

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.04.2021

CORAM:

THE HONOURABLE Mr. JUSTICE S.S.SUNDAR

S.A. No.266 of 2017

S.Vimala Bai

.. Appellants

Vs

1.C.N.Kumaran

2.The Commissioner,
Cuddalore Municipality,
Bharathi road, Cuddalore.

.. Respondents

Second Appeal filed under Section 100 of Civil Procedure Code, 1908, against the judgment and decree in A.S. No.12/2016 dated 15.11.2016 on the file of the Principal Sub Judge, Cuddalore, reversing the judgment and decree in O.S. No.40/2011 dated 20.01.2016 on the file of the Principal District Munsif, Cuddalore.

For Appellants : Mr. N.Suresh

For Respondent - 1 : Mr. R.Guru Raj
2 : No appearance

JUDGMENT

The plaintiff in the suit in O.S. No. 40 of 2011 on the file of Principal District Munsif Court, Cuddalore, is the appellant in this Second Appeal. The

appellant filed a suit in O.S. No.40 of 2011 for the following reliefs:

“i) pass a decree in favour of the plaintiff and as against the 1st defendant declaring the plaintiff's title and right to use 'B' Schedule Property and consequentially;

ii) pass a decree for recovery of possession of 'B' Schedule property after removal of superstructure through process of Court free from obstruction of the 1st defendant within a time frame failing which the plaintiff may be permitted to remove the superstructure at the expense of 1st defendant;

iii) pass a decree for Permanent injunction restraining the 1st defendant and his men from putting up any sort of further construction in Schedule 'B' property;

iv) pass a decree in favour of the plaintiff and as against the 1st defendant declaring the plaintiff's title and right to use 'C' Schedule property for taking the free course of rain and sewage water through the portion marked as ABCD in the plaint plan and consequentially;

v) pass a decree for mandatory injunction directing the 1st defendant to remove all the constructions putup in the length and breadth of the passage marked as 'CD' in the plaint plan within a time frame, failing which the plaintiff may be permitted to remove the same at the expense of 1st defendant;”

Schedule – A to the plaint refers to the plaintiff's absolute property bearing door No.11 A. Plaint B- Schedule is described as a right of easement in

respect of a property measuring 3 ½ feet x 26 ft which is shown as pathway right attached to property described under A-Schedule. The C-Schedule property is described as right of easement to drain rain and sewage water through the property of defendant.

2. The case of the plaintiff as stated in the plaint can be summarised in the following lines:

The suit properties consisting of A-Schedule including the right of passage described in B-Schedule and the drainage channel described in C-Schedule belonged to the plaintiff. The plaintiff states that she purchased the entire A-Schedule from one Kandavel Pillai under registered sale deed dated 17.02.1988 for a valid consideration. The plaintiff's vendor Thiru. Kandavel Pillai purchased the suit A-Schedule under registered sale deed dated 23.12.1985 from one S.Vijayaranga Chettiar who had also purchased the same property including the right of passage under a previous registered instrument dated 14.12.1975 from one Polin Anthony Ammal. It is also stated in the plaint that the said Polin Anthony Ammal got the property through her husband by name Anthony Udayar who purchased the A-Schedule property under sale deed dated 16.12.1970 from one Mohammed Ajeez. It is stated that in all the documents of title, the property A-Schedule including the right of passage, was

dealt with and conveyed. It is the specific case of the plaintiff that B-Schedule property is annexed to the suit A-Schedule. The suit B-Schedule is a small piece of vacant site measuring 3 ½ feet (North South) and 26 feet (East West) between the property of first defendant and house of one Jayaraman. It is the further case of the plaintiff that the plaintiff had put up a septic tank in his garden and cleaning of the said tank was done only through the passage namely B-Schedule property without the interference of neighbours namely the residents of Door No.11 B. It is stated that the first defendant purchased the property in Door No.11 B by a document dated 04.03.2010 from one S.Vaitheeswaran. It is also stated in the plaint that the suit B-Schedule Property was referred to as the northern boundary of the property purchased by the first defendant even in the document of sale dated 04.03.2010. The plaintiff also referred to the document under which the vendor of first defendant by name Vaitheeswaran purchased the property with almost identical description by document dated 17.02.2006. It is the case of the plaintiff that the plaintiff's predecessor in interest had purchased the property with a right of taking the drainage and sullage water through the property described as C-Schedule. It is also the case of the plaintiff that there was a 'Vardhamanam agreement' under which the right of taking the drainage and sullage water was specifically acquired by the plaintiff's predecessors and that the predecessor's interest of the

first respondent executed the said Vardhamanam agreement dated 31.05.1976. Since the plaintiff claimed right over C-Schedule on the basis of the agreement dated 31.05.1976, entered into between the plaintiff and the predecessor's interest of the first defendant, it is case of the plaintiff that the document namely the Vardhamanam agreement is binding on the first defendant and that the right to take drainage and sullage water cannot be objected by the first respondent. Stating that the first defendant has no right to obstruct the passage over plaintiff B-Schedule or the free flow of drainage through C-Schedule property, the plaintiff came forward with a suit for declaration and consequential injunction in respect of suit 'B' and 'C' Schedule properties and for recovery of possession of suit 'B' Schedule property.

