



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.04.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN

S.A. (MD) Nos. 723 & 724 of 2006
and
C.M.P. (MD) Nos. 1 & 1 of 2006

G.Pitchai ... Appellant in both S.As.
-Vs-
1.Ganthimathi ... Respondent in both S.As.
2.Natesan ... Respondent in S.A. (MD) No.
723 of 2006
3.Pitchai ... Respondent in both S.As.
4.Murugan ... Respondent in S.A. (MD) No.
723 of 2006

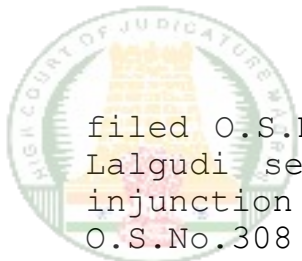
Prayer in S.A. (MD) No. 723 of 2006: Second Appeal is filed under Section 100 of the Civil Procedure Code, against Judgment and Decree dated 01.12.2005 made in A.S.No.71 of 2003 on the file of the Court of the First Additional Subordinate Judge, Thiruchirapalli, in confirming the Judgment and decree dated 17.02.2003 made in O.S.No.293/97 on the file of the District Munsif Court cum Judicial Magistrate, Lalgudi.

Prayer in S.A. (MD) No. 724 of 2006: Second Appeal is filed under Section 100 of the Civil Procedure Code, against Judgment and Decree dated 01.12.2005 made in A.S.No.70 of 2003 on the file of the Court of the First Additional Subordinate Judge, Thiruchirapalli, in confirming the Judgment and decree dated 17.02.2003 made in O.S.No.308/97 on the file of the District Munsif Court cum Judicial Magistrate, Lalgudi.

For Appellant : Mrs.J.Maria Roselin
for Mr.V.Sri Balaji
For R1 & R3 : Mr.S.K.Mani
For R2 : No appearance
For R4 : given up
(in both S.As.)

COMMON JUDGMENT

G.Pitchai S/o. Gurusamy is the appellant in these two second appeals. The contesting respondent is Ganthimathi. Ganthimathi
<https://hcservices.ecourts.gov.in/hcservices/>



filed O.S.No.293 of 1997 on the file of the District Munsif Court, Lalgudi seeking the relief of permanent injunction and mandatory injunction in respect of the suit pathway. The appellant filed O.S.No.308 of 1997 before the very same Court seeking the relief of permanent injunction restraining Ganthimathi and another Pitchai from interfering with his possession of the suit pathway. Both the suits were tried together. Ganthimathi examined herself as P.W.1 and her husband as P.W.2. Ex.A1 to Ex.A11 were marked. The appellant herein examined himself as D.W.1. Ex.B1 to Ex.B4 were marked. In the suit filed by the appellant, an application was taken out for appointing an advocate commissioner to note down the physical features of the property. The advocate commissioner's report, sketch and plan were marked as court exhibits X1, X4 & X5. The surveyor's sketch was marked as court exhibit X3. The learned trial munsif by Judgment and decree dated 17.02.2003 decreed Gandhimathi's suit and dismissed the appellant's suit. Questioning the same, the appellant filed A.S.Nos.70 and 71 of 2003 before the Sub Court, Trichirappalli. The First Appellate Court, by Judgment and decree dated 01.12.2005, dismissed the appeals. Challenging the same, these two second appeals have been filed.

2.S.A. (MD) No.723 of 2006 arises out of O.S.No.293 of 1997 filed by Ganthimathi. S.A. (MD) No.724 of 2006 arises out of O.S.No.308 of 1997 filed by the appellant. The second appeals were admitted by framing the following common substantial questions of law.

1. Whether the courts below are right in relying upon Exs.A1, A2, A4 and B4 which are irrelevant documents as per Sections 11 and 13 of Indian Evidence Act?

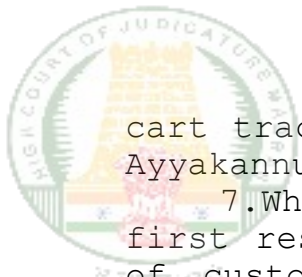
2. Whether the courts below are right in ignoring the commissioner's report, wherein it is specifically stated that there is a 10 feet cart track on the immediate north of the first respondent's property?

3. Whether the courts below are right in decreeing the suit of the first respondent herein for mandatory injunction in respect of 5 feet suit lane when there is specific finding by the commissioner, that there is only a 3 feet vacant space on the southern extremity of the appellant's property?

4. Whether the courts below are right in decreeing the suit of the first respondent herein in respect of 5 feet common lane when there is a specific findings by the Courts below that Exs.A1 and A2 do not speak about the existence of 5 feet common lane on the southern extremity of the appellant's property?

