directed to remove the construction made by the appellant. Hence, he seeks for setting



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aside the judgment passed by the learned 1st appellate judge.

8.The learner Counsel for the respondent would submit that the learned appellate judge after considering Ex.A5, which is the documents of adjoining property in the same survey number and in the said document there is a mentioning about the cement Road running from the West to East and the property of the plaintiff is situated in the road marked portion and hence, the learned trial judge correctly appreciated the evidence. Further, it is stated that as the appellate court is a final Court of finding on fact and that the appellate Court had considered the entire evidence and decreed the suit and there is no need to reverse and hence, this court has no jurisdiction to interfere with Section 100 of the Civil Procedure Code. He also read the evidence and documents of the defendants and the same also show that there is mentioning of the road and hence, the learned appellate judge is correct in decreeing the suit.



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9. This Court considered the rival submissions made by the learned counsel appearing for the appellant and the learned counsel appearing for the respondent and perused the material available on record.

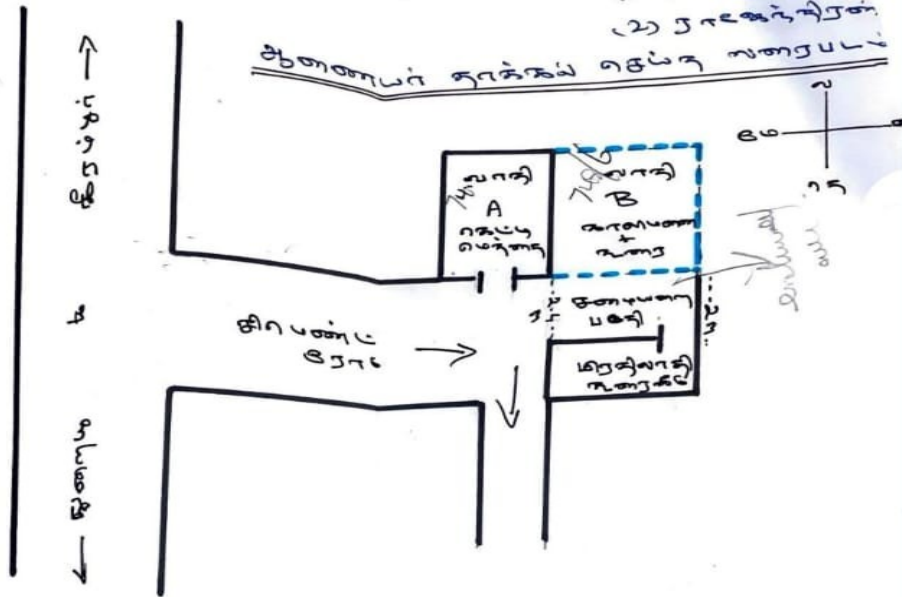
10. The appellant's property is situated in the southern side of the plaintiff's property. According to the plaintiff, the appellant's property is situated in the road marked portion. To substantiate and clarify the same, the Advocate Commissioner was appointed by the Court below. The commissioner visited the said property in the presence of both the appellant and the defendant in the suit. He filed a detailed report and for better understanding of the fact, the detailed sketch drawn by the commissioner is extracted hereunder:-



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பிரதி
பெயர்க்கணிய
தே.ந. எண் 160/2012
(VS)
பிரதிபாதிக்க
(1) தரபதர
(2) தரபதர



Plan fee if
fixed at Rs 150/-

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11.From the report of the Advocate Commissioner, it is clear that the property of the appellant is situated away from road portion. Admittedly, in the Commissioner's report it is not stated that it is situated in the road marked portion. The same also corroborated with sale deed of the first respondent, namely, plaintiff in the suit.

12.The first respondent categorically stated that on the southern side of the property, the appellant's land is situated. In view of the factual circumstances, the learned appellate judge committed an error in relying upon Ex.A5, which is situated on the western side of the plaintiff's property. It is an admitted case that in front of the property in Ex.A5 the cement road is running. It is not disputed that the cement road is running from West to east and end portion turn towards the southern side without touching the plaintiff's house and there was no road in the plaintiff's property.



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13.The learned 1st appellate Judge failed to consider the same. The learned Appellate judge also committed an error in relying Ex.A5 which is not inter parties. Apart from that, when the Commissioner's report clearly mentioned that the appellant was enjoying his own property and offending structure in his land and not in the road portion and the decree for mandatory injunction cannot be granted. Apart from that, this court finds no adequate evidence to prove that the appellant encroached the road marked portion. In view of the above circumstances, the appellate court committed an error in setting aside the well considered judgment of the trial Court relating to the relief of the mandatory injunction.

14.In result, this Second appeal is allowed and the question of law framed is answered in favour of the appellant and the appeal is liable to be allowed and the judgment passed by the learned Appellate Judge is liable to be set aside.



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15. Accordingly, the appeal is allowed. The judgment and decree passed A.S.No.9 of 2017 and decree in the suit in O.S.No. 160 of 2002 relating to the mandate Injunction is set aside. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

09.07.2025

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
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To

1. The District Munsif Court, Thuraiyur
2. The Sub Court, Thuraiyur
3. The Section Officer,
Madurai Bench of Madras High Court,
Madurai.



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K.K.RAMAKRISHNAN, J.

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