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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.03.2021

PRONOUNCED ON : 21.04.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 565 of 2009

and

M.P. No.1 of 2009

1. Karthikeyan
S/o. Kanthasamy
2. Ponnammal
W/o. Kanthasamy
3. Thilagavathi
W/o. Ragunathan

...Appellants/Defendants

Vs.

1. A. Palanisamy
S/o. Late Arunachala Gounder
2. Rukmani
W/o. Palanisamy

... Respondents/Plaintiffs

Prayer: Second Appeal is filed under Section 100 of CPC, 1908 against the judgment and decree dated 04.09.2007 passed in A.S. No.49 of 2007 on the file of the First Additional Subordinate Judge, Coimbatore, confirming the decree and the judgment dated 10.04.2006 passed in O.S. No.1238 of 2003 on the file of the First Additional District Munsif, Coimbatore.

For Appellants : Mr. S. Subbiah, Senior Counsel
for M/s. P. Raja

For Respondents

For R1 : Mr. T.R. Gayathri
for M/s. Sarvabhauman Associates

For R2 : No appearance.
Set exparte vide order
dated 30.03.2021.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree 04.09.2007 passed in A.S. No.49 of 2007 on the file of the First Additional Subordinate court, Coimbatore, confirming the judgment and decree and dated 10.04.2006 passed in O.S.



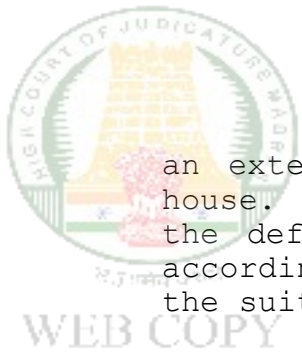
No.1238 of 2003 on the file of the First Additional District Munsif Court, Coimbatore.

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

3. The defendants in O.S.No.1238 of 2003 are the appellants in the second appeal.

4. Suit for permanent injunction.

5. Briefly stated, the case of the plaintiffs is that, the first plaintiff and one Kandaswamy, husband of the second defendant and father of the defendants 1 and 3 were brothers, both being the sons of late Arunachala Gounder, and the second plaintiff is the wife of the first plaintiff and put forth that there was a partition of ancestral properties during the life time of Arunachala Gounder and in the abovesaid partition deed dated 01.02.1969, the first plaintiff and his brother Kandaswamy were allotted their shares jointly described in the 'B' schedule of the partition deed and the first plaintiff and his brother Kandaswamy, for the purpose of convenient enjoyment, divided the properties between themselves and the division was recorded in the Panchayat muchalika dated 27.05.1982 by which Kanthasamy took 5.56.acres on the west while the first plaintiff took 5.16 acres on the east and the first plaintiff was given the right of cart track across the land of Kanthasamy and only for that purpose Kandasamy was given excess of 40 cents over and above the share of the first plaintiff and accordingly the respective parties had been in the possession and enjoyment of their shares and Kandaswamy had been allowing the cart track to be used by the first plaintiff for ingress and egress and the cart track runs from North South Vari Poramboke starting at the North East Portion of Kandaswamy's share to the entire East West length and enters the share of the first plaintiff and the plaint sketch would depict the existence of the cart track and Kandaswamy had not been heard of since 1991 and is presumed to be dead and the defendants who are his legal heirs have started to act on their own and by way of an Assurance Deed, the defendants have specifically admitted the existence of the cart track over which the plaintiffs having access to their lands and while so, during November 2002, the first defendant prevented the plaintiffs and their men from entering their lands by using the cart track and hence, a legal notice was given and after the receipt of the notice, the defendants kept quiet for some time and subsequently again attempted to interfere with the possession and enjoyment of the cart track and the contention of the defendants that inasmuch as the plaintiffs have sold their lands to the third parties, they are not entitled to the suit cart track is false. The plaintiffs have not sold their entire lands and had retained



an extent of 16 cents for the purpose of constructing a form house. The cart track is the only access to their lands and as the defendants interfered with their possession and enjoyment, according to the plaintiffs, they have been necessitated to lay the suit against the defendants for appropriate relief.