3. The suit was contested by the first defendant. The second defendant is the Commissioner of Cuddalore Municipality who is just a formal party. In the written statement filed by the first defendant, the ownership of plaintiff over door No.11 A is not disputed. However, the right to use the pathway described in plaintiff B-Schedule and the right to draw drainage and sullage water through C-Schedule passage was specifically disputed by the first defendant. It is further stated that the documents of title relied upon by the plaintiff only refers to the right of scavenging through B-Schedule property and that the claim of

plaintiff is contrary to the specific recitals in the document of title and that the claim is also barred under Section 91 and 92 of Evidence Act. With regard to the Varthamanam Agreement dated 31.05.1976, it is the case of the first defendant that the document is purely a private arrangement between the then owners and that mere existence of document may not establish any right, particularly where the document was not acted upon by making a hole as it was suggested in the Vardhamanam agreement. It is also the case of the first defendant that the agreement dated 31.05.1976, was not referred to in any of the title deeds relied upon by the plaintiffs. Stating that the agreement is purely between the persons who are parties to the Vardhamanam agreement, it is contended by the defendant in the written statement that the first defendant is not bound by the Vardhamanam agreement. Pointing out various factual circumstances, the first defendant also denied the existence of the property as it was described in plaint A and B -Schedule. It was also contended by the first defendant that by abolishment of scavenging, the right to use B-Schedule came to an end and that the plaintiff cannot sustain a claim of easement.

4. The trial Court after framing necessary issues considered the pleading and the documents filed by either side apart from carefully analysing the oral evidence of witnesses examined on both sides. Since the right of pathway

described in plaint B-Schedule was referred to in every documents of title, the trial Court found that the plaintiff is entitled to the right of pathway for scavengers to use B-Schedule property. Referring to the evidence on either side and the terms of the agreement under Ex.A16, the Vardhamanam agreement, the trial Court also held that the document Ex.A16 was acted upon. Since the document Ex.A16 specifically referred to the right of easement to take drainage and sullage water through C-Schedule property, the trial Court found that the plaintiff is entitled to the relief. The findings of the trial Court regarding right of easement over suit B and C-Schedule are specific. Since the relief for recovery of possession of plaint B-Schedule is contrary to the plea of easement, the trial Court dismissed the suit in respect of the relief of recovery of possession of B-Schedule property. After finding that the plaintiff is entitled to use B-Schedule property for scavenging purpose and to use C-Schedule property for taking rain and sewage water, the trial Court granted decree as prayed for in all other respects.

WEB COPY

5. The judgment and decree of the trial Court in O.S. No.40 of 2011 dated 20.01.2016 was challenged by the first defendant in A.S. No.12 of 2016 before the Principal Sub Court, Cuddalore. Aggrieved by the judgment of the trial Court in so far as the relief relating to the recovery of possession over B-

Schedule, the plaintiff preferred a cross appeal. The appellate Court though found that the plaintiff is entitled to the right of pathway over B-Schedule, reversed the judgment and decree of the trial Court with regard to all the reliefs in relation to suit B – Schedule property only on the ground that the plaintiff has not purchased the plaintiff B-Schedule property and that the findings of the lower Court regarding plaintiff's title are unsustainable. With regard to C-Schedule, the appellate Court held that the plaintiff has not proved the existence of channel prior to the filing of suit and the plaintiff has not established the fact that the first defendant blocked the way in C-Schedule property by putting up construction prior to the filing of suit.

6. It is to be noted that the appellate Court allowed the appeal in A.S. No.12 of 2016 and dismissed the cross appeal. In short the judgment and decree of the trial Court was set aside and the suit in O.S. No.40 of 2011 was dismissed in toto. Aggrieved by the judgment and decree of the Principal Subordinate Judge, Cuddalore in A.S. No.12 of 2016, the above second appeal is preferred by the plaintiff.

7. In the memorandum of grounds, the appellant plaintiff has raised the following substantial questions of law:

“A) Whether the Court below is right in setting aside the judgment and decree of the trial Court without taking into consideration the right of the plaintiff in respect of the suit B and C Schedule properties as provided under title deed of the plaintiff under Ex.A1 and the previous title deeds of the plaintiff and under Ex.A16 Vardamanam deed?

B) Whether the judgement and decree of the lower appellate court is perverse when it has clearly held that the plaintiff has purchased the right of scavenging through B schedule property by paying Rs.500/-, and hence it ought not to have reversed the judgement and decree of the trial court?

C) Whether the judgement and decree of the appellate court is liable to be set aside when it has come to the conclusion that the plaintiff's predecessor has been enjoying the C schedule way right for drainage and hence it ought to have held that the plaintiff is entitled to the same right as vested in the predecessors of the plaintiff?

D) Whether the judgement and decree of the lower appellate Court is liable to be interfered with when it has clearly held that inspite of the recital in Ex A1 for the plaintiff to have right of way, the plaintiff is not entitled to have the right exercised under the B schedule property?

E) Whether the judgement and decree of the lower appellate Court is liable to be set aside and interfered with for having rendered perverse findings and without taking into consideration the admitted evidence in the nature of documentary and oral evidence?”

8. Learned counsel appearing for the appellant relied upon Exs.A8, A7, A6, A1 and the sale deed under Ex.A1. Apart from the sale deeds, learned counsel also relied upon the Vardhamanam agreement under Ex.A16 dated 31.05.1976. Learned counsel submitted that lower appellate Court having found that the Vardhamanam agreement under Ex.A16, refers to the right of plaintiff

to take sewage water through C-Schedule, ought not to have reversed the judgment and decree of the trial Court. The question raised by the counsel for the appellant is whether the plaintiff has proved his right of easement over suit B and C-Schedule property under the previous title deeds. Since the documents relied upon by the plaintiffs under Ex.A1, A6, A7, A8 and A16 are proved to the satisfaction of the Court, learned counsel submitted that the appellate Court committed a serious error in reversing the judgment of the trial Court as the documents clearly establish the right of easement claimed by the plaintiff.

