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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.03.2019

PRONOUNCED ON : 11.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1541 of 2005

Kalaiselvi

...Appellant/Defendant/
Plaintiff

..Vs..

1. P.Nagarathinam

... 1st Respondent/Appellant/
1st Defendant

2. The Tahsildar
Arni Taluk Office
Arni Town and Taluk
Thiruvannamalai District

3. The Block Development Officer
B.D.O.Officer, Arni Town
Thiruvannamalai District.

4. The collector
Thiruvannamalai District
Thiruvannamalai

...Respondents/
Respondents 1 to 4/
Defendants 2 to 4

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the learned Sub-Ordinate Judge, Arni in partly allowing the Appeal in A.S.No.3 of 2003 dated 01.03.2005 on his file and reversing the judgment and decree of the learned Principal District Munsif, Arni in O.S.No.159 of 1998 on his file dated 29.11.2002

For Appellant : Mr.A.Gowthaman
for Mr.M.Suresh

For Respondents : Mr.R.Prathapan for R1
Mr.N.Manikandan for R2 to R4
Government Advocate (CS)



JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 01.03.2005 passed in A.S.No.3 of 2003 on the file of the Subordinate Court, Arni, partly reversing the judgment and decree dated 29.11.2002 passed in O.S.No.159 of 1998 on the file of the Principal District Munsif Court, Arni.

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

"1. Whether the judgment and decree of the learned appellate court is contrary to right conformed on the appellant under Section 13 of Indian Easements Act, 1882?

2. Whether the learned appellate court having accepted the title of the appellant with regard to 'B' schedule suit property can without any findings nor reasons reverse the relief granted with regard to 'B' schedule suit property?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. Suit for mandatory injunction and permanent injunction.

6. From the plaint averments, it is found that the plaintiff is claiming the right of cart way in respect of the plaint 'C' schedule property for gaining access to the plaint 'A' and 'B' schedule properties and accordingly alleging that only through the plaint 'C' schedule property, the plaintiff is having access to the plaint 'A' and 'B' schedule properties belonging to her as described in the plaint plan and putting forth the case that there is no other way other than the plaint 'C' schedule property for ingress and egress to the plaint 'A' and 'B' schedule properties and also further putting forth the case that the plaintiff had also prescribed title and easementary right by way of prescription in respect of the plaint 'C' schedule property by using the same as cart way for more than 25 years from the days of her ancestors, to the knowledge of the first defendant and his predecessors in interest and alleging that the first defendant had put up a wall as well as light roof structures and also latrine room and sump by annexing the plaint 'C' schedule property so as to hinder the usage of the same by



the plaintiff for gaining access to the plaint 'A' and 'B' schedule properties and also alleging that the first defendant had been draining the waste and sewerage water over the plaint 'D' schedule property and with a view to remove the offending structure put up by the first defendant in the plaint 'C' schedule property as well as causing interference in the usage of the plaint 'D' schedule property as well as preventing him from making any further interference with the enjoyment of the plaint 'C' schedule property, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

7. The first defendant has resisted the plaintiff's suit contending that by way of the present suit, the plaintiff is endeavouring to form a new cart/pathway in the property belonging to him and in his possession and enjoyment, which cannot be done by the plaintiff and contending that the property in his possession and enjoyment has been used by him for several years from the days of his ancestors and accordingly the first defendant prayed for the dismissal of the plaintiff's suit. The other defendants did not contest the plaintiff's suit and remained exparte.

8. In support of the plaintiff's case P.Ws.1 to 3 were examined and Exs.A1 to A20 were marked and on the side of the first defendant D.W.1 was examined and Ex.B1 was marked. C.W.1 was examined as court side witness and Exs.C1 to C5 were marked.