5. Whether the courts below are right in relying upon Ex.B3, when it has been specifically deposed by the second respondent herein that there is no recital therein about the existence of 5 feet common lane on the southern extremity of the appellant's property?

6. Whether the courts below are right in ignoring the admission of the second respondent herein that there is 10 feet



cart track on the immediate north of her property and south of Ayyakkannu's property?

7. Whether the trial Court is right in decreeing the suit of first respondent in respect of the suit property on the basis of customary rights, when the plaintiff has claimed common ownership rights in respect of the suit property?"

Notice was issued to the contesting respondent and the respondent has also entered appearance through counsel.

3. Before I take up the rival contentions for consideration, it is necessary to make a brief reference to the antecedent facts:-

A piece of land measuring 66 cents of lands abutting Ariyalur to Kallakkudi road belonged to three persons namely Ayyakkannu Udayar, Chidambarathudayar and Karuppudayar. There was a partition of the property among the three brothers. Ayyakkannu Udayar took 22 cents of lands on the northern side, while Karuppudayar took 22 cents of lands on the southern side. The middle portion of 22 cents was taken by Chidambarathudayar. Chidambarathudayar had three sons namely Gurusamy Udayar, Ponnusamy Udayar and Karuppudayar. There was a partition among three sons of Chidambarathudayar. The partition among the three sons was in equal shares. Gurusamy Udayar took the western portion abutting Ariyalur to Kallakkudi Main Road. Karuppudayar took eastern portion. Ponnusamy Udayar took the middle portion. Later, Karuppudayar sold his share to Ponnusamy Udayar vide Ex.B3, dated 04.07.1967. From Ponnusamy Udayar and his son Pitchai who is figuring as fourth defendant in O.S.No.293 of 1997 and first defendant in O.S.No.308 of 1997, Ganthimathi the contesting respondent herein purchased a portion on the eastern side vide Ex.A1, dated 18.08.1977. She purchased another portion vide Ex.A2 dated 15.07.1982. Ex.A2 was executed by Pitchai Udayar. Put together, the total extent of land purchased by Ganthimathi vide these two sale deeds would come to nine cents of land. According to Ganthimathi, she could reach her house only through the suit lane from Ariyalur to Kallakkudi Main Road. While so, the appellant Pitchai obstructed the pathway by erecting stone pillars. That necessitated filing of O.S.No.293 of 1997 seeking the relief of permanent injunction. Ganthimathi had obtained an order of temporary injunction initially and according to her, in defiance of the same, he had put up construction. Therefore, the plaint had to be amended and prayer for mandatory injunction also came to be later made during the pendency of the suit. On the other hand, the case of Pitchai was that the suit pathway is not really five feet wide but three feet wide. It is true that he had permitted the defendant namely Pitchai S/o Ponnusamy Udayar and Ganthimathi to use the pathway but that was by way of leave and licence. In other words, Ganthimathi used the suit pathway only at the sufferance of the appellant. Since such leave and licence had been explicitly revoked, Gandhimathi as well as Pitchai S/o Ponnusamy Udayar no longer enjoyed the right to use



the pathway. Be that as it may, the Courts below have concurrently found in favour of the contesting respondent Ganthimathi and against the appellant. Questioning the same, these second appeals have been filed.

4. The learned counsel appearing for the appellant Pitchai reiterated all the contentions set out in the memorandum of grounds. She pointedly contended that the Courts below have decreed the suit by rendering a finding that only through the suit lane, Ganthimathi can reach her property. In other words, according to the Courts below, Ganthimathi is entitled to pathway rights over the suit lane by way of easement of necessity. The appellant's counsel drew my attention to the pleadings of Gandhimathi in this regard. Gandhimathi had, in paragraph No.5 of her plaint, claimed that the suit lane is a common lane. In other words, Ganthimathi was seeking to exercise her proprietary rights over the suit lane. That is her specific case. The Courts below erred in granting relief by anchoring it on easement of necessity. In this regard, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in **Civil Appeal Nos.5798-5799 of 2008 (Bachhaj Nadar Vs. Nilima Mandal and another)**, dated 23.09.2008. Paragraph Nos.14 to 17 of the said decision read as under:-

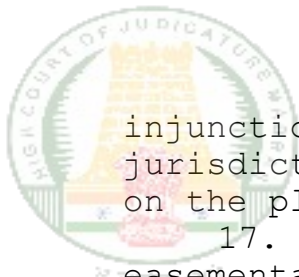
14. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have 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. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and 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.