6. The defendants resisted the plaintiffs' suit contending that the suit laid by plaintiffs is false and not maintainable in law and put forth the case that the allotment of 'B' schedule properties jointly in favour of the first plaintiff and his brother Kandaswamy vide partition deed dated 01.02.1969 is true and disputed the division of the abovesaid properties between the first plaintiff and Kandaswamy by way of the muchalika on 27.05.1982 and the allotment of 5.56 acres to Kandaswamy on the western side and the allotment of 5.16 acres to the first plaintiff on the eastern side and also disputed that the cart track right had been given in the land allotted to Kandaswamy for the purpose of ingress and egress by the first plaintiff and according to the defendants, no such cart track right had been given to the first plaintiff since there existed no such cart track and according to the defendants, the respective parties are in the possession and enjoyment of their respective properties from the date of mutation of the revenue records and therefore, there is no question of granting the cart track right to the first plaintiff over the lands belonging to Kandaswamy and the plaint plan is misleading and incorrect and disputed that the defendants have admitted the existence of the cart track by way of an Assurance Deed as put forth in the plaint and according to the defendants, the Assurance Deed is a fabricated document and the same has also not been mentioned in the legal notice and further contended that inasmuch as no cart track is in existence as alleged by the plaintiff, there is no question of the defendants interfering with the plaintiffs' enjoyment of the cart track and therefore, according to the defendants, the plaintiffs have come forward with the false case suppressing the true facts and according to the defendants, the plaintiffs are enjoying and using the cart track available in S.F. Nos.265/1B and 265/2 and therefore, prayed for the dismissal of the plaintiffs' suit.

7. In support of the plaintiffs' case P.W.1 was examined and Exs. A1 to A14 were marked. On the side of the defendants D.W.1 was examined and Exs.B1 to B8 were marked. Exs. C1 to C4 were marked.

8. On an appreciation of the oral and documentary evidence adduced by the respective parties and the submissions put forth in the matter, the courts below were pleased to grant the relief in favour of the plaintiffs as prayed for. Challenging the same, the present second appeal has been laid by the defendants.



9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- 1) When the dominant owners were parted with the major portion of the property, without sufficient evidence, whether the court can grant the relief of permanent injunction, violative of Section 37 of the Easements and License Act 1882?
- 2) Whether the suit for permanent injunction alone is maintainable without the prayer of declaration when the appellant is dominant owners of the property?

10. The first plaintiff and Kandaswamy are brothers and the second defendant is the wife of Kandaswamy and the defendants 1 and 3 are the sons of Kandaswamy and the second plaintiff is the wife of the first plaintiff. It is not in dispute that the properties had been jointly allotted to the first plaintiff and Kandaswamy under Ex.A1 partition deed. The plaintiffs would claim that subsequent to A1 partition deed, by way of the panchayat muchalika, the first plaintiff and Kandasamy effected division of the properties allotted to them jointly under Ex.A1 partition deed and by way Ex.A2 panchayat muchalika, the plaintiffs claim cart track right over the land belonging to Kandaswamy. According to the defendants, no such cart track had been in existence in the lands belonging to Kandasamy and therefore, the claim of the plaintiffs that the first plaintiff had been granted the cart track right over the lands belonging to Kandaswamy should be rejected.

11. Considering the pleas put forth by the plaintiffs, it is seen that the plaintiffs are only claiming the easementary right over the suit cart track said to be in existence in the lands belonging to Kandaswamy. The panchayat muchalika dated 27.05.1982 has been marked as Ex.A2. On a reading of Ex.A2, it only recites that the parties thereto had agreed to form a necessary pathway for having access to their respective lands. There is no material placed on record on the part of the plaintiffs as to whether any such pathway right had been created or formed subsequent to Ex.A2 panchayat muchalika. Therefore, when the panchayat muchlika does not denote the existence of the suit cart track in the lands said to have been allotted to Kandaswamy and on the other hand the recitals in Ex.A2 would only go to point out that the parties had agreed to form a pathway right for having access to the first plaintiff's lands and when there is no material projected on the part of the plaintiffs that subsequent to Ex.A2 any such pathway right had been created or formed and whether the same had been used by the first plaintiff, such being the position, the plaintiffs' alleged claim of cart track right over the lands belonging to



