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S.A.No.772 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.06.2024

PRONOUNCED ON : 04.07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

S.A.No.772 of 2012

1.Sellappan

2.Dhanam

...

Appellants

Vs.

1.Ramasamy Gounder

2.Pavayee

3.Kathirvel

...

Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree of the Subordinate Court, Tiruchengode, dated 29.04.2011, in A.S.No.34 of 2010 reversing the Judgment and Decree of the Principal District Munsif Court, Tiruchengode, dated 12.01.2010, in O.S.No.51 of 2022.

For Appellants

: Mr.P.Valliappan, Senior Counsel

For Respondents

: Mr.M.Elango



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JUDGMENT

Challenge in this second appeal is made to the Judgment and Decree dated 29.04.2011, in A.S.No.34 of 2010, on the file of the Subordinate Court, Tiruchengode, reversing the Judgment and Decree dated 12.01.2010, in O.S.No.51 of 2022, on the file of the Principal District Munsif Court, Tiruchengode.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

3. The case of the plaintiffs, in brief, is that plaintiffs are the owners of the lands in S.Nos.204/2A, 204/1F, 204/1D, 215/6, 215/7 and other lands at Palamedu village, Tiruchengode Taluk. The defendants are the owners of the lands in S.No.215/5 at Palamedu village, Tiruchengode Taluk. The lands in S.Nos.215/5 and 215/6 are adjacent to each other and in between the lands of S.Nos.204 and 215, Thirumanimutharu river runs and there cannot be water in the river in all the months of the year. There is a well beaten cart track that starts on the western corner of S.No.215/6, runs along the southern border of S.No.215/5, then runs towards the west to S.No.215/5 and then to Thirumanimutharu river and reaches S.No.204/1D. The plaintiffs are using the



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said cart track to ingress and egress from their lands in S.Nos.215/6 to 204/1D.

The plaintiffs and their predecessors are using the suit cart track for all these years. Except the suit cart track, there is no access from S.No.204/1D to reach S.No.215/6. The plaintiffs, their men, cattle, lorries and other heavy vehicles are using the suit cart track. The width of the suit cart track is 15 feet. The plaintiffs are entitled to the right of cart track under the principle of easement by necessity and prescription. Due to the dispute between the plaintiffs and defendants with regard to cattle trespass, the defendants made arrangement to obliterate the suit cart track that runs in S.F.No.215/5 and also obstructed the plaintiffs from using the same. The defendants have no right to obliterate the suit cart track. Hence, the plaintiffs filed the suit for declaration of easement right of cart track with the consequential relief of permanent injunction restraining the defendants and their men from in any way obstructing the plaintiffs from using the suit cart track or obliterate the same with the cost of the suit.

4.The defendants contested the suit, denied the allegations in the plaint and filed a written statement contending that there is no cart track ABCD as alleged in the plaint rough plan on ground. The allegations that the plaintiffs are using the said cart track to ingress and egress from their lands in



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S.No.215/6 to S.No.204/1D and their predecessors also using the same is false

and incorrect. The allegation that the plaintiffs are not having any other cart track except the one shown in the description of property is false. It is absolutely false to allege that the width of the suit cart track is 15 feet. There is no cart track as alleged. The plaintiffs are not taking their cart, cattle, lorries and other vehicles and they are not entitled to any right much less easement by necessity and prescription which are inconsistent. Hence this suit is not maintainable in law and thus, pleaded to dismiss the suit.

5.On the basis of the abovesaid pleas set out by the respective parties, the following issues and additional issue were framed by the trial Court for consideration:

- 1. Whether the suit cart track ABCD is in existence and the plaintiffs are entitled to use the same?***
- 2. Whether the plaintiffs are entitled to the relief of declaration and permanent injunction as prayed for?***
- 3. To what other reliefs the plaintiffs are entitled?***



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Additional Issue

***Whether the suit is bad for mis- joinder of
Government as necessary party?***

6. Before the Trial Court, in support of the plaintiffs' case, PWs 1 & 2 were examined and 12 documents were marked as Ex.A.1 to Ex.A.12. On the side of the defendants, DWs 1 and 2 were examined and 7 documents were marked as Ex.B.1 to Ex.B7. Ex.C1 to Ex.C5 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court dismissed the suit with a direction to the parties to bear their own costs.