9. Based on the materials placed on record, both oral and documentary, the trial court was pleased to decree the suit in favour of the plaintiff as prayed for. On appeal preferred by the first defendant, the first appellate court accepted the relief granted in favour of the plaintiff in respect of the plaint 'D' schedule property as determined by the trial court, but in other aspects, the first appellate court set aside the judgment and decree of the trial court and thereby dismissed the plaintiff's suit as regards the said aspects by way of allowing the appeal preferred by the first defendant. Impugning the same, the present second appeal has been preferred.

10. On a reading of the plaint, it is found that it has not been made clear by the plaintiff by proper pleadings as to in what manner she is seeking the easementary right in respect of the plaint 'C' schedule property. Other than vaguely pleading that she had been gaining access through the 'C' schedule property for ingress and egress to the plaint 'A' and 'B' schedule properties and further stating that except the plaint 'C' schedule property, there is no other way and also putting forth her claim that she has been using the plaint 'C' schedule property for several years, on that footing, the plaintiff has come forward with the claim of easementary right in respect of



the plaint 'C' schedule property both by way of prescription as well as by way of necessity. On a reading of the plaint as well as the evidence adduced by the plaintiff, it is found that she is seeking the easementary right in respect of the property now admittedly in the possession of the first defendant.

11. As could be seen from the materials placed on record and as determined by the first appellate court, there is no serious dispute that the plaint 'A' and 'B' schedule properties belong to the plaintiff. Similarly as could be seen from the certified copy of the sale deed dated 04.01.1929 in favour of Bagiyammal marked as Ex.A20 and as determined by the first appellate court, Bagiyammal being the first defendant's grand mother, accordingly, the first appellate court has held that through his grand mother, the first defendant has also acquired title to the property now in his possession and enjoyment and accordingly recognising the same, further held that the first defendant had been granted the patta also, which has been projected by the first defendant as Ex.B1. No doubt, the plaintiff would dispute the claim of title of the first defendant in respect of the property now in his possession and enjoyment, however, the plaintiff only seeks the right of way in the property in the occupation and enjoyment of the first defendant by way of easement for gaining access to her properties described in the plaint 'A' and 'B' schedule. As abovenoted, the first defendant has seriously challenged the claim of the plaintiff projecting easementary right in respect of the property in his occupation and enjoyment and according to the first defendant, the suit itself has been laid by the plaintiff only to create a new cart track some how or the other for gaining access to her properties.

12. As above noted, despite the abovesaid challenge put forth by the first defendant to the claim of easementary right projected by the plaintiff with reference to the plaint 'C' schedule property by way of prescription and necessity, still the plaintiff has not endeavoured to seek the necessary relief of declaration with reference to her alleged easementary right and, on the other hand, has only come forward with the suit seeking the relief of mandatory injunction and permanent injunction. As above noted, the plaintiff has not come forward with clear pleadings as to in what mode she seeks the easementary right over the plaint 'C' schedule property as claimed in the plaint.

13. The Apex Court has held that in a suit for the enforcement of an easementary right, which relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner / occupier of such property, in such circumstances, the party who seeks the enforcement of easementary right, should come forward with the clear pleadings as to in what mode/manner



he seeks the easementary right put forth by him in the property of another, so as to enable the opponent to understand the nature of the claim of the easementary right projected by the plaintiff, as the same would enable him to defend the suit put forth by the plaintiff as regards the issues involved in the matter, particularly, the Apex Court has also pointed out that the easementary rights being of different kinds and for every kind of easementary right, the pleadings and proof of the same are different from each other, accordingly, laid down that, it is only the plaintiff, who seeks the enforcement of such kinds of easementary right, who should put forth necessary and proper pleadings with reference to the same and in the absence of the same, the court cannot assume or infer a case of easementary right by referring to a stray sentence here and there in the pleadings or evidence. The above position of law has been outlined in the Apex Court decision reported in (2008) 17 Supreme Court Cases 491 (Bachhaj Nahar vs. Nilima Mandal and Another) and the same is extracted below:

D. Civil Procedure Code, 1908 - Or.6 Rr. 1 to 3, Or.2 Rr.1 & 2 and Or.14 Rr.1,3 & 4 - Pleadings and issues - Object and purpose, stated

The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief.

