



SA.No.819 of 2006

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.10.2023

PRONOUNCED ON: 20.10.2023

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.No.819 of 2006

and

MP.No.1 of 2006

SAIL Refractory Company Ltd.,
Salem,
Formerly Burn Standard Co Ltd.,
Rep. by Chief General Manager,
Having Office at Salem-5.
Salem.

... Appellant

- Vs -

1. K.Udhayakumar (died)
2. K.Sureshkumar
3. Vinayathal @ Valli
4. Jayalakshmi
5. Kalaichelvi
6. K.V.Sabarishkumar

(R4 to R6 brought on record as LR's of the deceased R1 vide Court order dated 09.09.2022 made in CMP.Nos.4851, 4857 & 4854 of 2020)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 29.07.2005 passed in A.S.No.29/2004 on the file of the Principal Subordinate Judge, Salem



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confirming the judgment and decree dated 29.01.2004 passed in O.S.No.528/1992 before the I Additional District Munsif of Salem.

For Appellant : Mrs.Hema Sampath
Senior Counsel
for Mr.T.Sezhian

For Respondents : Mr.R.Nalliappan

JUDGMENT

The appellant herein is the 2nd defendant. The deceased 1st respondent is the brother of the 2nd respondent herein, and they are the plaintiffs in the suit. The 3rd respondent herein is the first defendant in the suit and owner of the adjacent property.

2. For the sake of convenience, the parties will be referred to according to their litigative status.

3. Brief averments of the plaint:-

a) The plaintiffs are the brothers and they have purchased the property situate in S.No.20/1 and 20/3 of Ammapalayam Village under two Sale Deeds both dated 16.09.1982 from one P.Ranganathan. The said Ranganathan purchased the said property on 19.08.1970 from one



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Kandasamy. According to the plaintiffs, for the above said lands a cart-track branches from east-west panchayat road and runs in S.Nos.18/9 and 17/2, which is marked as ABCDEF in the plaint plan, having width of 30 feet. The plaintiffs submits that they and their predecessor have been using the said cart-track to reach their lands situate in SF.Nos.20/1 and 20/3. The above said cart-tracks are referred to in their Sale Deeds. The suit cart track running in SF.No.18/9, which belongs to the 2nd defendant and the other strip of the suit property runs in SF.No.17/2, which belongs to the 1st defendant. The 2nd defendant has obstructed the cart track referred as “CD” in the plaint plan.

b) It is the further submission of the plaintiffs that they and their predecessor have been enjoying the suit cart track more than a statutory period continuously and would submit that they had perfected their title by prescription. It is the further submission of the plaintiffs that the suit cart track exists in S.F.No.18/9 has been sub-divided as 18/8 measuring 0.25 acres and classified as cart track poromboke. During 1985, the 2nd defendant encroached upon the portion of the cart track. Since the 2nd defendant has encroached upon the suit cart track, it has become



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necessary to file a suit for declaring the right to use the suit cart track and for permanent injunction. Hence, prayed to decree the suit declaring the plaintiffs' right to use the suit cart track and for removal of encroachment and for permanent injunction.

4. Brief averments of the 1st defendant's Written Statement:-

This defendant disputes the allegations made by the plaintiffs. It is the submission of this defendant that even if there is any cart track exists in S.No.18/9, there is no cart track available in 17/2. They are also disputing the rough sketch. This defendant submits that there is reference about the existence of public pathway on the eastern side of S.F.No.20/3. Hence, this defendant submits that the plaintiffs have right of public pathway on the eastern side of S.F.No.20/3. Therefore, it is the submission of this defendant that there is no need for the plaintiffs to make a claim for the right to use the alleged cart track. Hence, this defendant prayed to dismiss the suit.

5. Brief averments of the Written Statement of the 2nd—defendant:-

This defendant disputes the existence for cart track in S.F.No.18/6



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and 17/2 and this defendant also disputes the rough sketch. This defendant disputes the usage of the suit cart track by the plaintiffs and their predecessor. According to this defendant, the plaintiffs cannot claim any new right in their favour with reference to the 1st defendant's land. This defendant submits that the properties bearing S.F.Nos.20/1 and 20/3 belong to the same person and that they are the adjacent and contiguous lands. The above land have got right of cart track on the eastern side of S.F.No.20/3 and the same is mentioned in the Sale Deed of the 2nd plaintiff. Therefore, the plaintiffs' properties situate in S.F.Nos.20/1 and 20/3 have no right over the lands of this defendant. This defendant disputes the correctness of the recitals in the sale deed of the 1st plaintiff in respect of the alleged cart track. This defendant further submits that there is no cause of action in this suit. Hence, prayed to dismiss the suit.