8. Aggrieved over the same, the plaintiffs had filed A.S.No.34 of 2010, before the Subordinate Court, Tiruchengode. The First Appellate Court, after considering the entire materials and evidence on record found that the plaintiffs are not entitled for easement by prescription for using the suit cart track as there is no evidence that the plaintiffs were continuously enjoying the suit cart track for more than 20 years. But, relying upon the Commissioner's report, declared the plaintiffs' right of using 12 feet cart track running on the western



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side of S.No.215/5 and the consequential permanent injunction with regard to the same and declined the prayer of the plaintiffs as stated in the plaint over ABCD cart track as per the plaint rough plan. In this regard, the learned Subordinate Judge, Tiruchengode, partly allowed the appeal. Aggrieved by the same, the defendants have filed the present second appeal.

9. The second appeal has been admitted on the following substantial questions of law:

a) When admittedly the respondents have claimed easementary right over the river poramboke, can the suit be maintained without impleading the Government as a party ?

b) When the case of the respondents is that the suit cart track runs partly through the land belonging to the appellants and partly through river poramboke, is the Lower Appellate Court correct in law in granting relief of easement right over the property belonging to the appellants, while rejecting the claim of the right over the river poramboke ?

c) Whether the claim of easement by way of



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necessity without pleading that there was unity in title at some point of time regarding the servient tenament and dominant tenament, is sustainable ?

d) Whether the plea of easement by prescription is sustainable, without necessary plea that the person claiming easement by prescription has been in enjoyment of the right over the other man's property continuously, for over a period of 20 years ?

10.The learned counsel appearing for the appellants contended that the First Appellate Court failed to consider the pleadings and evidence on record properly and failed to consider the fact that the plaintiffs have not established their easementary rights as claimed in the plaint and no documents were produced by the plaintiffs in this regard. Ex.A11 sale deed has been misconstrued by the learned Judge. The learned Judge has erred in granting the decree on the basis of Exs.C1, C2, C3 & C4 Commissioner's report and plan overlooking the fact that the plaintiffs had not placed any evidence for claiming easementary rights over the cart track running on the western side of S.No.215/5. Further, the First Appellate Court failed to consider the fact that Exs.B1 & B2 judgment and decree in A.S.No.110 of 2008 will clearly prove



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that the plaintiffs had failed to establish the alleged rights in proceeding with a third party in respect of a part of the alleged suit cart track. There is no evidence to show that the plaintiffs are entitled to the right of suit cart track to reach their lands under the principle of easement by necessity and reiterated the other grounds raised in the grounds of appeal and thus pleaded to allow the second appeal.

11.The learned counsel appearing for the respondents supported the judgment of the First Appellate Court and contended that the Commissioner's report Exs.C1 & C2 clearly mark the existence of cart track running on the western side of the S.No.215/5. The judgment and decree in A.S.No.110 of 2008 is not pertaining to the suit cart track. The existence of the cart track is proved by the Commissioner's report. The plaintiffs have no access to reach their lands at S.F.No.215/6 except through this suit cart track mentioned in the Commissioner's report. He further contended that the First Appellate Court had rightly allowed the appeal in part, there is no ground to interfere with the findings and no substantial question of law is involved in this case. To support his case, he relied on the judgments in **(i) Nazir Mohamed Vs.J.Kamala and Ors reported in AIR 2020 SCC 4321, (ii) Chandrabhan (Deceased) Through Lrs.& Ors. Vs. Saraswati & Ors. (iii) Kshitish Chandra Purkait Vs. Santosh**



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Kumar Purkait & Ors reported in AIR 1997 SCC 2517 (iv) Umerkhan Vs.

Bismillabi @ Babulal Shaikh & Ors reported in AIR 2012 SCC 1646 & (v)

Sree Swayam Prakash Ashramam and anr. Vs. G.Anandavally Amma and

Ors. reported in (2010) 1 SCR 2721 and thus pleaded to dismiss the Appeal.

12.I have considered the matter in the light of the submissions made on either side and perused the materials on records as well as the Judgments passed by the Courts below.

13.In this case, the plaintiffs seek declaration of easement right over the cart track shown as ABCD in the plaint rough plan with a consequential permanent injunction restraining the defendants and their men from in any way obstructing the plaintiffs from using the suit cart track or obliterate the same. The defendants filed a written statement by contending that there is no cart track in existence and the plaintiffs are not using the same. On a perusal of the records and the oral evidence coupled with the Commissioner's report, it is evidenced that there is a cart track running on the western side of the S.No.215/5. It is also evidenced that the cart track is not running on the defendants land in S.No.215/5. But runs on the southern border of S.No.215/5 and runs towards west in S.No.215/5 then runs to Thirumanimutharu river



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crossing the river reaching S.No.204/1D. This is evidenced by the

Commissioner's report and rough plan. Further, the Commissioner in the report Ex.C1 recorded that the suit cart track is an old one and there is no alternative pathway for the plaintiffs to reach their lands.