Kandaswamy based on Ex.A2, as such, cannot be countenanced in any manner. Similarly when the plaintiffs have miserably failed to establish that any cart track right had been allotted to the first plaintiff over the lands belonging to Kandaswamy under Ex.A2 panchayat muchalika, the case projected by the plaintiffs that the defendants have admitted the existence of the cart track by way of the Assurance Deed marked as Ex.A7 also cannot be believed and accepted. As rightly put forth by the defendants' counsel, even in Ex.A7 Assurance Deed, it has been only recited that by way of Ex.A2 Muchilika the parties had agreed to form a cart track/pathway right and as above pointed out, when there is no material on the part of the plaintiffs pointing that any cart track / pathway right had been since formed by the parties concerned, the question of the plaintiffs claiming the cart track right over the lands belonging to Kandasamy, cannot at all be believed and accepted. As rightly contended by the defendants' counsel, if really the Assurance Deed Ex.A7 has any element of truth, the same would have been reflected in the legal notice sent by the plaintiffs marked as Ex.A9. However, no reference is made about the Assurance Deed in Ex.A9 legal notice. Be that as it may, when the existence of the suit cart track, as depicted in the plaint sketch, is not shown to be in existence at the time when Ex.A2 panchayat muchilika has been effected and as above pointed out under Ex.A2 panchayat muchilika, the parties thereto only agreed to form the pathway for gaining access to the first plaintiff's land and when their abovesaid agreement of forming a pathway has not been shown to be put in action by the respective parties, resultantly, it has to be held that the plaintiffs' claim of cart track or pathway right over the lands belonging to Kandaswamy cannot be accepted based upon either Ex.A2 panchayat muchilika or Ex.A7 Assurance deed.

12. In this matter, the courts below seem to have wholly relied upon the commissioner's report and plan marked as Exs.C1 and C2. From the first report and plan of the Advocate Commissioner marked as Exs.C1 and C2, it is found that no proper notice had been given by the Advocate Commissioner at the time of his first inspection and the commission appears to be an exparte commission. During the second inspection, the commissioner had pointed out the existence of the cart track in S.F.Nos.265/1B and 262/2 for the plaintiffs to gain access to their lands and in the second inspection report, the commissioner had noted the existence of the plants and trees, etc., over the alleged suit cart track said to have been in existence during his first inspection. Be that as it may, when the plaintiffs have miserably failed to establish the existence of the suit cart track in the properties belonging to Kandasamy by virtue of Exs.A2 and A7 and as above pointed out, when the plaintiffs have also failed to establish that following Exs.A2



in particular the parties had formed any cart track/pathway right over the lands belonging to Kandasamy and using the same since then, in such view of the matter, the courts below are found to be not justified in placing reliance upon Exs.A2 and A7 for upholding the plaintiffs' claim of easementary right over the properties belonging to Kandasamy.

13. The suit has been laid only for the relief of permanent injunction. By way of the suit, the plaintiffs are claiming the easementary right over the lands belonging to Kandasamy. In such view of the matter, when the plaintiffs' claim of easementary right over the lands belonging to Kandaswamy had been stoutly disputed tooth and nail by the defendants in the written statement, as rightly contended by the defendants' counsel, the plaintiffs should have come forward with the relief of declaration as to the nature of the easementary right claimed by them over the lands belonging to Kandaswamy. The plaintiffs have also not come forward as to what is the nature of the easementary right they claim over the lands belonging to Kandaswamy, whether they are claiming easementary right by way of necessity or easementary right by way of prescription and despite the specific denial of the plaintiffs' alleged easementary right over the lands belonging to Kandasamy, the failure of the plaintiffs in amending the suit for the relief of declaration is found to be totally not in consonance with the decision of the the Apex Court reported in CDJ 2008 SC 603 (Anathula Sudhakar V. P.Buchi Reddy (dead) by Lrs and others). Furthermore, the Apex Court in the decision reported in (2008) 17 SCC 491 (Bachhaj Nahar vs. Nilima Mandal and another) has held that the 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 and 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 and accordingly pointed out that the pleadings regarding the claim of easementary right should be more precise and particularly as to the nature of the easementary right claimed by the plaintiffs and the position of law has been outlined by the Apex Court in the abovesaid decision as follows:

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



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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 pleadings, 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 party to the suit.

