



SA No.1693 of 2003

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Date of Reserved	01/04/2025
Date of Pronounced	13/05/2025

CORAM

The Hon'ble Mr.Justice **G.ILANGO VAN**

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- | | |
|--|--|
| 1.Duraipandi Nadar (Died) | : 1 st Appellant/
Respondent/
1 st Defendant |
| 2.Chellammal | |
| 3.D.Jagadeesh | : Appellants 2 & 3/
LR.s of the
deceased sole
appellant |
| (Appellants 2 and 3 are
LR.s of the deceased sole
appellant vide order,
dated 31/07/2012 & made
in MP(MD)No.2 & 3 of 2011) | |

Vs.

- | | |
|--|--|
| 1.Kumaresan | : 1 st respondent/
Appellant/
Plaintiff |
| 2.Jayachandra Pandian | |
| 3.Thirunelveli Diocesan Trust
Association, represented by
its Secretary & Treasurer,
Palayamkottai,
Thirunelveli District. | : Respondents 2 and 3/
Respondents/
Defendants 2 and 3 |

PRAYER:-Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 21/03/2003 made in AS No.9 of 2002 on the file of the Sub Court, Tuticorin, by reversing the judgment and decree, dated 29/09/2000 in OS No.6 of 1999 on the file of the District Munsif, Srivaikundram.



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For Appellants : Mr.S.Siva Thilakar
For 1st Respondent : Mr.M.P.Senthil
for Mr.J.Antony Jesus
For R2 and R3 : Given up

J U D G M E N T

This Second Appeal is filed against the judgment and decree, dated 21/03/2003 passed in AS No.9 of 2002 by the Sub Court, Tuticorin, by reversing the judgment and decree, dated 29/09/2000 passed in OS No.6 of 1999 by the District Munsif, Srivaikundram.

2.The averments in the plaint in brief:-

(i)The suit property items 1 to 3 originally belongs to one Dinakaran. The first item contains a house bearing No.36 on the north-east of the first item. The second and third items are vacant site. In between these properties, 4th item runs east-west. Along with the plaint, a rough sketch is annexed to show the lie of the properties. The 4th item is mentioned as 'BGJKHB1'. Through the 4th item only, one can reach the items 1 and 2. Except the 4th item, no other pathway exists.

(ii)The 4th item belongs only to the owners on the south-north and west. No others are having any right in the 4th item on the east of the 2nd item. The defendants 1

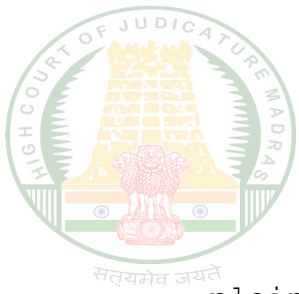


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and 2 are having house sites and house. On the east of the 3rd item, the third defendant house and house site are situated. So, the 4th item belongs to the plaintiff and the defendants exclusively as a common pathway.

(iii)The above said Dinakaran mortgaged the property with the Society. Without redeeming the same, he died. The plaintiff purchased the property through auction sale namely 1 to 3 items. In the mortgage deed executed by Dinakaran and subsequent sale certificate issued in favour of the plaintiff, survey number and extent were wrongly mentioned, which were later rectified by way of rectification deed. As mentioned above, except the 4th item, the plaintiff has no other pathway to reach items 1 to 3. The defendants 1 and 2 blocked the 4th item in the portion marked as 'GH' and put up a thatched blockage. Apart from that, they installed a pillar near 'GJ' area. Because of the blockage made by the defendants 1 and 2, the plaintiff is unable to reach their items 1 to 3. A request was made by the plaintiff to remove the blockage, for which the defendants promised, later refused. So, the suit is laid for declaration, permanent injunction and for mandatory injunction for removal of the blockage made by the defendants 1 and 2 in the 4th schedule, costs.



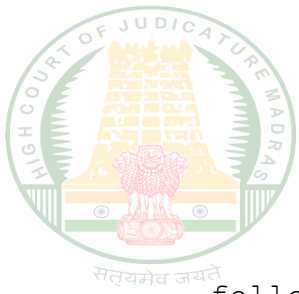
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3. The statement of the first defendant:-

The plaintiff is constructing house in item No.1 on the north of that property belongs to one Durai Pandi Nadar. On the further east, the first defendant is having vacant site and a thatched house. In that place, he constructed 4 pillars. Now by putting a thatched roof, were residing. On three sides, by putting thatti and mattai. On the south of the first defendant's house and the vacant site, compound wall was constructed on the north-south direction. The plaintiff have no right in the property, which lies on the south of his house. That portion left by the first defendant for draining eves water and maintaining the southern wall. The plaintiff has alternative pathway on the north and south. In the 4th item, the plaintiff have no right and possession.