14. On a perusal of the records and evidence, it is noticed that the plaintiffs had purchased the properties in S.No.215/7 and properties in S.F.No.215/6 by virtue of sale deed Ex.A2. On a perusal of the sale deed Ex.A2, it is noticed that the suit cart track runs on the southern side of S.F.No.215/5. At the same time, it is also noticed that no right was given specifically to the plaintiffs. The First Appellate Court, in paragraph Nos.14, 15 & 16 of its judgment, had discussed about the cart track with the Commissioner's report. For better appreciation, the same is extracted hereunder:

14. The plaintiff contends that a 15 feet cart track is running on the western side of S.F.No.215/6 that belong to him runs through the southern side of S.F.No.215/15 that belong to the defendant up to Thirumaninmutharu River and the predecessors of the plaintiffs and after purchase the plaintiffs are using the same to have an access



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to their land in S.F.No.215/6. The existence of cart track and user of the same by the plaintiffs and their predecessors are denied by the defendants. The plaintiff's had purchased S.F.No.215/7 and S.F.No.215/6 by virtue of a sale deed marked as Ex.A2 and on perusal of the same the suit cart track running on the southern side of S.F.No.215/5 was not though mentioned specifically the plaintiffs were given mamool right of way that runs as follows:-

" முத்துக் கவுண்டர் நிலத்திற்கும் தெற்கு கந்தப்ப கவுண்டர் செங்கோட கவுண்டர் நிலத்திற்கும் வடக்கு கிழக்கு பொது இட்டேரிக்கும் மேற்கு இதன் மத்தியிலுள்ள ஏ.0.02 நிலத்தில் பொதுவில் பேர் பாதி பாக பாத்தியமும் ஆகிய இவைகளும் இவைகளுக்கு உண்டான மாழில் தடப் பாத்தியமும் மற்றும் சகல ஈஸ்மெண்ட் பாத்தியமும் சகிதம் கிரையத்திற்குப் பாத்தியப்பட்டது..."

15. Though the defendant had denied the existence of suit cart track in their written statement and Chief affidavit had admitted the same during their cross examination on marking of a sale deed executed by 2nd defendant in favour of one Kandasamy as Ex.A12. On perusal of Ex.A12



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the recitals regarding the cart track runs as follows :-

"..... இதற்கு என் மீதி நிலத்திற்கு தெற்கோரமாக 12 அடி அகலத்தில் கிழமேலாகச் செல்லும் தடத்தின் வழியாக நீங்களும், நானும் அவரவர் பாக நிலங்களுக்கு போக வரவும் வண்டி அனைத்து வாகனாதிகள், ஆட்கள், கால்நடைகள் ஓட்டியும் போகவும் வரவும் வரப்போகவும் மாமூல் தடப் பாத்தியம் மற்றும் சகல ஈஸ்மெண்ட் பாத்தியமும் உங்களுக்கும் எனக்கும் உண்டு ஆகிய இவைதான் இந்தக் கிரையத்திற்குப் பாத்தியப்பட்டது....."

Though the defendant contends that it was left by them, it was not mentioned so in Ex.A12 and on the other hand he had mentioned that a 12 feet pathway was running on he southern side which is against the contentions of the defendants. Thus the defendant bad denied the existence of a path way on the southern side of S.F.No.215/5 that was subsequently claimed to be left by him which was not supported by the defendants own document Ex.A12.

16. A Commissioner was appointed at the request of the plaintiff who had inspected the suit property and filed his report and plan that was



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marked as Ex.C1 and C2. The Commissioner had mentioned about the existence of suit cart track and its course of running. The Commissioner had mentioned as follows in his report with regard to the suit cart track.