9. Learned counsel appearing for the respondent submitted that when the lower appellate Court found that the plaintiffs and his predecessors in interest have purchased only the scavenger right in suit B-Schedule, the judgment of the lower appellate Court holding that the plaintiff has not established his title over the property is well founded. Learned counsel relying upon the evidence of P.W.1 submitted that during the course of the evidence the plaintiff admitted that the property in B-Schedule is not the property of first defendant and that the plaintiff had absolute right over the plaintiff B – Schedule property. Since the claim of title does not co-exist with the right of easement, learned counsel referring the judgment of the Hon'ble Supreme Court in *Chapsibhai Dhanjibhai Dand Vs. Purushottam* reported in [AIR 1971 SC 1878], submitted

that the plea of easement cannot be accepted. Referring to the fact that the Court fee paid under Section 25 (a) and 27 (c) of the Tamil Nadu Court Fee and Suit Valuation Act, the counsel submitted that the suit prayer as such cannot be sustained for want of bonafide and cause of action. Learned counsel also relied upon several judgments of Hon'ble Supreme Court and this Court which will be discussed in the course of this judgment.

10. This Court considered the pleadings and oral evidence relied upon by the plaintiff and defendant apart from the documents adduced by both sides. The plaintiff has filed the suit only to declare his right of easement over plaintiff B and C-Schedule property. The description of the property in plaintiff B and C-Schedule will give a picture that the plaintiff's suit is only for declaration of his right of easement and consequential relief. Though the plaintiff prayed for declaration of title over B-Schedule, the B Schedule property itself has been described as right of easement (Vazhinadai Pathiyam). The plaintiff's claim in respect of plaintiff B-Schedule is based on several documents relied upon by the plaintiff from Ex.A8 dated 16.12.1970. The document Ex.A16, the Vardhamanam agreement, clearly shows that the predecessor's interest of first defendant has conveyed the right of draining rain and drainage water through plaintiff C-Schedule. The lower appellate Court has mislead itself by presuming

as if the plaintiff claims title to the property and that the plaintiffs right of easement cannot be considered when the plaintiff claims title to the property.

11. Having regard to the rival submission of the counsel on either side this Court is inclined to record the following facts and circumstances as borne out from records. The relief claimed in the plaint can be treated only as a right of easement. The B-Schedule property is described claiming easementary right over an extent of 3 ½ ft. into 26 ft. with reference to specific boundaries. The C-Schedule property also has been referred to as a right to draw drainage and sullage water through the property of the defendant which is described as A,B,C,D under the plaint plan. The first prayer in the plaint is to declare the plaintiff's title and right to use B-Schedule property. Merely because of the word 'title' as mentioned in the prayer, the nature of relief cannot be treated as one to declare the plaintiff's title to pathway. The findings of the trial Court and appellate Court regarding enjoyment of B-Schedule property are concurrent. While the trial Court declares the plaintiff's right to use B-Schedule pathway, refuses to grant a decree for recovery of possession in respect of B-Schedule property. The trial Court held that the plaintiff is entitled to decree by directing the defendant to remove the superstructure through process of Court so that the plaintiff will use the B-Schedule free from any obstruction by the first

defendant. The appellate Court also concurred with the view of the trial Court that the plaintiff is entitled to get a declaration of plaintiff's easementary right to use the pathway described in the plaint B-Schedule property. The trial Court specifically found that the first defendant has no right over plaint B-Schedule on the basis of the admission of the first defendant in the course of evidence. Admittedly the first defendant has not filed any document to show that he has got any right over plaint B-Schedule. The concurrent findings of the Court below with regard to the right of easement enjoyed by plaintiff over plaint B Schedule are supported by several documents. When the first defendant has no right and does not prefer any right over plaint B-Schedule, there cannot be any obstruction over plaint B-Schedule preventing the plaintiff from exercising his right of easement namely the right of scavenging by having access to plaint B-Schedule.

12. The plaintiff marked Ex.A8 dated 16.12.1970, sale deed under Ex.A7 dated 14.07.1975, the sale deed under Ex.A6 dated 23.12.1985 and the sale deed under Ex.A1 dated 17.02.1988. The document Ex.A1 shows that the document of sale under Ex.A1 is the sale deed under which the plaintiff purchased the property from one D.Kandavel. The plaintiffs vendor purchased suit A-Schedule property from one Vijaya Ranga Chettiar under Ex.A6. The

said Vijaya Ranga Chettiar purchased the suit A-Schedule property under Ex.A7 from one Polin Anthony Ammal wife of Anthony Udayar. Antony Udayar purchased the A-Schedule property under Ex.A8 from the original owner. In all the sale deeds, the right of way for scavenging purpose through plaintiff B-Schedule property is referred to. With regard to B-Schedule property, the first defendant admit that he has no title. When the plaintiff specifically state in the plaint that the first defendant was trying to interfere with the enjoyment over plaintiff B Schedule property, the first defendant specifically state that the plaintiff had no right with the plaintiff B-Schedule property. As a matter of fact the first defendant disputed the very existence of the plaintiff B-Schedule pathway. In such circumstances, it cannot be said that the plaintiff has no cause of action to file a suit in respect of suit B-Schedule pathway.