4. The statement of the third defendant:-

The third defendant constructed a house by leaving west, east and south. Through that portion only, he is maintaining the wall. He never interfered or obstructed the pathway of the plaintiff. He prescribed eastmentary right in the portion because of the long use. There is no cause of action against him.



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5. On the basis of the pleadings of the parties, the following issues were formulated by the trial court:-

(1) Whether plaint map is correct?

(2) Whether the pathway stated by the plaintiff in the suit 4th schedule is in existence?

(3) Whether the 4th schedule pathway are in the common pathway of the parties?

(4) Whether the 4th schedule is in possession of the plaintiff?

(5) Whether the suit is bad for non joinder of necessary parties/

(6) Whether there is no cause of action against the 3rd defendant?

(7) Whether the plaintiff is entitled to the relief of declaration and permanent injunction as prayed for in the plaint?

(8) Whether the plaintiff is entitled to the relief of injunction as prayed for?



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(9)What other reliefs, the plaintiff is entitled to?

6.On 28/09/2000, the following issue was framed:-

10.Whether the 4th schedule is the pathway as well as the absolute necessity for the plaintiff?

7.On the side of the plaintiff, 3 witnesses were examined and 7 documents marked. On the side of the defendants, 2 witnesses were examined and 2 documents were marked. Exs.X1 to X3 were marked through witness. The Commissioner's report and plan were marked as Exs.C1 and C2.

8.At the conclusion of the trial process, the trial court dismissed the suit without any costs. Against which, he preferred AS No.92 of 2002 before the Sub Court, Tuticorin. The Sub Court, Tuticorin, differed from the finding recorded by the trial court. Accordingly, it allowed the appeal. The suit was decreed as prayed for, of course without costs.

9.Against which, this second appeal is preferred by the appellants.



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10. At the time of admission, the following substantial questions of law were framed:-

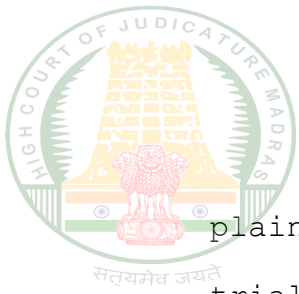
(1) Whether the judgment of the lower appellate court (being a reversing judgment) is vitiated in law in proceeding on the basis of a non-existing admission in favour of the plaintiff in Ex.A-1?

(2) When the defendants are not parties to Ex.A-4 whether a mere boundary recital in Ex.A-4 to show the existence of a common pathway would be conclusive proof against the defendants to hold that there exists a common pathway?"

11. Heard both sides.

Substantial Questions of Law Nos.1 and 2:-

12. Both are taken up together, since both are interconnected. Ex.A3 is the rough sketch drawn by the



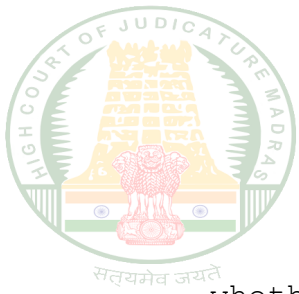
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plaintiff to show the lie of the properties. During the trial process, wherein it is stated that items 1, 2 and 3 belong to the plaintiff. In between item No.1 and the items 2 and 3, the disputed 4th schedule is situated, which connects the eastern north-south road with that of the first schedule. In the 4th schedule marked as 'GH' point, an obstruction was made by the 1st defendant.

13. According to the plaintiff, the 4th schedule is the common pathway of the plaintiff and the defendants. The first defendant's house site and house are situated on the east of the second schedule. The third defendant house and house site are situated on the east of the 3rd schedule.

14. The first defendant says that this is not the common pathway, in which the plaintiff having any right. The third defendant would say that the plaintiff was not having any right over the 4th schedule. The 4th schedule absolutely belongs to them. Apart from that, another issue, that was raised by the defendants is that the plaintiff is having access to his properties, which runs to the first schedule.



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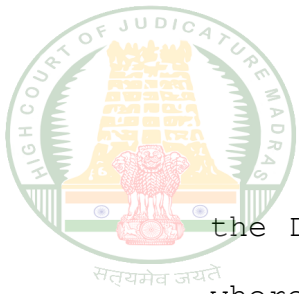
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15.A short point, which arises for consideration is whether the disputed 4th item is the common pathway of the plaintiff and the defendants or whether it is the absolute pathway of the defendants 1 and 3.

16.During the course of the trial process, some confusion arose with regard to survey number of the 4th schedule. Now it is clarified by the plaintiff that the 4th schedule property now lies or situated in survey No.91/23. Based upon the revenue records, the appellate court has concluded that 4th item, which lies in survey No.91/23 is a common pathway, in which the plaintiff and the defendants are having common right.

