



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED : 23.10.2019

JUDGMENT PRONOUNCED : 11.11.2019

CORAM :

THE HONOURABLE Ms. JUSTICE **P.T. ASHA**

S.A. (MD) No.70 of 2017 and

C.M.P. (MD) No.1375 of 2017

1.Thiyagarajan @ Karunanithi

2.Sureshkumar ...Appellants/Appellants/Defendants

Vs

1.Malarkantham

2.Senthilkumar

3.Sivakumar ...Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 31.03.2016 made in A.S.No.152 of 2014 on the file of the Sub Court, Trichy confirming the judgment and decree dated 27.06.2014 made in O.S.No.173 of 2011 on the file of the Principal District Munsif cum Judicial Magistrate, Lalgudi.

For Appellants : Mr.J.Barathan

For Respondents : Mrs.J.Anandhavalli

JUDGMENT

The defendants in the suit in O.S.No.173 of 2011 are the appellants before this Court.



2.This second appeal is filed challenging the judgment and decree in A.S.No.152 of 2014 on the file of the Sub Court, Trichy, confirming the judgment and decree in O.S.No.173 of 2011 on the file of the learned Principal District Munsif cum Judicial Magistrate, Lalgudi dated 27.06.2014.

3.The suit in O.S.No.173 of 2011 has been filed for the following reliefs:

a) for declaration that the suit lane is a public lane and for consequential relief of permanent injunction restraining the defendants their men servants agents or any body claiming under them from putting up any further constructions in the suit land by blocking the suit lane in any manner whatsoever;

b) for the relief of mandatory injunction directing the defendants to remove the unlawful illegal and objectionable construction such as latrine and septic tank as shown in the plaint plane to be done within the specifit time, failing which to do the same through process of Court.

4.The subject matter of the said suit is as follows:

In Tiruchirappalli District, Lalgudi Taluk in Punjai Sangenthi Village in Old Natham SF.No.260/1A part in New Natham SF.No.646 west of main street and properties of the 2nd defendant in Natham SF.No.646/31 and properties of third parties in SF.NOs.646/32 and 646/33.

North of Thangapalam property in Natham SF.No.646/34 east of the property of the 1st defendant in Natham SF.No.646/29 and the property of the third party in Natham SF.No.646/24 and south Natham SF.No.646/23 belonging to Illangovan and the property of third party in Natham in SF.No.646/24 within the above stated four boundaries the public lane L in shape a width of 10 ft., in New Natham SF.No.646/30.

