



S.A.No.1175 of 2019

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	14.08.2025
<i>Pronounced on</i>	31.10.2025

Coram:

The Honourable Mrs.Justice K.GOVINDARAJAN THILAKAVADI

Second Appeal No.1175 of 2019

Palanichamy .. Appellant
versus

1.Subramanian
2.Periasami .. Respondents

Prayer: Second Appeal is filed under Section 100 CPC, praying to set aside the judgment and decree dated 06.06.2019 made in A.S.No.58 of 2017 on the file of learned Additional Subordinate Judge, Namakkal, confirming the judgment and decree dated 01.02.2017 made in O.S.No.511 of 2010 on the file of Principal District Munsif, Namakkal.

For Appellant : Ms.Elizabeth Ravi and
Mr.D.Venkateswara Rao

For Respondents : Mr.C.Jagadish for R2
No appearance for R1



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JUDGMENT

The above second appeal arise out of the judgment and decree dated 06.06.2019 made in A.S.No.58 of 2017 on the file of learned Additional Subordinate Judge, Namakkal, confirming the judgment and decree dated 01.02.2017 made in O.S.No.511 of 2010 on the file of Principal District Munsif, Namakkal.

2.The unsuccessful plaintiff is the appellant herein.

3.The case of the plaintiff is that the suit property was allotted to the share of the plaintiff's father vide partition deed dated 22.10.1999, who executed a settlement deed dated 02.02.2007 in favour of the plaintiff. The patta is also issued in favour of the plaintiff. In the plaint plan, the panchayat road is shown as 'XY' and the property shown as ' P ' belong to the plaintiff and the property shown as 'D, D1' belongs to the defendants. The defendants have no right over the ' P ' property as shown in the rough



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plan. Moreover, the ' P ' property is about 3 feet height from the 'D1' property and 5 feet height from the 'XY' Panchayat road. The defendants taking advantage of their land lying on the east and north of ' P ' property are attempting to take cart and the cattles through ' P ' property to reach the Sellappa Colony from chidambarampatty using 'XY ' panchayat road, by forming a pathway measuring 3 feet width to the east of ' P ' property. No such pathway existed through the ' P ' property and was never used by the defendants. Hence, the suit.

4.The defendants contention is that, the entire ' P' property was not in possession and enjoyment of the plaintiff. The ' P ' property and ' D ' property are of the same height and on the east of ' P D ' lands there lies a "Kalcut" running south west direction and in the ' P ' property a three feet width land lies as "Tharisu" and for about 55 years, the defendants and their predecessor in title were using the above 3 feet width land to reach the ' D' property from ' X Y ' panchayat road. Originally, the above ' P D ' property



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measuring 5.18 acres was owned by one Vaiyaburi gounder. On 13.05.1970 the father of the plaintiff purchased ' P ' property situate in S.No.146/7 and thereafter on 02.02.2007 he executed a settlement deed in favour of the plaintiff. The ' D ' Property is situate in S.No.146/6 and when cultivation was not done, the defendants were using the ' P ' property. The said pathway was granted to them through the sale deeds. Hence prayed for dismissal of the suit.

5.The trial Court and the First Appellate dismissed the suit filed by the plaintiff. Aggrieved by this, the present second appeal is preferred by the plaintiff.

6.The learned counsel appearing for the plaintiff would submit that the plaintiff is the lawful owner of the suit property and having proved prima facie his title and possession, the same having been admitted by the respondents, the Courts below ought to have decreed the suit in favour of



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the plaintiff. When the defendants claim a right of easement of passage through a portion of the suit property, the onus shifts on the defendants that there existed such a right, either by way of easement of necessity, or prescription, where as, the defendants failed to prove their right of easement either under Section 13 or Section 15 of the Indian Eastments Act of 1882.

7. He would further submit that the right of easement can be claimed over the property belonging to another, called as servient owner, by a dominant owner, there must be such a right of easement, either by way of counter claim or by a separate suit either under Section 33 or Section 35 of the said Act, instituted by such dominant owner against such survient owner, such a right cannot be determined in a suit for permanent injunction simplicitor. Therefore, in the absence of any counter claim under Order 8 Rule 6 -A of Code of Civil Procedure, by the 2nd defendant, the Courts below ought not to have decided the issue relating to the easementary right.



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8.The interpretation of the recitals in Ex.B3 made by the Courts below as if there is a grant of such right of easement on the 2nd defendant is incorrect. No such right has been granted neither under Ex.B.3 nor under Ex.B.1 in favour of the defendants. In fact, the 2nd defendant has admitted that no such passage exist over the suit property. Further, the 2nd defendant examined as D.W.1 admitted above the existence of passage on the south west side of the plaintiff's property belonging to his father, the 1st defendant herein. The Advocate Commissioner also in his report and plan has stated that there was no passage existed in the suit land. He would further submit that the 1st defendant had purchased the eastern side of the suit property even before the 2nd defendant purchased it under Ex.B2 on 21.08.2008 and therefore, the claim of easement of necessity stands extinguished by reason of Section 41 and 42 of the Act, since it is only a floating easement. At the most the defendants are entitled only for damages under Section 33 of the Act, but not entitled to claim right of use under Section 35 of the said Act. He would further submit that the question of easementary right cannot be