6. Evidence and documents:-

Before the Court below, the plaintiffs had examined 5 witnesses as PW1 to PW5 and on behalf of the defendants, 4 witnesses have examined as DW1 to DW4. On behalf of the plaintiffs, 14 documents have been



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marked as Exs.A1 to A14 and 5 documents have been marked as Ex.B1 to B5 on behalf of the defendants. Exs.C1 to C4 have been marked as Court exhibits.

7. Finding of the both the Court below:-

The Trial Court, after considering the evidence and documents and after hearing the arguments of the parties, have ultimately decreed the suit. The Trial Court found that the plaintiffs have got right of easement over the suit cart track, however, under necessity. The above finding has been confirmed by the First Appellate Court. Aggrieved with the said order, the 2nd defendant is before this Court by way of the Second Appeal.

8. While admitting the Second Appeal on 25.07.2006, this Court has framed the following substantial questions of law:-

“(i) In the absence of pleading and proof that the plaintiffs have acquired easementary right by way of necessity, can a Court of law grant a decree holding that as easement of necessity, the plaintiffs are entitled to a decree as prayed for?”

“(ii) If the plaintiffs claim cannot be based on the easement of necessity, then in the absence of any grant in their



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9. Submissions of either side counsel:-

The learned Senior counsel appearing for the appellant/2nd defendant would contend that there is no proof as to the existence of passage in their land in S.F.No.18/9. The learned senior counsel would further contend that the very finding of the Trial Court granting the relief of declaration under the ground of easement of necessity is without any pleading. The learned senior counsel would also contend that the plaintiffs can have right through the land situate on the eastern side of the property purchased by them in S.F.Nos.20/1 & 20/3. It is the further submission of the learned senior counsel that contrary to the reference in Ex.A10-parental deed, in the plaintiffs' sale deed, which is marked as Exs.A1 & A2, there are self serving recitals, which cannot have any weightage or relevance for consideration of the existence of the passage. Hence, prayed to allow this Second Appeal.



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10. Per contra, the learned counsel for the respondents/plaintiffs would contend that even according to the proceedings of the Director of Survey and Settlement dated 09.05.1984, a cart track is directed to be classified as cart track poromboke in S.F.No.18/8. Therefore, it was argued that the contention put forth by the 2nd defendant that there is no cart track is contrary to the factual position. It is also further contended by the learned counsel for the respondents/plaintiffs that even prior to the proceedings of the Director of Survey and Settlement, in the plaintiffs' Sale deed, which is marked as Exs.A1 & A2, there is a clear reference about the existence of the suit cart track and the rights of the plaintiffs over the suit cart track. Therefore, the learned counsel for the plaintiffs would contend that the finding of fact recorded by the Trial Court, as well as the First Appellate Court is not liable to be interfered with. It is also the further submission of the learned counsel for the respondents that the concurrent findings recorded by both the Courts below is well considered and that there are no grounds for interference.

11. I have given my anxious consideration to either side submissions.



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WEB COPY **Analysis of the submissions:-**

12. In this case, the suit property is a cart track, which according to the plaintiffs runs in S.F.No.18/9 and 17/2 to a width of 30 feet and marked as ABCDEF in the plaint rough plan, which leads to the plaintiffs' land viz., S.F.No.20/1. However, the existence of the passage is strongly disputed by the 2nd defendant. Therefore, before we go into the rights of the plaintiffs over the alleged passage, there is a necessity arises for this Court to find out whether actually the suit cart track exist?

13. In this regard it is pertinent to mention herein that both the Courts below have recorded the finding of fact about the existence of the said passage. However, the learned senior counsel appearing on behalf of the 2nd defendant would contend that, since there is a perverse finding, the same is liable to be interfered with in the Second Appeal. Therefore, to find out whether the finding of fact recorded by both the Courts below is perverse, this Court deems it appropriate to consider the document relied by both the Courts below. While doing so, if we peruse Ex.A9, which is the proceedings of the Director of Survey and Settlement dated 09.05.1984, there is a clear cut finding about the existence of the cart



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track and the Director of Survey and Settlement has given a direction to the Revenue Authorities to classify an extent of 25 cents in S.F.No.18/8 as a cart track poromboke.