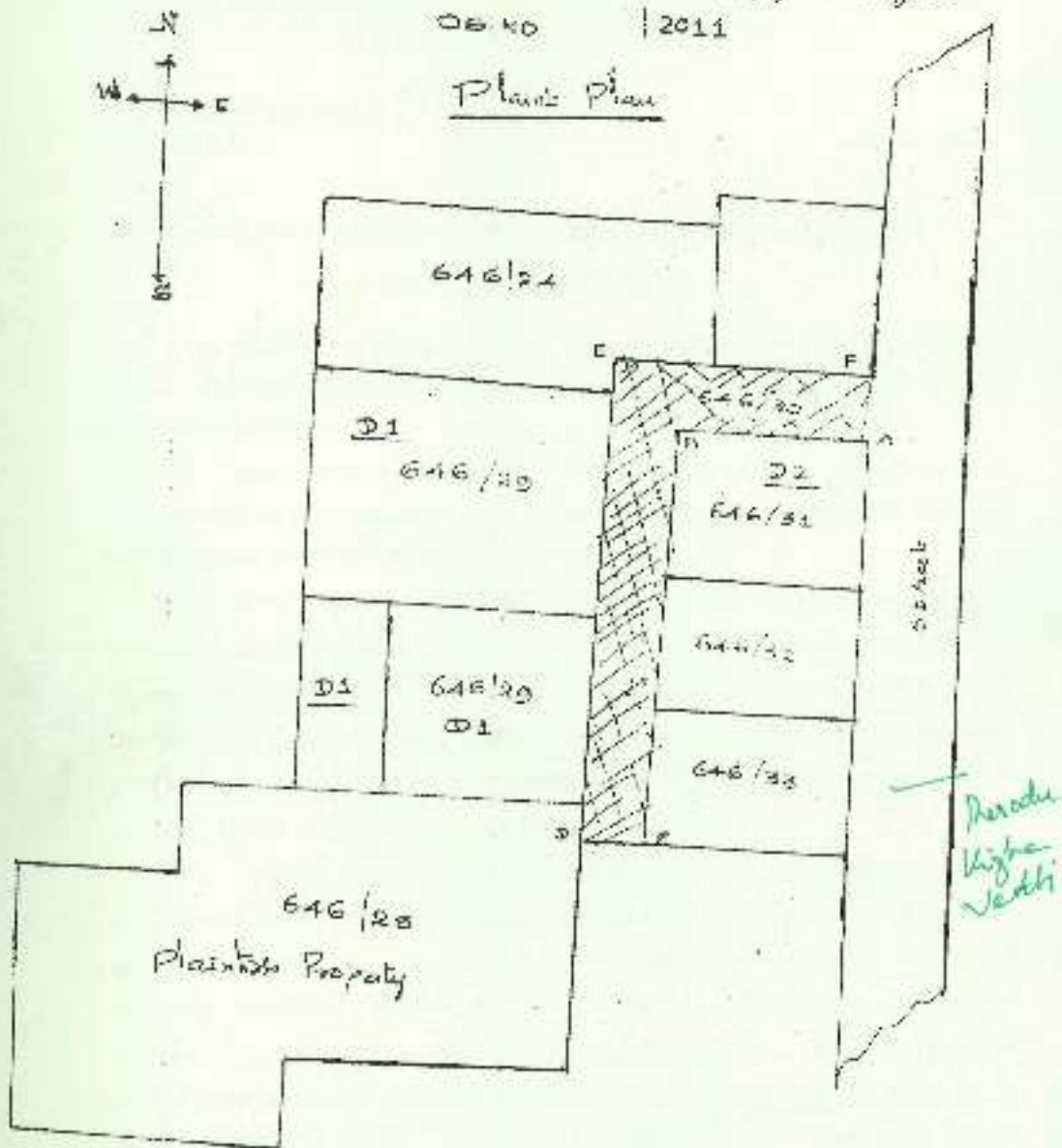
5.The plaintiff has also annexed a plan and the same is replicated herein:



WEB COPY

In The Court of The District Munsif, Lalugudi
08.10 | 2011

Plan's Plan



L. Shape
A. B. C. D. E. F.
Suit Property

Advocate for Plaintiff



6.For the sake of convenience, the parties are referred to in the same array as in the suit O.S.No.173 of 2011.

PLAINTIFFS' CASE:

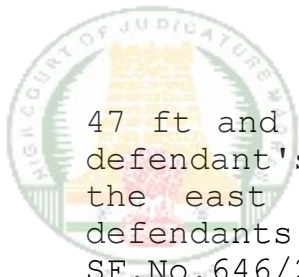
7.The plaintiffs would contend that the suit lane, which is described as 'ABCDEF' in the plaint plan reproduced herein, branches out from the north south street on the east and runs westwards and then turns south. The width of the said lane is 10 ft and is in existence for over 100 years and the lane is a public lane. They would further contend that they own the property south of the first defendant's property and the second defendant's property, which is on south and east of the said lane.

7.1.The plaintiffs would further contend that the property, namely, the suit lane, was used as an access by them, the defendants and third parties. During the rainy season, excess water of the plaintiffs' and the defendants' property drain into the gutter in the suit lane and reaches the main gutter in the main street. Both the parties to the suit and their predecessors-in-title having been in enjoyment of the property from time immemorial. The plaintiffs would claim under one Kunju Pillai @ Kunju Udayar, who is the father of Balakrishna Udayar, husband of the 1st plaintiff and father of the plaintiffs 2 and 3.

7.2.The plaintiffs would further contend that the said Kunju Pillai @ Kunju Udayar has purchased the property under Ex.A1 to Ex.A3, sale deeds. Ex.A4 and Ex.A5, which are the documents of title of the defendants, would clearly indicate that the suit lane is the public lane and relates to the property of the 1st defendant, which is now comprised in New Natham SF.No.646/29. It is the case of the plaintiffs that under the sale deed dated 20.10.2004 and settlement deed dated 17.09.2010, the suit lane has been deliberately omitted. The property of the 2nd defendant is situated in New Natham SF.No.646/31, which is the vacant space on the western side of the common lane portion. They would further contend that taking advantage of the closure of the Courts in May 2011, the defendants had constructed a latrine and septic tank in the suit lane. Despite several demands made by the plaintiffs to remove the offending structures, the defendants refused to accede to the demand. They would therefore contend that they have come forward with the suit in O.S.No.173 of 2011 for declaring the suit lane as a public lane and for permanent injunction and for mandatory injunction directing the defendants to remove the offending construction.

