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S.A.No.755 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.755 of 2017

1.Jayapal
2.Karunakaran
3.Punitha

...Appellants

Vs.

Agila Ammal

...Respondent

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree dated 29.04.2017 passed in A.S.No.31 of 2014 by the Sub-ordinate Judge, Dharmapuri confirming the judgment and decree dated 24.02.2014 passed in O.S.No. 195 of 2002 by the District Munsif, Dharmapuri.

For Appellants	: M/s.Arun Anbumani
For Respondent	: No appearance

J U D G M E N T

The unsuccessful defendants in the suit are the appellants. The respondent herein filed a suit seeking declaration of easementary right over the suit ABCD pathway and for consequential injunction restraining the appellants



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from interfering with her right of user over the ABCD pathway. The Trial Court decreed the suit as prayed for and the first appeal filed by the appellants was also dismissed. Aggrieved by the concurrent findings, the appellants have come up before this Court by way of this second appeal.

2. It is the case of the respondent that the house property was settled in her favour by one Chikkanna Gounder by settlement deed dated 08.08.1996 marked as Ex.A1. It is the specific case of the respondent that property was settled together with easementary right of user over the ABCD pathway. It is also averred by the respondent that the suit ABCD pathway has been used to reach her house and the appellants herein attempted to interfere with her right to use the said pathway. Hence, she was constrained to file a suit seeking declaration of easementary right over the suit ABCD pathway and for consequential injunction.

3. The appellants herein filed a written statement and denied the easementary right claimed by the respondent. Further, the specific case of the appellants is that neither the respondent nor her predecessor in title ever used the suit property as an access to their property. It was also alleged that the



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respondent has got an alternate poromboke pathway and the same had been used as an access to her property for all these years. The appellants claimed that suit pathway has been used by them exclusively and they have been in possession and enjoyment of the same and consequently sought for dismissal of the suit.

4. The Trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the suit property has been used as a pathway by the respondent for more than 20 years and consequently, the respondent was entitled to the prayer sought for in the suit. Aggrieved by the same, the appellants preferred first appeal in A.S.No.31 of 2014 on the file of the learned Sub-Ordinate Judge, Dharmapuri. The First Appellate Court also confirmed the findings of the Trial Court. Aggrieved by the concurrent findings, the unsuccessful defendants have come before this Court by way of second appeal.

5. Based on the arguments advanced by the learned counsel for the appellants, the following substantial questions of law are formulated for consideration in this second appeal.



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“1. Whether the Courts below are justified in declaring the easementary right by prescription when there was no plea by the respondent seeking easementary right by prescription.

2. Whether the judgments of the Courts below are vitiated when respondent sought for declaration of easement by necessity, the Courts below granted declaration of easementary right by prescription”.

6. The learned counsel for the appellants vehemently contended that the respondent/plaintiff sought for declaration of easement by necessity. She never pleaded easement by prescription. However, the Courts below assumed that respondent sought for easementary right by prescription and granted a decree. Therefore, it is the contention of the learned counsel for the appellants that when there is no plea in support of easementary right by prescription, the judgments rendered by the Courts below are vitiated.

7. Though notice was served on the respondent and her name is printed in the cause list, there is no representation for the respondent.



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8. The respondent in paragraph No.7c of the plaint specifically claimed easement by necessity. The averment reads as follows:-

“தாவா வழிநடையை (பிளானில் A,B,C,D என குறிப்பிடப்பட்டது) வாதி நீண்ட காலமாக பயன்படுத்தி வருகிறார். தாவா வழிநடையை தவிர ராஜவீதியில் இருந்து வாதியின் வீட்டிற்கு போகவர வேறு வழி இல்லை. தாவா வழிநடை வாதிக்கு அத்தியாவசியமானது. Easement of Necessary படி தாவா வழிநடையில் வாதி புழங்கும் உரிமையை விளம்பல் செய்ய வேண்டியது அவசியமாகிறது”.

9. Reading of the entire plaint of the respondent/plaintiff clearly establish that she claimed easementary right by necessity. Nowhere in the plaint the respondent claimed that she used ABCD pathway as a matter of right for more than 20 years and therefore she was entitled to easement by prescription. However, the Trial Court in the judgment observed as if the respondent was not claiming easement of necessity and therefore, there was no necessity to consider whether alternative pathway was in existence. The said observation of the Trial Court is clearly vitiated by misreading of the pleadings. Further, the Trial Court noted in it's judgment that Ex.C3, Advocate Commissioner's plan proves existence of suit pathway for so many years. I perused Ex.C3 filed in the typed set of papers. Nowhere in the Ex.C3, the



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Advocate Commissioner noted any pathway from street on Eastern side leading to the house of plaintiff through the property of the defendants. The pathways noted by the Advocate Commissioner lies in a circuitous route AFDE. Therefore, the observation made by the Trial Court as if the existence of suit pathway is proved by Advocate Commissioner's plan, Ex.C3 is also not correct.

10. The Trial Court, based on the evidence of P.W.1 to P.W.4 came to the conclusion that suit pathway had been used by respondent/plaintiff for more than 60 years and therefore, she was entitled to declaration of easementary right. First of all, the respondent has not pleaded easement by prescription. Therefore, the Trial Court erred in granting declarative relief by taking into consideration the alleged long enjoyment of the suit pathway by the respondent. Secondly, in Ex.C3, the Advocate Commissioner's plan, the pathway claimed by the respondent through the property of the appellants/defendants is not at all mentioned. In such circumstances, the findings rendered by the Courts below that the respondent had been using the suit pathway for more than 60 years is unsustainable.



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11. The First Appellate Court, based on the evidence of P.W.1 to P.W.4 has rendered a finding that respondent had been using suit ABCD pathway for more than 20 years. The First Appellate Court further stated that in the plaint averment the respondent has not specifically pleaded what kind of easementary right was claimed by her and however, based on the averments found in the plaint that respondent was entitled to molding of relief and hence, granted declaration of easement by prescription. As mentioned earlier in plaint averment, the respondent categorically claimed easement of necessity. However, the First Appellate Court wrongly observed that respondent has not made any specific averment with regard to the kind of easementary right claimed by her. When there is no plea in the plaint claiming easement of prescription by long use for more than statutory period, both the Courts below ought not to have assumed as if there was a plea by the respondent regarding easement by prescription and granted declaration of easementary right by prescription. Therefore, the findings rendered by the Courts below that respondent proved easement by prescription is not supported by any plea in her plaint. As mentioned earlier, the Advocate Commissioner in his plan which



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is marked as Ex.C3 has not noted existence of any pathway leading to plaintiff's property through appellants/defendants property. In such circumstances, the judgments of the Courts below are liable to be set aside.

12. In view of the discussion made earlier, the substantial questions of law formulated for consideration are answered in favour of the appellants/defendants and against the respondent/plaintiff.

13. Accordingly, the second appeal stands allowed

a) by setting aside the the judgment and decree dated 29.04.2017 passed in A.S.No.31 of 2014 by the Sub-ordinate Judge, Dharmapuri confirming the judgment and decree dated 24.02.2014 passed in O.S.No. 195 of 2002 by the District Munsif, Dharmapuri.

b) In the above facts and circumstances of the case, there will be no order as to costs.

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Index : Yes/No
Internet : Yes/No



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Neutral Citation Case : Yes/No
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To

1. The learned Sub-Ordinate Judge, Dharmapuri
2. The learned District Munsif, Dharmapuri.



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