E. Property Law - Easements Act, 1882 - Ss.35 and 12 - Injunction on the basis of an easementary right - Principles, stated - A court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence because there are various kinds of easements - Again a right of easement can be declared only when the servient owner is a part to the suit.

18.----- The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an



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easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right relates to a right possessed by a dominant owner / occupier over a property not his own, having the effect of restricting the natural rights of the owner / occupier of such property.

19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a watercourse, etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.

20. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and the defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary



right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

21. A right of easement can be declared only when the servient owner is a party to the suit.----"

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14. On a perusal of the plaint averments, it is seen that the plaintiff has not come forward with any specific case that the first defendant is the owner / occupier of the plaint 'C' schedule property and that the plaintiff had been using the right of easement over the plaint 'C' schedule property as of necessity and from what period of time, the plaintiff had been using the right of easement over the same for acquiring the easementary right by way of prescription and whether the properties belonging to the plaintiff as well as the first defendant are derived from the common ancestors, etc., and with reference to the all these facts, nothing has been averred in a clear manner in the plaint and other than vaguely stating that the plaintiff is using the plaint 'C' schedule property for gaining access to her properties described in the plaint 'A' and 'B' schedule properties and thereby the plaintiff has acquired easementary right over the same and no other plea has been projected by the plaintiff as to how she had derived the said right and when from she had derived the said right and through whom she had derived such rights.

15. In the light of the abovesaid background, we have to see whether the plaintiff's case should be accepted as such. On a perusal of the materials placed on record, though there is no serious dispute as regards the entitlement of the plaintiff with regard to the plaint 'A' and 'B' schedule properties and the dispute between the parties is only as regards the plaint 'C' schedule property. The documents of title projected by the plaintiff marked as Exs.A2 to A5 do not show that for the properties described therein, the access is made only available through the plaint 'C' schedule property. Similarly, even Ex.A20 does not point out any existence of cart way or pathway in the property described therein which is now in the occupation of the first defendant. Therefore, as rightly determined by the first appellate court, the plaintiff has not been granted any right of easement over the plaint 'C' schedule property under the documents of title projected by her and in such view of the matter, it is found that for seeking the enforcement of easementary right put forth by her, the plaintiff has to place other materials to sustain her case.

16. As regards the claim of the plaintiff that she has right of easement over the plaint 'C' schedule property for using the same as cart track for more than the statutory period, absolutely there is no material on the part of the plaintiff.



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From the evidence adduced by P.Ws.1 and 2 examined on behalf of the plaintiff, it is highly doubtful whether, at all, she would have used the plaint 'C' schedule property as a cart track for gaining access to her properties. As found by the first appellate court, it is found that the plaintiff and her husband Parasuraman (P.W.2) are found to be the permanent residents of Vellore and the same had been accepted by them. Furthermore, the plaintiff examined as P.W.1 has admitted that for the past 10 years, no cart is passing through the plaint 'C' schedule property. Even P.W.2 has admitted that he does not know the survey number in respect of which the cart track lies and accordingly also admitted that he has not seen any plan or revenue records indicating that the cart track is available in the plaint 'C' schedule property. Therefore, when from the abovesaid admission of the plaintiff and her husband that they are the permanent residents of Vellore and the cart has not been used or taken along the plaint 'C' schedule property for more than 10 years and when the plaintiff has also not come forward with the clear case as to when from she had been exercising the said right over the plaint 'C' schedule property and when there is no material to establish that the plaintiff has been exercising the right of easement over the plaint 'C' schedule property beyond the statutory period, in all, it is found that the claim of the plaintiff that she has prescribed the right of easement over the plaint 'C' schedule property with reference to the usage of the same as cart track by way of prescription cannot at all be countenanced and rightly disbelieved by the first appellate court. If really the cart track had been in existence in the plaint 'C' schedule property for several years as put forth by the plaintiff, FMPS or the revenue record pertaining to the plaint 'C' schedule property would point to the same and the plaintiff being a suitor, would have endeavoured to place the said documents as proof in support of her case. However, the evidence has been adduced on the part of the plaintiff that she had not seen any such record pointing to the existence of the cart track in the plaint 'C' schedule property. Therefore, I do not find any reason to interfere with the determination of the first appellate court refusing the claim of easementary right by way of prescription claimed by the plaintiff in respect of the plaint 'C' schedule property.