DEFENDANTS' CASE:

8.The 1st defendant has filed a written statement, which was adopted by the 2nd defendant, in which they would contend that there is no lane proceeding southwards and the only lane that exists is the lane branching from the main street westwards to the length of



47 ft and 9 ft width. They would further contend that the second defendant's properties in SF.No.346/31 is situated to the south of the east west lane and the 1st defendant's to the west. The defendants would contend that the entire property comprised in SF.No.646/29 originally belonged to two persons namely, Duraisamy Udayar, father of the 1st defendant and one Karuppayee Ammal. The 1st defendant's father had enjoyed the northern portion and the said Karuppayee Ammal had enjoyed the southern portion of the said SF.No.646/29. Since the said Karuppayee Ammal's land was situated on the south of the land of the said Duraisamy Udayar, without an access to the North South Street, a lane was provided on the east, so as to enable her to have access to the north south street. Thereafter, by a sale deed dated 21.01.1936, Duraisamy Udayar has purchased the southern extent from Karuppayee Ammal and he was in enjoyment of the entire extent of SF.No.646/29.

8.1.The defendants would further contend that in SF.No.646/29, there is no pathway running north south on the east. On 20.10.2004, the 2nd defendant had purchased the land in SF.No.646/31, which lies to the south of the east west lane and to the west of the land belonging to the defendants 1 and 2.

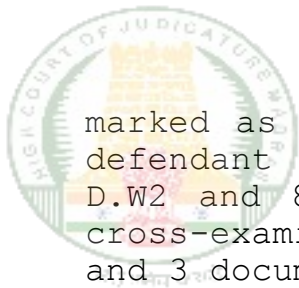
8.2.The defendants have come forward with the catagoric case that there is no lane in existence between the properties situated in SF.Nos.646/29 and 646/31. They would further contend that they have put up a brick walled toilet as well as the septic tank nearly 15 years prior to the filing of the suit. The plaintiffs' property, which is situated in SF.No.646/28 does not have any access through SF.No.646/29. They would further contend that the east west lane was a common lane to be enjoyed by the owners of the land comprised in SF.Nos.646/29, 646/23 and 646/24. Therefore, the defendants sought for dismissal of the suit.

TRIAL COURT:

9.The learned District Munsif cum Judicial Magistrate, Lalgudi has framed the following issues:

- 1.Whether the suit lane is a common lane?*
- 2.Whether the plaintiffs are entitled for the relief of declaration as prayed for?*
- 3.Whether the plaintiffs are entitled for consequential relief of injunction?*
- 4.Whether the defendants have made encroachment in the common lane?*
- 5.Whether the plaintiffs are entitled for the relief of mandatory injunction as prayed for?*
- 6.To what other reliefs are the parties entitled?*

9.1.On the side of the plaintiff, the 2nd plaintiff was examined as P.W1 and one Vasudevan was examined as P.W2 and 14 documents were



marked as Ex.A1 to Ex.A14. On the side of the defendants, the 1st defendant was examined as D.W1 and one Rajendran was examined as D.W2 and 8 documents were marked as Ex.B1 to Ex.B8. During the cross-examination of P.W2, 1 witness document was marked as Ex.X1 and 3 documents were marked as Ex.C1 to Ex.C3.

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9.2.The learned District Munsif cum Judicial Magistrate, Lalgudi by his judgment and decree dated 27.06.2014 was pleased to decree the suit as prayed for.

APPELLATE COURT:

10.Challenging the said judgment and decree, the defendants have filed an appeal in A.S.No.152 of 2014 on the file of the learned Subordinate Judge, Trichy. The learned Subordinate Judge, Trichy, has confirmed the judgment and decree of the lower Court.

SECOND APPEAL:

11.Challenging the concurrent judgment and decree of the Courts below, the defendants have filed the above second appeal.

12.This second appeal is admitted on the following substantial questions of law.

1.Whether the Courts below were right in declaring the North-South portion of the suit lane as a public lane without any document to this effect?