13. Having regard to the documents and oral admissions of the first defendant, this Court has no hesitation to hold that the plaintiff is entitled to right of easement over plaintiff B-Schedule property as claimed by the plaintiff. The overwhelming documentary evidence also come in the aid of plaintiff's case to grant a declaration as to the easementary right over the plaintiff B-Schedule property. The document Ex.A1 dated 17.02.1988, not only refers to the right of pathway through B-Schedule but also refers to the right to drain the

sullage water through C-Schedule property. It is to be seen that the document Ex.A1 also refers to the document through which the plaintiff is entitled to drain the rain and sullage water through the property bearing door No.11 B. The document Ex.A16 is the Vardhamanam agreement dated 31.05.1976. This agreement was entered between the plaintiff's predecessor in interest with the first defendant's vendor. In the said Vardhamanam agreement, the following terms are found:

“...

1) 1வது நபர் வீட்டின் கழிவு நீரும் மழை நீரும் 2வது நபர் வீட்டின் மேல்புரம் தோட்டத்து சுவற்றில் துளை செய்து அதன் வழியாக 2வது நபர் வீட்டின் வடபுரம் உள்ள சாலவம் வழியாக போய் பொன்னப்பன்டாரம் வீதியில் இருக்கும் முனிசிபல் சாலவத்தில் சேர்த்து விட வேண்டியது. இதற்கு 2வது நபர் நிரந்தரமாக அனுமதிக்கிறார்.

...

2) 1வது நபர் தன் வீட்டு வடபுரம் தோட்டத்தில் கீழ்புரம் அதாவது 2வது நபர் வீட்டு தோட்டத்து மேல்புரம் சுவற்றின் உயரத்தில் இருந்து 2அடி உயரம் முதல் நபர் தன் சொந்த சிலவில் 2வது நபருக்கு சொந்தமான சுவற்றின் பேரில் சுவர் எழுப்பி அதிலிருந்து மேல்புரமாக 1வது நபர் தன் புழக்கங்களுக்கு கட்டியிருக்கும் குனியல் அறையை இணைத்துக் கொள்ள வேண்டியது. அதற்கு 2வது நபர் அனுமதி கொடுத்து 1வது நபரும் அனுமதி பெற்றுக் கொள்கிறார். இதன் மதிப்பு ரூ.20/.

மேற்சொன்ன இரண்டு ஊரத்துக்களில் உண்டான சலுகைகளை 2வது நபர் 1 நபருக்கு 11ஏ, 11ழு இந்த இரண்டு வீடுகளுக்கும் நடுவில் தோட்டத்து பக்கமாக உள்ள சுனாக உள்ள இடத்தை திருத்தி சுவர் வைத்துக் கொள்ள 1வது நபர் தனக்குச்

சொந்தமான இடத்தில் 6 சதுரடியை 2வது நபருக்கு யாதொரு பிரதிப்பிரயோஜனமும் இல்லமல் தானமாக கொடுக்க சம்மதிக்கிறார். அந்த துனின் விபரம் இத்துடன் சேர்க்கப்பட்டிருக்கிற Plan ல் கொடுக்கப்பட்டிருக்கிறது. அது red ink ல் குறிக்கப்பட்ட இடமாகும். அந்த 6 சதுரடியின் மதிப்பு ரூ.30/ ஆகும்.”

The document Ex.A16 refers to the right of easement over the plaint C-Schedule property. It is the specific case of the plaintiff that the agreement under Ex.A16 was acted upon and that the same was supported by consideration. Since the agreement is supported by consideration and it is stated that the promise to the first defendant's predecessor interest was fulfilled, the document Ex.A16 has to be taken as acted upon as an executed agreement.

14. Learned counsel appearing for the appellant submitted that the lower appellate Court without considering the findings of the trial Court and the documents relied upon by the plaintiff, dismissed the suit in entirety on an erroneous appreciation of facts. The contention of the learned counsel for the appellant is fair and this Court is also convinced that the lower appellate Court committed an error while construing the documents as well as the findings of the trial Court. The lower appellate Court has recorded the following findings with regard to the plaint B-Schedule.

“ Therefore, the findings by the lower Court that the plaintiff has established his right by impeachable document is not sustainable”.

Again in the paragraph 20 of the judgment, the appellate Court recorded the following findings:

“ Therefore all the facts put together makes the Court presume that the plaintiff is entitled only to scavenging right in the B-Schedule property and the plaintiff has not purchased the B-Schedule property”.

With regard to plaint C-Schedule property, the lower appellate Court rendered the findings in the following lines:

“ Therefore the so called existence of the channel prior to the filing of the suit in the C-Schedule property has now been proved by the plaintiff. Admittedly the C-Schedule property has been blocked by the first defendant. Therefore it has to be established by the plaintiff that the first defendant blocked the way in C-Schedule property by putting up construction prior to the filing of the suit ... It may be presumed that the way of right was exercised by the predecessors of the plaintiff in title under the Ex.A16, but the plaintiff must establish her case that she was exercising the right in the C-Schedule property prior to the filing of the suit which the plaintiff has failed to prove. In so far as plaint B-Schedule is concerned, the plaintiff's right is well established through the documents”

15. Having regard to the findings of the Court below, the plaintiff is entitled to get a decree declaring his right of easement over plaint B-Schedule property. The lower appellate Court presumes that the plaintiff claim title to B-Schedule property. The findings are not only erroneous but also perverse. With regard to C-Schedule property, the trial Court granted the decree on the basis of Ex.A16 and other evidence including the recitals in some of the documents through which the plaintiff claim the right of easement.