15. A right of easement can be declared only when the servient owner is a party to the suit. But nowhere in the plaint, the plaintiffs allege, and nowhere in the judgment, the High Court holds, that the first or second defendant is the owner of the suit property. While concluding that the plaintiffs were not the owners of the suit property, the High Court has held that they have a better right as compared to the first defendant and has also reserved liberty to the plaintiffs to get their title established in a competent court. This means that the court did not recognize the first defendant as the owner of the suit property. If the High Court was of the view that defendants were not the owners of the suit property, it could not have granted declaration of easementary right as no such relief could be granted unless the servient owner is impleaded as a defendant. It is also understandable as to how while declaring that plaintiffs have only an easementary right over the suit property, the court can reserve a right to the plaintiffs to establish their title thereto by a separate suit, when deciding a second appeal arising from a suit by the plaintiffs for declaration of title. Nor is it understandable how the High Court could hold that the apart from plaintiffs, other persons living adjacent to and north of the suit property were entitled to use the same as passage, when they are not parties, and when they have not sought such a relief.

16. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs. one lakh, the court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery of possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent



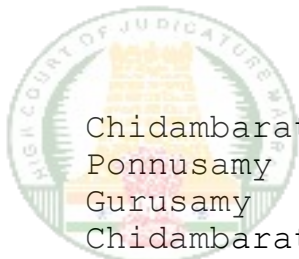
injunction, court grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

17. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage."

5. According to the learned counsel for the appellant, the ratio laid down in the aforesaid decision of the Hon'ble Supreme Court squarely applies to the case on hand. She would further point out that both in Ex.A1 as well as Ex.A2 which are the title deeds of Ganthimathi, there is no reference to the so called five feet lane. She also would point out that in Ex.B3 executed by Karuppudayar in favour of Ponnusamy Udayar, there is again no reference to the alleged lane. On the other hand, to the north of Ganthimathi's property, there is a ten feet wide cart track which has been specifically referred to by the advocate commissioner in his report. The contention of the appellant's counsel is that these material aspects have been totally lost sight by the Courts below. She therefore wanted this Court to reverse the impugned Judgment and answer the substantial questions of law in favour of the appellant and allow these second appeals.

6. Per contra, the learned counsel appearing for the respondent submitted that the impugned Judgments do not call for any interference and wanted me to sustain the same and dismiss these second appeals.

7. I carefully considered the rival contentions and went through the evidence on record. I have already noted that the larger extent of land measuring 66 cents belonged to three brothers namely Ayyakkannu Udayar, Chidambarathudayar and Karuppudayar. The partition among three brothers appears to have been oral. There is no dispute that the share allotted to Chidambarathudayar was sandwiched between the lands of Ayyakkanu Udayar and Karuppudayar.



Chidambarathudayar had three sons, namely, Gurusamy Udayar, Ponnusamy Udayar and Karuppudayar. The appellant's father is Gurusamy Udayar. The partition among three sons of Chidambarathudayar again was oral. It is also not known as to when the said partition had taken place. Gurusamy Udayar/father of the appellant had taken the portion contiguous to Ariyalur to Kallakkudi Main Road. Ponnusamy Udayar took the middle portion, while Karuppudayar took the eastern portion. Ponnusamy Udayar had purchased the Karuppuudayar's property in the year 1967 vide Ex.B3. It is not in dispute that Ponnusamy Udayar as well as the appellant had put up construction. Originally, they were tiled houses. The doors of both the houses opened on the southern side. In other words, the doors of both the houses were facing the suit lane. The appellant does not deny that the suit lane was used as pathway both by Ponnusamy branch as well as Gandhimathi. His only claim is that it was by virtue of his leave and licence and not by way of any easementary right.

8.However, as rightly pointed out by the learned counsel appearing for the respondents, the appellant, who examined himself as D.W.1, in his cross-examination, had admitted that the land lying to the north of his property as well as Ganthimathi's property belonged to Ayyakkannu Udayar. He also admitted that on Ayyakkannu Udayar's property, none from the Chidambarathudayar's branch will have any right. It may be that Ayyakkannu Udayar had left ten feet wide pathway, which, Ganthimathi or even Pitchai Udayar S/o Ponnusamy Udaiyar are using. As rightly found by the First Appellate Court, Ganthimathi has no right whatsoever on the piece of land lying to the north of her house. Now the question is as to how Ganthimathi can access her property. If even according to the appellant, Chidambarathudayar's branch will not have any right over the piece of land lying to the north of their share, then Ganthimathi as well as Ponnusamy branch can reach their respective houses only through the suit pathway and there is no other way. That is the categorical finding of the Courts below.

9.In the cross-examination of the appellant by the fourth defendant namely Pitchai S/o Ponnusamy Udayar, the appellant had admitted that the fourth defendant can go through the suit pathway. As rightly contended by the learned counsel appearing for the respondent, Section 13(e) of Easements Act, 1882 will come into play. The said provision reads that where a partition is made of the joint property of several persons, 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. This benefit or right would pass on the transferee also.