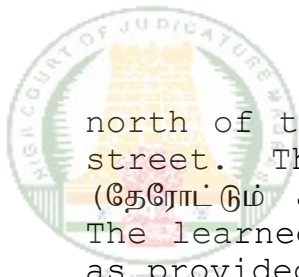
2.Whether the Courts below were right in granting a decree for declaration that the North-South portion of the suit lane is a public lane without impleading public authorities?

3.Whether the Courts below have properly interpreted Ex.A1 and Ex.B4 sale deeds?

4.Whether the Courts below were right in ignoring Ex.C3-Survey Plan filed along with the Commissioner's report which would establish that the suit lane does not reach the plaintiff's property?

SUBMISSIONS:

13.Mr.J.Barathan, learned counsel appearing for the appellants/defendants would contend at the outset that the plaintiffs, who have come forward with the suit for declaring their right to the suit lane, have not established their right over the suit lane, since none of their documents of title confer any right to the plaintiffs on the alleged suit lane. Exs.A1 to A3, through which, the plaintiffs claim right to the property in SF.No.646/28, does not provide any access to the suit lane or make a mention that the suit lane is the access to the plaintiffs' property. On the contrary, the plaintiffs' access is through the lane situated on the



north of their property running westwards branching out from middle street. The suit lane branches out from the East Car Street (தேரோட்டும் கீழ் வீதி) and runs westwards and ends at the western end. The learned counsel would contend that the lane does not turn south as provided in the plaint plan.

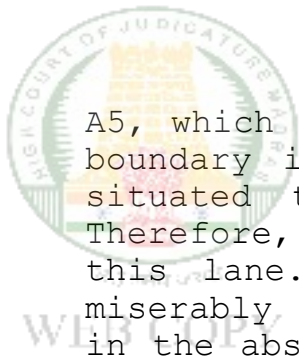
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14.The learned counsel would further contend that the plaintiffs, who have come forward to declare the suit lane as a public lane, had not spelt out the persons, who are in enjoyment of the suit lane and has also not impleaded them or the public authorities as parties to the suit. He would further contend that the plaintiffs are not sure as to the nature of the lane, since in one place, the suit lane is called as private lane in another place, it is referred to as a common lane and in yet another place, the same is called as public lane. However, no details of the persons in common enjoyment of the said lane has been provided.

15.The learned counsel would further contend that in Ex.A7, which is of the year 2003 and Ex.A6 which is of the year 2004, the western boundary is shown as the land belonging to one Thiagarajan in SF.No.646/29 and not the suit lane. He would further contend that the suit is bad for non-joinder of necessary parties, as the suit is framed as one for declaring the lane as a public lane. Since the plaintiffs' contention is that the suit lane is being enjoyed by the neighbouring owners, the plaintiffs ought to have impleaded all the property owners. That apart, the plaintiffs have not let in any evidence to show that the suit lane is in existence as a public lane. Further, the plaintiffs' document of title does not confer any right of usage to the lane east of the 1st defendant's property. On the contrary, the plaintiffs' documents of title provide for another access to reach their property. It is crystal clear that the plaintiffs have not proved their claim/right to the suit lane.

16.The learned counsel would further contend that the Commissioner's report would clearly show that there was no usage of the suit lane said to be running southwards and the same is only shown as a vacant site, unlike the east west lane which is clearly demarcated as a lane. He would further contend that the learned Judge has failed to refer to the documents filed by the plaintiffs and the entire onus has been placed on the defendants to prove the plaintiffs' case, since the Court below has only picked holes in the document filed by the defendants. Therefore, he would contend that the very framing of issues appear to be wrong. In support of this contention, he would rely on the judgment of the Hon'ble Supreme Court in the case of **Union of India and others Vs. Vasavi Co-operative Housing Society** reported in **2014 (2) SCC 269**.

17.*Per contra*, Mrs.J.Anandhavalli, learned counsel appearing for the respondents/plaintiffs would contend that under Exs.A4 and



A5, which are the documents of title of the defendants, the eastern boundary is shown as lane and the property of the plaintiffs is situated to the west of this lane comprised in SF.No.646/29. Therefore, it is crystal clear that the plaintiffs have right to this lane. She would further contend that the defendants have miserably failed to prove that the lane was their private lane and in the absence of the above, the defendants cannot claim exclusive right to the suit lane.