....

18. A perusal of the pleadings clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. 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 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 water course 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



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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 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."

In the light of the abovesaid dictum laid by the Apex Court as to how pleas, proof should be put forth for establishing the easementary right and when the plaintiffs have not come forward clearly as to the nature of easementary right claimed by them over the lands belonging to Kandaswamy and when their pleas made in the plaint are found to be vague and accordingly, the plaintiffs are also unable to substantiate the alleged right by placing acceptable and reliable material other than Exs.A2 and A7 and when, as above pointed out, Exs.A2 and A7 do not confer any easementary right over the existing cart track as such in the lands belonging to Kandaswamy and on the other hand, it only purports that pathway right is to be created by the parties thereto subsequent to Ex.A2 panchayat muchilika and when there is no material produced on the part of the plaintiffs evidencing that any such cart track/pathway right had been formed since the date of Ex.A2, in such view of the matter, the courts below are found to be not justified in upholding the plaintiffs' claim of easementary right over the properties belonging to Kandaswamy.

14. The courts below also seemed to have accepted the genuineness of Ex.A7 Assurance Deed despite the total denial of the same on the part of the defendants and in this connection endeavoured to compare the signature of the defendants with their signatures in the vakalat, written statement, etc. Pointing to the abovesaid endeavour of the courts below,



according to the defendants' counsel, the same has been deprecated by this Court in the decisions reported in 2017 3 LW 378 (K.M.Balasubramanian vs. S. Shanmugam (Decd) and others) and 2017 4 LW 830 (Sankara Narayana Pillai vs. Ignatious Selvaraj). In the abovesaid decisions, it has been held by this Court that the courts should not endeavour to compare the signatures and in the event of endeavouring to compare the signatures, the courts should give adequate reasons as to how the disputed signatures and the admitted signatures tally or similar or dissimilar, and without proper reasons, the courts should not go for comparison. The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

15. The defendants' counsel also placed reliance upon the decisions reported in (2020) 5 MLJ 94 (K. Rajasekara Kumar vs. Yasodha Purushothamman (died) and others), (2021) 2 MLJ 400 (Rangasamy and others vs. Palanigounder). In the decision reported in (2021) 2 MLJ 400, the principles outlined by the Apex Court in the decision reported in (2008) 17 SCC 491 had been followed.

16. In the light of the abovesaid discussions, when the plaintiffs have failed to establish the existence of the suit cart track in the lands belonging to Kandaswamy and for the same they relied upon Exs.A2 and A7 and when Exs.A2 and A7 do not advance the case of the plaintiffs as above stated and when the plaintiffs pleadings are not precise and clear as to the nature of the easementary right they claim over the lands belonging to Kandaswamy and accordingly when the plaintiffs have also miserably failed to establish the usage of the alleged easementary right by them and on the other hand, when the plaintiffs are found to have access to their lands through the other pathway as depicted in the commissioner's report and plan as above pointed out, in such view of the matter, in my considered opinion, the question of invocation of Section 37 of the Easements Act, does not apply to the case at hand. Furthermore, the plaintiffs, despite the denial of the alleged easementary right put forth by them by the defendants in the written statement in toto, the plaintiffs having failed to seek the relief of declaration of their alleged easementary right, on that score, the plaintiffs suit has to fail. The substantial questions of law formulated in this second appeal are accordingly answered.

17. In conclusion, the judgment and decree 04.09.2007 passed in A.S. No.49 of 2007 on the file of the First Additional Subordinate court, Coimbatore, confirming the judgment and decree and dated 10.04.2006 passed in O.S. No.1238 of 2003 on the file of the First Additional District Munsif Court,



Coimbatore, are set aside. Resultantly, the suit in O.S. No.1238 of 2003 is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition is closed.

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Assistant Registrar(CS-V)

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Sub Assistant Registrar

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To

1.The First Additional Subordinate court,
Coimbatore.

2.The First Additional District Munsif,
Coimbatore.

+1cc to M/s.Elizabeth Ravi, Advocate, S.R.No.24276

S.A.No.565 of 2009

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