16. Learned counsel appearing for appellant submits that the right of easement over plaint 'C' Schedule is purely under Ex.A16 and that therefore the plaintiff need not prove long enjoyment or absolute necessity. Learned counsel appearing for the appellant relied upon the judgment of the Hon'ble Supreme Court in the case of *Hero Vinoth (Minor) Vs. Seshammal* reported in 2006 (4) CTC 79 wherein the Hon'ble Supreme Court has expressed its views in the following lines:

“28. The question whether an easement is one acquired by grant contrasted from an easement of necessity) does not depend upon ab necessity of it. It is the nature of the acquisition that is relevant. Many easements required by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is of matter of contract between the parties. In the matter of grant the parties a governed by

the terms of the grant and not anything else. Easement necessity and quasi easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Any how the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that I was to continue only until such time as the necessity was absolute. In at the time it was granted, it was not one of necessity. If it is a fact even permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be recognized and the servient tenement will be permanently burdened with that disability Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable only to easement of necessity arising under Section 13.

29. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity

by implication of law is legally withdrawn or extinguished as statutorily recognized in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case.”

17. Learned counsel appearing for the appellant relied upon the yet another judgment of the Hon'ble Supreme Court in the case of *Sri Sweyam Prakash Ashramam and another Vs. G.Anandavally Amma* and others reported in (2010) 1 CTC 455. It is held that specific pleading regarding easement of grant is not necessary when the Court came to the conclusion that the plaintiff was given right of easement by way of grant. Learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court eventhough the plaintiff in the present case has specifically pleaded the right of easement as an easement by grant. It is the contention of the learned counsel for the appellant that the question whether the plaintiff is entitled to the right of easement by necessity, need not be decided when the plaintiff proves his right of easement by grant. Since the plaintiff has established his right of easement by grant under Ex.A16, and the sale deeds this Court also agrees with the submission of the learned counsel for the appellant. As against the submission of the learned counsel for the appellant relying upon the above judgments of Hon'ble Supreme Court, learned counsel for the first respondent submitted his arguments relying

upon a few judgments of Hon'ble Supreme Court. The learned counsel for the first respondent relied upon the judgment of the Hon'ble Supreme Court in the case of *Chobsibhai Vs. Purushotham* particularly paragraph 17 to 21 which reads as follows:

“17. Parties to a suit, are, it is true, entitled to make contradictory pleas in the alternative in their pleadings. But at the stage of the evidence, no serious attempt was made by the appellant to establish accession by adverse possession. On the contrary, the appellant sought to make out a case of easementary rights by prescription, a case incompatible with the claim of adverse possession where a party claims title over the land of another as his own and therefore there would be no dominant tenement claiming a right by prescription over a servient tenement. In this state of the evidence the Letters Patent Bench, in our judgment, was right in rejecting the claim of accession which the learned Single Judge had erroneously accepted.

18. As regards the appellant's claim to the easementary rights, assuming that a lessee can claim such rights over an adjacent property belonging to his lessor, S. 15 of the Easements Act requires that the access and use, on the basis of which an easement is claimed, must be as and by way of easement and without interruption for a period of 20 years. The enjoyment must be, in other words, as of right and not permissive either under a licence or an agreement. In Abdul Rashid v. Braham Saran, ILR (1938) AII 538 (AIR 1938 AII 293) a Full Bench of the Allahabad High Court held, on the principle embodied In section 12, that the possession of a tenant being in law the possession of his land lord, the tenant cannot acquire by prescription an easement in favour of his holding except on behalf of his landlord. The Full Bench, however, made a distinction between

an easementary right of way and an easementary right of light and air mentioned in the first two paragraphs of S. 15, and held that though a lessee of land, who is the owner of the building on such land, cannot acquire by prescription an easement of way one to flow water over another right of land of the lessor, so far as the use of light and air or support for his building is concerned he is the owner of the building and may under the first two paragraphs of S. 15 acquire such easements as he would not acquire for any one except himself under S. 12. This decision was followed in Haji Abdulla Haroon v. Municipal Corporation, Karachi, AIR 1939 Sind 39. But in Ambaram v. Budhalal, ILR (1943) Bom 690 (AIR 1943 Bom 443) the High Court of Bombay differed from the Allahabad High Court holding that the distinction in English law arising from the language of sections 2 and 3 of the Prescription Act, 1832 between an easement of light and air on the one hand and of easement of way on the other, did not hold good under the Easements Act as no such distinction is made in Ss. 4 and 12 of the Act, that it is under S. 12 that an easement is acquired and not under S. 15 which provides for not the persons who can acquire easementary rights but the method by which they can be acquired, and there fore, the principle laid down in Sections 4 and 12 would apply, namely, that if the lessee acquires a right to light and air, he does so on behalf of the owner and therefore he cannot acquire it on behalf of the owner as against such owner. There is thus clearly a conflict of view between the two High Courts. It is, however, not necessary to resolve this conflict in this case as the question of easements in the present case can be disposed of in another way.