18.The learned counsel drew the attention of this Court to the admission of D.W1, wherein, she would submit that the access of Karuppayee Ammal's property was only through the suit pathway and in Ex.A5, the eastern boundary has been described as lane. She would further contend that the term "public lane" has been loosely used and that the pathway has been used both by the owners of the land in SF.No.646/29 as well as the plaintiffs. She would further argue that the defendants were also aware of the same. In support of her contention, she would rely on the judgments of the Hon'ble Supreme Court in the case of **Nedunuri Kameswaramma Vs. Sampati Subba Rao** reported in **AIR 1963 Supreme Court 884 (V 50 C 133)**. She would in support of her argument that the Court should consider the documentary and oral evidence to decide the right of parties rely on the judgment of Hon'ble Supreme Court in the case of **Sri Venkataramana Devaru and others Vs. State of Mysore and others** reported in **AIR 1958 Supreme Court 255 (V 45 C 42)** and the judgment of our Court in the case of **C.Jeyaraman Vs. Arumbakkam Bala Vinayagar Nagar Welfare Association** reported in **(2017) 5 MLJ 628**.

DISCUSSION:

19.The plaintiffs have come forward with the suit O.S.No.173 of 2011 contending that the suit property, which is a public lane and which is the shaded portion in the plaint plan, was being used by them as an access to reach their lands in SF.No.646/28 and also by third parties. They have also contended that the rain water is being drained into the suit lane through a gutter onto the main street.

20.In the plaint, the plaintiffs would contend that the suit lane is used as a service lane for cleaning the toilets. They have also referred to the lane as a public lane in paragraph number 3 of the plaint and the same is as follows:

3.....The suit lane has been and is in existence from time immemorial for more than 100 years. It is a public lane and also it is a service lane.

21.The learned counsel appearing for the plaintiffs would contend that the word "public lane" has been used loosely. However, the plaintiffs have once again referred to the lane as a public lane in paragraph number 6 and 8 of the plaint, which pleadings are herein below extracted:

<https://hcservices.ecourts.gov.in/hcservices/>. Further, the documents of the predecessors of



the plaintiffs would clearly indicate that the suit lane is a public lane and the same is in 'L' shape.

8.The sale deeds dated 23.06.1933 and 21.01.1936 would clearly indicate that the suit lane is a public lane and they relate to the property of the first defendant which is in New SF.No.646/29.

22.The suit itself is to declare the lane as a public lane. Therefore, the plaintiffs have come forward with the case that the suit lane is being used as an access by them and the members of the general public. A definition of public street as defined in Section 3 (21) of the Tamilnadu District Municipalities Act, 1920 would read as follows:

(21) 'Public Street' means any street, road, square, Court, alley, passage or riding-path [over which the public have a right of way] whether a thoroughfare or not, and include-

- a) the roadway over any public bridge or causeway;
- b) the footway attached to any such street, public bridge or causeway; and
- c) the drains attached to any such street, public bridge or causeway and the land, whether covered or not by any pavement, verandah, or other structure, which lies on either side of the roadway upto the boundaries of the adjacent property whether that property is private property or property belonging to [the Government];

23.Once the plaintiffs have taken a plea that the lane in question is a public lane and they seek a declaration that the suit lane be declared a public lane, they ought to have impleaded the public authorities and also the owners having access to this public lane. The plaintiffs do not come forward either in the plaint or in the oral evidence to state as to how the neighbouring owners are using the suit lane as an access to reach their property or to use the same for draining out the rain water. The plaintiffs would entirely rest their case on the description of the four boundaries in Ex.A4 and Ex.A5, which are the documents in title of the defendants, where, a lane is shown turning southwards from the east west street branching out from the north south street on the eastern extremity and stopping at the southern end of SF.No.646/29.

24.The documents of title of the plaintiffs namely, Ex.A1 to Ex.A3 do not refer to the suit lane and on the contrary, the access to the plaintiffs' property is shown only through a lane situated to the north of the plaintiffs property and branching out from the Middle Street. The documents (particularly Ex.A2) would further indicate that the water should drain as usual from the 1st item in the schedule given thereunder through the vacant site of Vadugappa Udayar's land on the east.



25. Further the very description of the property given in the suit schedule would clearly indicate that the suit lane ends at the northern extreme of the properties comprised in SF.No.646/34, which admittedly is not the property of the plaintiffs. The plaintiffs' property is situated to the west of this property in SF.No.646/28.