14. On perusal of Ex.A9-the 2nd defendant appears to be party to the proceedings. Even on perusal of FMB sketch, which has been filed by the plaintiffs under Ex.A7, S.F.No.18/8 has been subdivided. These documents are of the year 1984 &1987.

15. Even prior to the above documents, under Exs.A1 & A2, sale deed of the year 1982, where the plaintiffs purchased a land in S.F.Nos.20/1 & 20/3, there is a specific recital as to the existence of passage in S.Nos.18/9 and17. Though the defendants 1 & 2 have raised objection towards these documents, they were not in a position to put forth any material contradicting the above documents. Therefore, the existence of the passage and the right of the plaintiffs over the said passage are established through the above documents. This Court is of the firm view that the findings of fact recorded by both the Courts below are based upon acceptable materials available on record and such findings are well considered.



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16. Coming to the substantial question of law, the very substantial question of law has been formulated upon the findings recorded by the Trial Court as well as the First Appellate Court in respect of easement of necessity while decreeing the suit. In this connection, the learned senior counsel has relied upon the following Rulings:-

- (i) *Murugesu Moopanar Vs. Sivagnana Mudaliar* reported in *1997 1 CTC 348*;
- (ii) *Saripzella Venkatapathiraju Vs. Saripalli Subbaraju* reported in *(1931) 33 LW 191*;
- (iii) *R.Paramasivan Vs. T.Anasuya* reported in *ILR 2005 Kar 1188*;
- (iv) *Mariyayi Ammal Vs. Arunachalal Pandaram* reported in *(1956) 69 LW 435*;
- (v) *Krishnamarazu Vs. Marraju* reported in *ILR (1905) 28 MAD 495*;
- (vi) *Lambodar Panda Vs. Ramesh Chandra Panda* reported in *AIR 1958 Ori 248*
- (vii) *Ponnaiyan Vs. Karuppakkal* reported in *(2003) 2 LW 716*.

17. In all those judgments, the ratio is, the easement of necessity cannot be granted, for the sake of convenience. In this case, it is the



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submission of the defendants that according to Exs.A1 & A2-Sale deeds, existence of cart track on the eastern side of S.F.No.20/3 is mentioned. Therefore, contended that when the plaintiffs have got right of passage on the eastern side of S.F.No.20/3, there cannot have any right in the suit cart track on the ground of easement of necessity.

18. This Court has carefully gone through the pleadings of the plaintiffs. Nowhere in the pleadings, the plaintiffs sought for the relief based on the ground of easement of necessity. As rightly submitted by the learned Senior counsel, the word “easement” is not referred in the plaint. But on harmonious reading of the plaint, would reflect the prayer for declaratory relief for easement under the prescription. Therefore, this Court is of the view that, though there is a reference of the word “easement of necessity” in the judgment of the Trial Court as well as the First Appellate Court, it could only be construed as a misquoting instead of the phrase easement by prescription.

19. Therefore, this Court is of the view that the existence of the passage has been established under the Sale deed of the plaintiffs as well as the FMB sketch and the proceedings of the Director of Survey and



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Settlement. Therefore, it is clear that what the plaintiffs pleaded and what they prayed is a right under easement by prescription. The loose reference by both the Courts in respect of easement of necessity is as stated supra, nothing but misquoting. Therefore the contention put forth by the learned senior counsel that the relief granted by the Trial Court as well as the First Appellate Court was under the ground of easement by necessity is respectfully disagreed.

20. Therefore, this Court is of the firm view that the findings recorded by both the Courts below are liable to be confirmed. Thus, the substantial question of law are answered against the appellant. In the result, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected MP.No.1 of 2006 is also closed.

20.10.2023

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Index : yes/no

Speaking/Non Speaking Order

Neutral Citation Case: Yes/No



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C.KUMARAPPAN, J

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To

1. The Principal Subordinate Judge,
Salem.
2. The I Additional District Munsif,
Salem.

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and
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