19. Chapter IV of the Ac deals with the disturbance of easements and Section 33 therein provides that the owner of any interest in the dominant heritage or the occupier of such heritage may institute a suit for the disturbance of the easement provided that the disturbance has actually caused substantial damage to the plaintiff. Under Explanation II read with Explanation I to the section, where the disturbance pertains to the right of

free passage of light passing through the openings to the house, no damage is substantial unless the interference materially diminishes the value of the dominant heritage Where the disturbance is to the right of the free passage of of air, damage is substantial if interferes materially with the physical comfort of the plain tiff. In Raychand v. Maniklal, ILR (1946) Bom 184-(AIR 1946 Bom 266) (FB), it was held that an easement by prescription under Sections 12 and 15 of the Act is in fact an assertion of hostile claim of certain rights over another man's property and in order to acquire the easement the person who asserts the hostile claim must prove that he had the consciousness to exercise that hostile claim on a property which is not his own and where no such consciousness is proved he can not establish a prescriptive acquisition of the right. Therefore, if the owner of a dominant tenement has, during the period of prescription, exercised rights on the footing that he is the owner but which he later on claims as an easement over a servient tenement, then, his exercise of those rights is not exercised as an easement and he must fail in a claim for an easement. As already stated, a party to a suit can plead inconsistent pleas in the alter native such as the right of ownership and a right of easement. But, where he has pleaded ownership and has failed, he cannot subsequently turn around and claim that right as an easement by prescription. To prove the latter, it is necessary to establish that it was exercised on some one else's property and not as an incident of his own ownership of that property. For that purpose, his consciousness that he was exercising that right on the property treating it as someone else's property is a necessary ingredient in proof of the establishment of that right as an easement.

20. In his evidence, the appellant did not claim the right of passage or of light and air or of draining his waste and rain water over the said strip of land as rights over the respondent's property. On the contrary, he made it clear that the said strip of land fell under the document of lease. "I have a right on both the properties under the lease deed it self", he declared in his

evidence, and added, "whatever rights I have acquired are under the lease deed itself and not afterwards." His claim that the strip of land was included in the leased land could not succeed because he had to admit that although two different municipal numbers, 94 and 93, were given as early as 1929 to the two portions of the land, 94 to the portion under his possession, and 93 to that under the possession of the respondent, no complaint was ever made to the municipality or any other authority that the strip of land which he claimed to be covered under the lease should be included in his plot, namely, No. 94. In 1940, and again in 1955, when transfer deeds in respect of plot No. 94 were executed by him, the area mentioned therein was described as measuring 5182 sq. ft. which would not include the strip of land, forming part of plot No. 93. Having thus failed in his claim that the said strip of land was acquired either as accession or as one covered by the lease deed, he could not turn round and successfully claim that he had during the requisite period exercised rights over it on the footing of an owner of a dominant tenement exercising these rights over a servient tenement of another.

21. Assuming, however, that the said strip of land was used by him as a passage, the evidence clearly showed that it was permissive. There was evidence of a permission having been asked for from the respondent's father by the appellant for installing a hand-pump over the respondent's well in plot No. 93. If the appellant, and previously his father, were permitted to draw water from that well, the use of the well for drawing water and of the strip of land as a passage for going to the well was clearly permissive and not as an open hostile use over the lessor's property. The appellant himself admitted that his father had taken a portion of plot No. 93 on lease paying separate rent there for at Rs. 45/- a year, and had put up there on a tin-shed which stood there from 1935 to 1941. It is clear that the strip of land was allowed to be used as a passage both to the well and the said shed. He admitted two letters. Dated September 30, 1958 and December 4, 1959, having

been written by .. to the respondent both relating to 2nt due by him in respect of the said land on which the said tin-shed stood. On these facts it is impossible to sustain the right of passage over the said strip of land as an easementary right by prescription for a continuous period of 20 years.”

The principle reiterated by the Hon'ble Supreme Court in the judgment above referred to is well accepted. A person who pleads ownerships cannot subsequently turn around and claim right of easement by prescription after unable to establish title. The plaintiff in the present case claimed only a right of easement over the plaint B-Schedule property and the plaint averments cannot be construed to mean that the plaintiff's prayer was to get a declaration of title over the property referred to as plaint B-Schedule. The purpose for relying upon the judgment of Hon'ble Supreme Court by the respondent counsel is that the plaintiff, by claiming title to the property, cannot canvass right of easement over plaint B-Schedule property. When the declaration itself is regarding the right to use 'B' Schedule as pathway, the judgment of Hon'ble Supreme Court has no application to the present case.

18. Learned counsel then relied upon the judgment of Hon'ble Supreme Court in the case of *Chandar Kali Bail and others Vs. Jagadish Singh Thakur* and another reported in *[AIR 1977 SC 2262]*. In these judgments the Hon'ble

Supreme Court ruled that no evidence can be looked into upon a plea which was never put forward. This Court is unable to understand as to how the said judgment will help the counsel appearing for the respondent. This Court has already held that the plaintiff has pleaded only the right of easement and that the construction of pleading by the lower appellate Court and counsel for the respondent is artificial. Having regard to the specific pleading in the plaint, it cannot be held that the plaintiff's plea regarding B-Schedule property is one for declaration of title and that right of easement cannot be granted in favour of the plaintiff over plaint B-Schedule property.

19. Learned counsel also relied upon yet another judgment in the case of *M/s.Trojan & Co. Ltd., Vs. Ram.N.N.M. Nagappa* reported in AIR 1953 SC 235. In the said judgment the Hon'ble Supreme Court held that the Court cannot grant relief or remedy outside the pleadings of parties unless the parties are allowed to amend the pleading. Similarly the plaintiff is not entitled to seek alternative prayer which cannot be a substitute. A plea of adverse possession which is not raised before the trial Court cannot be permitted to be raised. It is to be noted that the Hon'ble Supreme Court in the said judgment has held that when there was no plea of adverse possession even though there was reference to long possession, such a plea cannot be construed as a plea of adverse possession.