"..... தாவா வண்டிப்பாதையானது மனுதாரர்கள் வீட்டிலிருந்து வரைபடத்தில் மனுதாரர்கள் நிலம்-1 என்று குறிப்பிட்டுள்ள நிலத்திற்கும் பின் தொடர்ச்சியாக சென்று திருமணித்தாற்றை கடந்து மனுதாரர்களின் நிலம்-2 என்று காண்பிக்கப்பட்டுள்ள நிலத்திற்கு சென்றடையும் வண்ணம் அமைந்திருந்தது. தாவா தடத்தின் அகலம் சுமார் 15 அடி இருக்கும். D முதல் E வரை தாவா தடம் தரை மட்டத்திலிருந்து சுமார் 2 முதல் 3 அடி வரை பள்ளமாக இருந்தது. அந்த இடத்தில் பாதையின் இரு ஓரங்களிலும் கற்களால் கல்கட்டு கட்டப்பட்டிருந்தது. E என்ற இடத்திலிருந்து சரிவாக ஆற்றுக்குள் இறங்கி ஆற்றினுள் தெற்காக 50 அடி தூரம் சென்று பின்னர் F இடத்தில் ஆற்றிலிருந்து சுமார் 3 அடி உயரத்திலுள்ள மனுதாரர்களின் நிலத்தை அடைய சரிவாக பாதை அமைக்கப்பட்டிருந்தது. மேற்படி F என்ற இடத்தில் இருந்த சரிவான பகுதி சிறிதளவு சேதப்படுத்தப்பட்டிருந்தது. அதனை வரைபடத்தில் சிவப்பு வண்ணத்தில் காண்பித்துள்ளேன்.

5.மேற்படி திருமணிமுத்து ஆற்றில் சுமார் $\frac{1}{2}$ அடி அளவு தண்ணீர் இருந்தது. நான் ஆற்றினுள் இறங்கி



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வரைபடத்தில் மனுதாரர்களின் நிலம்-2 என குறிக்கப்பட்டுள்ள நிலத்திற்கு சென்றேன். அங்கு சுமார் 250 தென்னை மரங்களும் நெல்அறுவடை செய்யப்பட்ட காலி நிலங்களும் இருந்தன. மேற்படி நிலத்தில் கிணறு ஒன்றும் மின் மோட்டார் பம்பு செட்டுகளும் இருந்தது.

6. E என்ற இடத்திற்கு தெற்கில் ஆற்றுக்கு கிழக்கு ஓரமாக சுமார் 30 அடி அகலம் கொண்ட காலி நிலம் தொடர்ச்சியாக இருந்தது. மேற்படி நிலம் பாதைகளும் முட்செடிகளும் நிறைந்து காணப்பட்டது. அதனை வரைபடத்தில் ரோஸ் வண்ணத்தில் காண்பித்துள்ளேன்.

7. மேற்படி பாதையானது மிக மிக பழமையானதாகவும் தெளிவாகவும் காணப்பட்டது. மனுதாரர்கள் தங்கள் வீடு மற்றும் மனுதாரர்கள் நிலம் -1 என குறிக்கப்பட்டுள்ள நிலம் ஆகியவற்றிலிருந்து மனுதாரர்கள் நிலம் -2 என குறிக்கப்பட்டுள்ள நிலத்திற்கு செல்ல தாவா பாதையை தவிர வேறு பாதைகள் எதுவும் காணப்படவில்லை....."

15.From the above, it is clear that there exists a 15 feet cart track and except the suit cart track, there is no other alternative way to reach the land in S.No.215/6 owned by the plaintiffs. In such circumstances, the judgment of the First Appellate Court in allowing the appeal in part and declaring the plaintiffs' right of using the suit cart track running on the western side of S.F.No.215/5 and the consequential permanent injunction is based upon the evidence on record. Accordingly, I find no reason to interfere with the findings of the Court



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16.Further, the plaintiffs had not claimed the easement right over the river poramboke. They are using the river for crossing to reach their lands. No one can claim any easement right over the river. Therefore, the Trial Court as well as the First Appellate Court declined to grant any such right. There is no illegality in that. Impleading Government as a party is not required in this case since there is no sufficient evidence for long enjoyment. In this case, the claim of easement of necessity is established by the plaintiffs. Therefore, the question of easement by prescription will not arise. The claim of easement of necessity is justified. On appreciation of the evidence, the First Appellate Court granted easement of necessity.

17.In the light of the abovesaid factors, it is found that the First Appellate Court, on a proper appreciation of the materials placed on record, both oral and documentary evidence adduced by the respective parties and the principles of law governing the same, had rightly allowed the appeal in part. There is no misappreciation of evidence, irrelevant consideration and no ground to hold that the findings are perverse. There are no merits in the case. The substantial questions of law formulated in the second appeal are accordingly answered.



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Index : Yes/No

Internet: Yes/No

Speaking order/Non-Speaking order

Neutral Citation : Yes/No

To

1. The Subordinate Court, Tiruchengode.
2. The Principal District Munsif Court, Tiruchengode.



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V.SIVAGNANAM, J.

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Pre-Delivery Judgment made
in S.A.No.772 of 2012

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