17. Furthermore, the plaintiff would also claim the right of easement in respect of the 'C' schedule property by way of necessity. In other words, according to the plaintiff other than the plaint 'C' schedule property, she has no other access to reach her properties. In this matter, the commissioner had inspected the properties concerned twice and filed his report and plan marked as Exs.C1 to C5. Ex.C5 is the filed map for survey No.319. Furthermore, the advocate commissioner has been examined as C.W.1 also. On a perusal of the abovesaid



documents, in toto, as well as the evidence of the advocate commissioner (C.W.1), it is evident that the plaintiff is having other access to reach her properties as deposed by the advocate commissioner and in such view of the matter, the plaintiff cannot be allowed to take advantage of the first report of the advocate commissioner for contending that she has no other access for gaining ingress and egress to her properties. As rightly pointed out by the first appellate court, when the advocate commissioner first visited the scene, as he had not been shown the alternative way for gaining access to the plaintiff's properties, he had not noted the same. Subsequently, during the second inspection, the advocate commissioner has noted the existence of the alternative access to the plaintiff's properties and accordingly mentioned the same in his second report and also deposed about the same during the course of evidence and in such view of the matter, when the plaintiff has miserably failed to establish the existence of cart track as such in the plaint 'C' schedule property and when she is found to have other access to reach her properties, in all, it is found that the claim of easementary right by way of necessity claimed by the plaintiff also goes out and thus it is found that the first appellate court is also justified in declining the abovesaid right of easement put forth by the plaintiff and no interference is called for with reference to the same.

18. As rightly pointed out by the first appellate court, the first defendant, by way of title as well as by claiming patta, is in the occupation of the property in respect of which the plaintiff is seeking the easementary right. The patta said to have been issued in favour of the first defendant has not been cancelled till date. The plaintiff, instead of challenging the same in the manner known to law under the appropriate act, has come forward with the present suit seeking the right of cart track over the property in the occupation and enjoyment of the first defendant. Therefore, it is found that the plaintiff has not come forward with the clean hands and accordingly unable to sustain her case with acceptable and reliable materials.

19. When the first defendant has thrown a serious challenge to the plaintiff's claim of enforcement of easementary right in respect of the plaint 'C' schedule property in the occupation of the first defendant, for sustaining her case, the plaintiff should have sought for the necessary relief of declaration with reference to the same and also should have put forth appropriate pleadings for obtaining the said reliefs. On the other hand, as above noted, without proper pleadings, very vaguely, the plaintiff has levied the present suit for claiming the reliefs of mandatory injunction and permanent injunction and accordingly unable to sustain the same with necessary proof.



20. In the light of the above discussions, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the first defendant.

21. The plaintiff's counsel in support of his contentions placed reliance upon the decision reported in MANU/SC/2774/2006 (Hero Vinoth vs. Seshammal) and the counsel for the first defendant, in support of his contentions placed reliance upon the decision reported in 1993 AIR (Calcutta) 125 (Durga Pada Mukherjee and another vs. Ambujakshya Ganguli). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

22. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1. The Sub-Ordinate Judge,
Arni
2. The Principal District Munsif,
Arni.

Copy to

The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.R.Prathapan, Advocate, S.R.No.35584
+1cc to Mr.M.Suresh, Advocate, S.R.No.37172
+1cc to the Special Government Pleader, S.R.No.35971

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