20. The other judgment relied upon by the counsel for the respondent is the judgment of *Mussammatt Biro Vs. Atma Ram* reported in *AIR 1937 (PC) 101* wherein while dealing with the case relating to proof of will, the Privy Council has held as follows:

“In view of this strange provision, and considering the niggardly manner in which the daughter, who should have been the proper object of her fathers bounty, was treated, their Lordships think that the will was an inofficious testament. The inclusion of the three ladies who had no claim whatever upon his charity among the devisees, with rights equal to those of his own widow, undoubtedly gave the testament the advantage of verisimilitude; but it would not inflict any injury upon her if it came into existence after the deaths of those ladies. It is most unlikely that a person having a wife and a minor unmarried daughter, who should be the objects of his affection, would make a will which would practically disinherit them.

That the testament is unnatural and runs counter to the ordinary sentiments of persons having a status in society similar to that of Harbans Lal cannot be seriously disputed. But this is not the only circumstance which tells against its genuineness. The will purports to have been executed on August 24, 1900, and the testator died within a month of that date. But it is strange that it was not produced until 1922, after the commencement of the present litigation. During this long period of twenty-two years which intervened there were occasions when the widow or her advisers could have produced the document, if it had been in existence; but they did not do so. In July, 1920, she herself made a will, which confirmed the oral gift to Bhagat Ram and gave other properties to educational institutions. How does she describe in it the nature of the estate held by her and her power of disposing of it? It is significant that she does not say that she had received the estate under her husbands will, but

merely mentions the fact that She was holding it “in the capacity of heir “ of her husband. Now, this description, which is usually employed to denote the estate which a Hindu widow gets upon her husband's dying intestate, does not convey any idea of her having received the estate under her husband's will. If that will had been the foundation of her title she would have made a prominent mention of it in this document, which was executed by her in relation to the property inherited by her from her husband.

Moreover, the will in dispute conferred upon her an absolute estate, and that provision would furnish an irresistible authority for making the gift to Bhagat Ram and for other dispositions. There would, in that case, be no necessity for suggesting in her will various reasons which are ordinarily mentioned to justify an alienation by a Hindu widow of the estate held by her on the usual widow's tenure. It cannot be believed that, if she was, at that time, armed with absolute power granted by her husband, she would have refrained from citing it as the source of her authority.

Her failure to mention the will in question on a critical occasion is incapable of explanation on any other reasonable hypothesis than that it did not exist at that time. This circumstance, reinforced, as it is, by the unnatural character of the dispositions contained in it, as explained above, warrants the conclusion that the appellant has failed to prove that the alleged will was made by Harbans Lal. Their Lordships consider it unnecessary to refer to other evidence, which, in their opinion, supports the same conclusion. They will therefore humbly advise His Majesty that the judgment of the High Court should be affirmed, and the appeal be dismissed. They will, however, make no order as to the costs, as there is no appearance before them by, or on behalf of, the respondents.”

This Court is unable to find any support to the respondent from this judgment.

21. Learned counsel for the respondent relied upon the judgment of the Hon'ble Supreme Court in the case of Kalyan sing Vs. Smt. Chotti reported in AIR 1990 SCC 396. The relevant paragraph of the said judgment is extracted hereunder:

“The will in the present case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a serious doubt on genuineness of the will. The will has not been produced for very many years before the Court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty. We, therefore, concur with the conclusion of the High Court and reject the will as not genuine.”

22. Relying upon the two judgments above referred to, the learned counsel appearing for the first respondent submitted that the Vardhamanam agreement executed in the year 1976, was not referred to in any of the subsequent documents. The submission of the learned counsel is not correct. The document Ex.A1 under which the plaintiff purchased A-Schedule specifically refers to the document. The right of easement over plaint C-Schedule is an easement by grant as it was conveyed for consideration as evident from Ex.A16. In the written statement filed by the first defendant, it is stated that the document Ex.A16 was purely between the persons who are

parties to the document and that it will not be binding on the person who are not the parties to it or who do not approve it. When the document Ex.A16 was executed by predecessor in title of first defendant, the first defendant cannot just ignore the document on the short ground that he was not a party. The fact that the document Ex.A16 was acted upon is established by referring to the right over C-Schedule property in other documents filed by the plaintiff. The two judgments relied upon by the counsel appearing for the respondent is regarding proof of will. When the will did not come into light for several years after the lifetime of the testator, the Courts can recognise the non-disclosure of will as one of suspicious circumstance. The same logic that was applied with reference to proof of it cannot be applied in the present case where the document under Ex.A16 is admitted and that the appellant's predecessor in interest has fulfilled the promise he has made.

23. Learned counsel for the respondent then relied upon the judgment of Hon'ble Supreme Court in the case of *Karnataka Board of Wakf Vs. Anjuman-E-Ismail Madris-Un-Niswan* reported in (1996) 6 SCC 343 wherein the Hon'ble Supreme Court has considered the scope of Section 100 C.P.C. The following paragraphs of Hon'ble Supreme Court may be extracted to appreciate the arguments of the learned counsel for the respondent.