10.Now the core contention raised by the learned counsel appearing for the appellant will have to be answered. The appellant would point that if a proprietary right had been originally claimed



by the plaintiff, then, the Court has to either uphold the same or reject the same. The Court will not be justified in giving relief anchored on the premise of an easementary right. In support of the said contention, the learned counsel appearing for the appellant placed reliance on the decision in *Bachhaj Nahar Vs. Nilima Mandal and another*. The proposition advanced by the learned counsel for the appellant is beyond cavil. Now what has to be seen is the nature of pleading put forth by Ganthimathi. In Paragraph No.5 of her plaint, Ganthimathi though employed the expression 'common lane', actually means that only through the said lane, it is possible to reach Ponnusamy Udayar's portion. In Paragraph No.6 of the plaint, it has been specifically pleaded that there is no pathway to reach the plaintiff's house, except the suit lane.

11. From this, one can safely come to the conclusion that Ganthimathi was asserting only easementary right over the suit lane and she was not claiming any proprietary right. The Courts below, after an elaborate consideration of the oral as well as the documentary evidence, have found that even though there is a 10 feet wide cart track to the north of Ganthimathi's house, she has no right whatsoever over the same and that, it is through the suit lane, she can access her property. In Exs.A1 & A2-sale deeds executed in favour of Ganthimathi, it is stated that conveyance includes all the attendant pathway rights of the vendor. Ganthimathi claims right through the two sale deeds. While the first sale deed was executed by Ponnusamy Udayar as well as his son Pitchai, the second sale deed was executed by the son namely Pitchai alone. Since Ganthimathi claims right only through the very same Chidambarathu Udayar's property, Section 13(e) of the Indian Easement Right, 1882, will squarely come into play.

12. However, I must note that the exact dimensions of the suit pathway are not quite clear. The report of the advocate commissioner mentions that the suit pathway is three feet wide. However, the Courts below have given a finding that Ganthimathi is entitled to the relief of injunction in respect of the five feet wide lane. The advocate commissioner had categorically found that the suit lane does not measure five feet in width throughout. The said fact has not been dislodged. Therefore, the third substantial question of law is answered in favour of the appellant. Exs.A1, A2, A4 and B4 cannot be said to be irrelevant documents. Exs.A1 and A2 are the title documents of Ganthimathi and therefore, the Courts below rightly relied on them. The first substantial question of law is answered against the appellant.

13. The Courts below have not ignored the advocate commissioner's report. The Courts below had specifically taken note of the fact that there is a ten feet cart track on the immediate north of the Ganthimathi's property. Finding has been given that Ganthimathi has no right whatsoever over the ten feet wide cart



track. Therefore, it is not correct to contend that the Courts below have ignored this part of the commissioner's report. The second substantial question of law is answered against the appellant.

14. Even though in Exs.A1 and A2 as well as Ex.B3, the dimensions or presence of the suit lane may not have been mentioned, since the antecedent partitions were oral in nature, the Courts below were justified in taking into account the overall facts and circumstances to come to the conclusion about the existence of the suit lane. In fact, the appellant himself had admitted the existence of the suit lane. The controversy is more regarding right and width. While the advocate commissioner's report stated that it is three feet wide at some places, the respondent's counsel stated that it is five feet wide. Again the appellant would state that others have no right whatsoever. Except these controversies, the existence of the lane as such cannot be in dispute. This is more so because, all the three houses are having doors opening on the southern side. Question Nos.4, 5, 6 & 7 are also answered against the appellant.

15. Since I have found that the third substantial questions of law is in favour of the appellant, the decree passed by the Courts below is modified and injunction granted in favour of the Gandhimathi is confirmed by holding that the suit lane is not five feet wide but as set out in the report of the Advocate Commissioner. S.A.(MD)No.723 of 2006 is partly allowed. S.A.(MD)No.724 of 2006 is dismissed. I make it clear that the right of Ganthimathi is by way of easement of necessity and she is not having any proprietary right over the suit lane. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

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To

1.The District Munsif Court cum Judicial Magistrate,
Lalugudi.



S.A. (MD) Nos. 723 & 724 of 2006

2. The First Additional Subordinate Judge,
Thiruchirapalli.

3. The Record Keeper-2 copies
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.J.MARIA ROSELINE, Advocate (SR-16548[F] dated
20/04/2021)

+2 CC to Mr.S.K.MANI, Advocate (SR-16645[F] dated 20/04/2021)

Judgment made in
S.A. (MD) Nos. 723 & 724 of 2006
and
C.M.P. (MD) Nos. 1 & 1 of 2006
17.04.2021

KM(21.05.2021) 10P 8C