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26. To have an access to the suit lane, the plaintiffs have to enter property in SF.No.646/34 and then enter the alleged suit lane comprised in SF.No.646/29. Such an access is not pleaded by the plaintiffs. Even a reading of the documents, under which, the plaintiffs' predecessors in title have purchased the property, the eastern boundary has been shown as a vacant site of Minor Vadugappa Udayar. In fact, a right has been reserved in Ex.A2 dated 29.01.1946 to leave right of way for reaching the lane of Vadugappa Udayar on the north and the deed would further describe the manner in which the water from the 1st item of property should be drained out.

27. Therefore, from a reading of the schedule of the suit property as provided in the plaint, the documents of title of the plaintiffs, Ex.A1 to Ex.A3, it is clearly evident that the plaintiffs have not been conferred with any right over the suit property. At this juncture, it is necessary to extract the provisions of Sections 13 and 14 of the Indian Easements Act, 1882 since the plaintiffs are trying to establish a right of easement over the alleged suit lane:

13. Easements of necessity and quasi-easements:- Where one person transfers or bequeaths immovable property to another, -

a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement, or

b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall unless a different intention is expressed or necessarily implied, be entitled to such easement, or

c) if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement, or

d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator, shall unless a different intention is expressed or

<https://hcservices.eports.gov.in/hcservices/> necessarily implied, be entitled to such easement.



Where a partition is made of the joint property of several persons:-

e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall unless a different intention is expressed or necessarily implied be entitled to such easement.

14.Direction of way of necessity:- When [a right] to a way of necessity is created under Section 13, the transferor, the legal representative of the testator, or the owner of the sharer over which the right is exercised as the case may be is entitled to set out the way but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

28.In order to establish the easement of necessity, the plaintiffs, who claim to be the dominant owner, have to first establish that prior to them, their predecessors in title had been enjoying the servient right over the suit lanes in SF.No.646/29. In the instant case, the plaintiffs have failed to prove the same and further, from the description provided in the suit schedule and the documents, Ex.A4 and Ex.A5, it is clear that the lane, which was in existence in the year in 1933 and 1936 extended only to the southern extreme of the lands in SF.No.646/29 stopping at the northern end of the lane comprised in SF.No.646/34 and not the plaintiffs' land in SF.No.646/29. This coupled with the fact that Ex.A1 to Ex.A3 do not provide for an access through SF.No.646/29 would establish the fact that neither do the plaintiffs enjoy an easement by grant nor an easement of necessity.

29.The plaint plan is not in keeping with the suit schedule since in the plan, the north south lane is extended to a small extent to the east of SF.No.646/28. This plan is not in consonance with the description given in the suit schedule or Ex.A4 and A5. Admittedly, neither the plaintiffs nor their predecessor in title have been given a right of way in the suit lane under Ex.A1 to Ex.A3. From the pleadings, it appears that the plaintiffs are trying to claim a easement of necessity over the suit schedule lane. The judgment relied upon by the defendants in the case cited supra reported in **2014 (2) SCC 269** would apply in all fours to the instant case since both the Courts below have cast the onus on the defendants to prove the plaintiffs case and they have also referred only to the documents filed on the side of the defendants and not the documents filed by the plaintiffs to arrive at their respective



conclusions. The Hon'ble Supreme Court in the said judgment has held as follows:

19.The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (sic them), in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited.

30.On a conspectus of the above, I am of the view that the Courts below have committed a grave mistake in law in not appreciating the documents particularly, the schedule given thereunder and the description of the property given by the plaintiffs themselves in the suit schedule and this oversight appears to have affected their decision. The substantial questions of law are answered in favour of the defendants.

31.Accordingly, this Second Appeal is allowed and the judgment and decree in A.S.No.152 of 2014 on the file of the Sub Court, Trichy confirming the judgment and decree in O.S.No.173 of 2011 on the file of the Principal District Munsif cum Judicial Magistrate, Lalgudi, dated 27.06.2014, is hereby set aside. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To

1.The Subordinate Judge, Trichy.

2.The Principal District Munsif cum Judicial Magistrate,Lalgudi.

Copy to:The Section Officer, (2 copies)

V.R.Section,Madurai Bench of Madras High Court,Madurai.

+1 CC to M/s.T.R.JEYAPALAM, Advocate (SR-97303[F]

+1 CC to M/s.J. ANANDHAVALLI, Advocate (SR-97670[F]

judgment made in

S.A. (MD)No.70 of 2017

11.11.2019

sma/21/01/2020/12p/7c