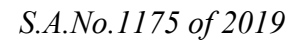


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adjudicated in a suit for permanent injunction filed by the servient owner and that in a suit for injunction unless there is a counter claim for declaration of easementary right, the same cannot be adjudicated. To support his contention, he has relied upon the judgement reported in ***AIR 1999 Kerala 405.***

9. The learned counsel further submits that the " easement of grant " is a matter of contract between the parties and that has to be governed by the terms of contract and hence, even after the necessity got extinguished, the right over the said pathway will not extinguish like an easement of necessity. The facts of the present case, would show that no specific document had never been executed between the parties with regard to the grant of pathway. Moreover, an "easement of necessity" is extinguished when the necessity comes to an end as per Section 41 of the Indian Easement Act. After the purchase of the 1st defendant, the land lying to the east of the suit property, the necessity for using the ' P ' land comes to an



10. The learned counsel would further submit that when the judgment of the final Court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence, this Court in Second Appeal is entitled to interfere with the judgment. To support his contention, he has relied upon the judgment reported in *(2002) 6 Supreme Court Cases 404*.

11. Hence, prayed for setting aside the judgment and decree dated 06.06.2019 in A.S.No.58 of 2017 confirming the judgment and decree dated 01.02.2017 passed in O.S.No.511 of 2017.

12. On the other hand, the learned counsel for the respondents would submit that under Ex.B.1 and Ex. B.3 it is clearly mentioned that how the



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defendants should reach their land and that the same cannot be construed as "floating easement". The defendants have also filed their objections to the Commissioner's report. The trial Court as well as the First Appellate Court has rightly concluded that no injunction could be granted against the defendants, which calls for no interference by this Court.

13.Heard on both sides and records perused.

14. An 'easement by grant' is a matter of contract, the dominant owner retains the right to use the granted pathway even if a new, alternative, or more convenient route is established. An easement of necessity arises only when a property is land locked and has no other possible means of access. This right is based purely on absolute necessity and it is automatically extinguished when the necessity ceases to exist, i.e., when an alternative pathway becomes available. Now it has to be seen whether the defendants are enjoying the right of easement by grant or easement of necessity.



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15. The schedule of property mentioned in Ex.B1 and Ex.B3 are extracted as under:

Ex.B.1

“கிழமேல் நாமக்கல் பாதையிலிருந்து இக்கிரைய நிலத்திற்கு தென்புறம் நான் ஒரு சுப்பராயக்கவுண்டருக்கு கிரையம் செய்து கொடுத்திருக்கும் நிலத்தின் கிழபுறம் ஓரமாய் கட்டுக்கரை வழியாய் வடக்கு முகமாக வெள்ளாமை காலத்தில் மாடுகளுக்கு வாய்பொட்டி போட்டும் சகல ஈஸ்மெண்டு பாத்தியகளும் தான் கிரையம்,” என்று கண்டுள்ளது.

Ex.B.3

“இந்த கிரைய நிலத்தின் கிழபுற ஓரமாக எங்களில் 1 லக்கமிட்டவர் தம்பி சின்னாக்கவுண்டர் வடபுற பாகத்துக்கு வெள்ளாமை காலத்தில் மாட்டுக்கு வாய்பொட்டி போட்டு பிடித்துக் கொண்டு பாகத்தில் இருந்து வடக்கு முகமாக ஆள் ஆடு மாடு நடந்து கொண்டு செல்லும் தடபாத்தியமும், இந்த நிலத்தில் வெள்ளாமை இல்லாத காலத்தில் மேல்கண்ட வடபுற பாகத்துக்கு வண்டி ஓட்டிக் கொண்டு போகும் பாத்தியமும்”



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16. Therefore, the grant of pathway has been established by the defendants by producing Ex.B.1 and Ex.B3 sale deeds. The grant has been authenticated by virtue of specific recitals in the above documents. Since the right is created by a deed, it is a permanent right unless the grant itself specifies a condition for its termination. Though it is contended on the side of the plaintiff about the availability of another pathway, the same does not nullify the original arrangement. Since it is an easement by grant it is not automatically gets extinguished just because an alternate pathway becomes available. Only if it is an easement of necessity, the provision of Section 41 of the Easement Act of 1882 can be invoked. Hence, the Courts below have rightly rejected the relief of permanent injunction as claimed by the plaintiff. No perversity or infirmity found in the findings of the Court below which warrants any interference by this Court. Therefore, I do not see any question of law much less a substantial question of law in order to enable me to entertain this appeal.



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17.In the result,

(i) The second appeal is dismissed.

(ii) The judgement and decree dated 06.06.2019 made in A.S.No.58 of 2017 on the file of learned Additional Subordinate Judge, Namakkal, confirming the judgment and decree dated 01.02.2017 made in O.S.No.511 of 2010 on the file of Principal District Munsif, Namakkal is upheld. No costs.

31.10.2025

vsn/bga

Index: Yes/No

Speaking order / Non-speaking order



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To

- 1.The Additional Subordinate Judge, Namakkal
2. The Principal District Munsif, Namakkal
- 3.The Section Officer, VR Section, High Court, Madras.



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K.GOVINDARAJAN THILAKAVADI,J.

vsn/bga

**Pre- delivery judgment made in
Second Appeal No.1175 of 2019**

31.10.2025