17.Before the trial court, a Commissioner was appointed. He has also filed a report and plan, which were marked as Exs.C1 to C4. But the Commissioner did not measure the property with reference to the revenue records. The survey number of 4th schedule was not mentioned by the Commissioner. But the lie of the property in the disputed land is admitted by both sides.

18.Because before filing the suit by the plaintiff, a notice was issued by the defendants under Ex.A1, which is dated 04/05/1998. Notice was issued at the instance of

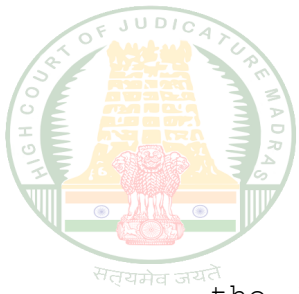


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the Durai Pandi Nadar and his brother Jayachadra Pandian, wherein it has been stated that the plaintiff is claiming noval right over the suit lane. In the description of the property in the notice, house, vacant site and lane are mentioned. Reply notice was sent by the plaintiff stating that the disputed lane belongs to the plaintiff by way of purchase, in which the defendants 1 and 2 have no right. They have put up a thatched gate around 1998. Apart from erecting the stone pillars in that property, causing obstruction for him to access to the properties.

19.So, it is seen that even before filing of the suit, existence of the suit 4th item or schedule was admitted by the defendants and they claimed absolute right, but whereas the plaintiff originally claimed absolute right, but later in the plaint, he has stated that it is a common pathway. As mentioned above, the plaintiff has committed a mistake while drawing the plaint sketch in not mentioning the correct survey number of the 4th item as stated above. As found by the appellate court that the 4th schedule lies in survey No.91/23.



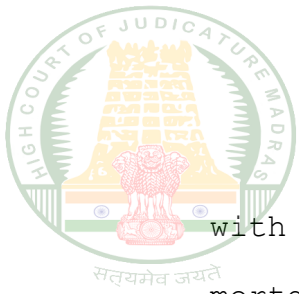
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20.Now we will go to the revenue records. Ex.X2 is the Natham Settlement Register regarding Survey No.91, wherein we see that survey No.91/23 is classified as a common lane. Survey No.91/26 belongs to one Dinakaran, who is the predecessor-in-title of the plaintiff in respect of items 1 to 3. Survey No.21/24 belongs to the Society. Ex.A3 is the adangal extract regarding the survey Nos.91/80, 90/20 and 90/55. Survey No.91/24 now stands in the name of Durai Pandi Nadar, Jayachandra Pandian. Now it is seen that during natham survey, 4th item was classified as 'common pathway'.

21.Now the case of the defendants is that the predecessor-in-title of the plaintiff, items 1 to 3 did not have any right over the 4th item, because those properties were originally belongs to one Chithiraivel Nadar, as per the partition effected between himself and his brother. The certified copy is marked as Ex.B1. It is, dated 28/10/1953. Chithiraivel Nadar is the third party. He was allotted with property in the third schedule property, wherein the marked portion does not bear any survey number. Only four boundaries are mentioned, wherein there is no reference to any survey number. According to the defendants, only this portion was brought for sale. Dinakaran mortgaged the property



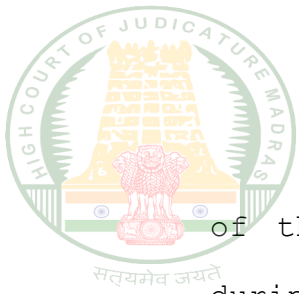
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with the Society. Later, he failed to redeem the mortgage, which resulted the auctioning of the items 1 to 3, which was purchased by the plaintiff.

22.On the side of the plaintiff, the mortgage deed copy is marked as Ex.A4. There was some mistake or correction in the sale certificate. It was corrected under Ex.A6. Original sale certificate was marked as Ex.A5. As mentioned in the preamble portion, the substantial questions of law were framed with reference to the evidentiary value for Ex.A4 and subsequent sale deed, correction document, etc. Stating that the defendants are not parties to Ex.A4 and subsequent documents, mere recital in the document relating to the boundary will not show any right or interest upon the plaintiff. This is the major issue that was raised in the grounds of appeal. Now in this background, let us go to the oral evidence available on record so that we can have a clear and correct picture.

23.PW1 would say that items 1 to 3 originally belonged to Chithiraivel Nadar. These properties were allotted to Chithiraivel Nadar at the time of partition. As mentioned above, Ex.B1 is the partition deed between Chithiraivel Nadar and his brother. There is no mention

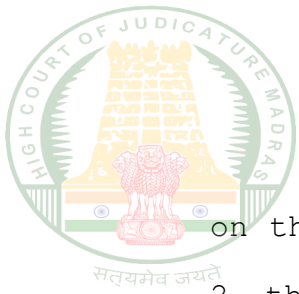


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of the 4th item as pathway. When this was put to PW1 during the course of cross examination, he has stated that he has no knowledge. He has also no knowledge whether the property by Chithiraivel Nadar, now is the subject property of Dinakaran. At the time of mortgaging the properties, survey numbers were mentioned as 82/8, So, it was suggested to PW1 by the defendants that the second item was not allotted to Chithiraivel Nadar in the partition and that was not the subject matter of the mortgage. This assumes importance, since it is stated in the written statement filed by the defendants 1 and 2 that second item does not belong to the plaintiff. We need not concentrate much upon now, because this is not the subject matter of the issue between the parties. We can avoid discussion regarding the second item and concentrate only upon the 4th item.