"10. In second appeal, the High Court framed the following question of for consideration: "(i) Having regard to the fact that Exbs. P-1 and P-2 are the sale deeds executed by the vendors in favour of the plaintiffs, whether the courts below are justified in holding that they have the effect a wakf." creating

11. A perusal of this question hardly gives an impression that the said question involves any question of law much less a substantial question of w. In the ordinary course, what we have stated above would have sufficed or the disposal of this appeal. However, the approach of the High Court in his case has been in total contravention of the law laid down by this Court in catena of decisions.

12. This Court had repeatedly held that the power of the High Court to Interfere in second appeal under Section 100 CPC is limited solely to decide à substantial question of law, if at all the same arises in the case. It has deprecated the practice of the High Court routinely interfering in pure findings of fact reached by the courts below without coming to the Conclusion that the said finding of fact is either perverse or not based on material on record.

13. In Ramanuja Naidu v. V. Kanniah Naidu! this Court held: (SCC Headnote)

"It is now well settled that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of Civil Procedure Code. The Single Judge of the High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code in the way he did."

14. In Navaneethammal v. Arjuna Chetty2 this Court held: (SCC Headnote)

"Interference with the concurrent findings of the courts below by the High Court under Section 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappreciate the evidence just to replace the findings of the lower courts. ... Even assuming that another view is possible on a reappreciation of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material."

15. And again in *Secy., Taliparamba Education Society v. Moothedath Mallisseri Illath M.N.3* this Court held: (SCC p. 486, para 5) *"The High Court was grossly in error in trenching upon the appreciation of evidence under Section 100 CPC and recording reverse finding of fact which is impermissible."* 16. We are not referring to these judgments because they have laid down new legal principles, but to highlight the fact how the High Court has over looked then dicta.

17. In the narration of facts of this case in the paragraphs hereinabove. we have referred to minimal facts of the case only to show that the question involved in the suit as well as in the appeal was a pure question of fact. The b recitals in the documents produced by the plaintiff itself established on their face the facts necessary settle the question in dispute, without even having to interpret the contents of the documents. The two courts below have correctly understood the same. In the instant case, if the learned Judge of the High Court felt that there was a need for examining the evidence to find out whether the findings of the lower courts were either perverse or not borne out of records then we would have expected him to refer to and discuss the evidence in detail, pointing out the fatal error committed by the courts below in their finding of fact. In the instant case, the High Court after quoting extensively from certain judgments of this Court and without pointing out how the ratio of those judgments applied to the facts of the present case, reversed the concurrent

finding which, in our opinion, was wholly unwarranted. The trial court noted the specific admissions made by PW 1 during the course of his cross-examination which clearly negated the case of the plaintiff/appellant. It also came to the conclusion that the evidence of PW 1 with reference to lack of opportunity given to the plaintiff was "clearly. false". The first appellate court during the course of its judgment held that the plaintiff at the first appellate stage had filed a fabricated affidavit in support of its application under Order 41 Rule 27 CPC for additional evidence, and directed that steps should be taken to impound the affidavit in question and to keep the affidavit in safe custody for further action in the matter against the persons concerned. If really the High Court had applied its mind to the facts of the case, as understood by the two lower courts, then certainly it should have commented upon the above circumstances relied upon by the lower courts. All these facts noted above give us an impression that the High Court has interfered with the concurrent findings of the two courts below in a routine and casual manner by substituting its subjective satisfaction in the place of the lower courts."

The conclusion of Hon'ble Supreme Court in para 17 of the above judgment would show how the said judgment has no application to the facts of the present case.

24. Learned counsel also relied upon the yet another judgment of Hon'ble Supreme Court in relation to the scope of Section 100 CPC. The Hon'ble Supreme Court in the case of *Pakeerappa Rai Vs. Seethama* reported in (2001) 9 SCC 521 has held that an erroneous finding of fact cannot be interfered with in a Second Appeal. It has been repeatedly held by this Court and the Hon'ble Supreme Court that this Court has no jurisdiction to reappraise the evidence.

However, if the conclusion reached by the lower appellate Court is perverse, this Court can interfere with the findings.

25. This Court has considered the judgment of lower appellate Court in full and pointed out its wrong and erroneous approach and misconstruction of pleadings as a whole. The perversity of the judgment of lower appellate Court has already been pointed out. As against the judgment of the trial Court which is well founded and supported by reasons, the lower appellate Court has committed a serious error in dismissing the suit in entirety even after holding that the plaintiff has proved his case of easement.

26. Having regard to the conclusions reached by this Court, this Court has no hesitation to hold that the plaintiff is entitled to the right of easement over plaint B and C Schedule property. The judgment and decree of the trial Court is perfectly in order. However, the judgment and decree of the lower appellate Court in A.S. No.12 of 2016 are liable to be set aside. The substantial questions of law raised by the appellant in B, C and E are answered in favour of the plaintiff appellant.

27. As a result the Second Appeal is allowed. No costs. The judgment and decree of the Principal Sub Judge, Cuddalore in A.S. No.12 of 2016, dated 15.11.2016, are set aside. The judgment and decree of the Principal District Munsif, Cuddalore in O.S. No.40 of 2011 dated 20.01.2016 are restored.

27.04.2021

Index:Yes/No
Speaking order / Non speaking order
bkn

To

1. The Principal Sub Judge, Cuddalore.
- 2.The Principal District Munsif, Cuddalore.



WEB COPY

S.A.No 266 of 2017

S.S.SUNDAR. J.,

bkn



S.A. No. 266 of 2017

WEB COPY

26.04.2021