24.The plaintiff would further dispute the knowledge regarding the sub-division of the items 1 and 3. That was not the main reason in not mentioning the survey number of the items including the 4th schedule, which caused confusion, since he has mentioned only survey Nos.91/26 and not 91/23. The trial court, on the basis of the admission made by the defendants 1 and 2 found that the 4th item now lie in survey No.91/23. We can proceed only



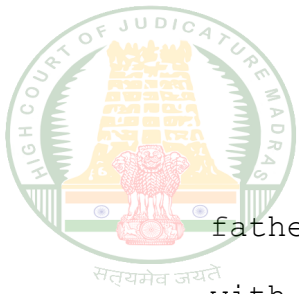
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on that line. It was suggested to PW1 by defendants 1 and 2 that the third defendant is having only right of easement over the 4th item. Apart from that, there was no right upon them to use the same as pathway. The plaintiff would further admit that there was northern east-west pathway and another east-west pathway between the first schedule and 3rd defendant's Church. Through that pathway only, the plaintiff can reach his properties. But that was denied by the plaintiff.

25.Now we will go to the evidence of DW1. She is the wife of the first defendant. She would say that the second item belongs to one Durai Pandi Nadar, but the plaintiff has stated that something wrong regarding the second item as if it belongs to him. But, as mentioned earlier, we can skip the second item as to the ownership because Durai Pandi Nadar is not a party to the suit discussion may cause unnecessary trouble to the parties. More over, it is not the subject matter of the issue now.

26.As mentioned above, DW1 says that through the second item and the temple, north-south pathway runs which connects northern pathway. She blocked the 4th item, it was in existence even during the relevant time of her



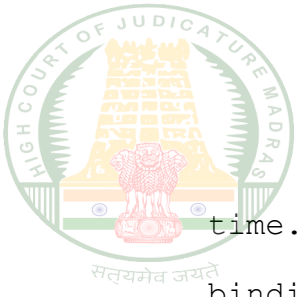
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father in law. So, during survey, no notice was issued with regard to the classification of survey Nos.93/23 as pathway, so survey is not binding on her. The 4th item belongs to her, the second defendant and Durai Pandi Nadar. The third defendant is having only easementary right to maintain their northern wall. She was cross examined on the point regarding the existence of the electrical post to Dinakaran's land through the 4th item. She claimed ignorance. This was commented by the appellate court stating that this piece of evidence on the side of the DW1 is unbelievable. The blockage made by putting thatti is admitted by her.

27. Reading of the evidence of PW1 and DW2 conjointly will indicate that even though in Ex.A4, the defendants 1 and 2 are not parties, but the existence of the 4th item is admitted even before filing of the suit through Ex.A1. Now it is too late for the defendants 1 and 2 to say before the trial court that no such pathway is in existence in item No.4. As mentioned above, it was classified as common pathway by the revenue authorities. The defendants 1 and 2 did not make objection before the concerned authorities, but they failed even after knowing about the classification. It appears that objection was not made by the defendants 1 and 2 within the reasonable



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time. It is too late for them to say that survey is not binding upon them.

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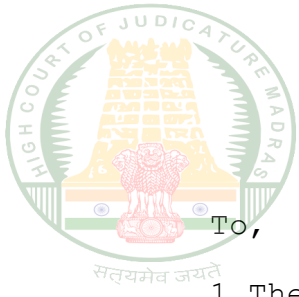
28. Even though in the mortgage deed made by Dinakaran, the sale effected by the society in favour of the plaintiff and subsequent correction of survey number in the sale deed, the defendants 1 and 2 are not parties, but the lie of the property as well as the user of the 4th item clearly indicates that it is a common pathway of the plaintiff and the defendants 1 to 3.

29. So, the contentions raised by the appellant herein are rejected. I find absolutely no reason to interfere into the judgment and decree of the appellate court. So, the substantial questions of law Nos.1 and 2 are answered accordingly.

30. In the result, the second appeal fails and the same is **dismissed** with costs, confirming the decree and judgment of the appellate court.

13/05/2025

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

1.The Sub Judge,
Tuticorin.

2.The District Munsif,
Tuticorin.

3.The Section Officers,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGOVA, J

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