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S.A.No.73 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on : 01.03.2023**

**Delivered on : 14.03.2023**

**CORAM**

**THE HONOURABLE Mr. JUSTICE V. LAKSHMINARAYANAN**

**S.A.No.73 of 2004**

1.Solave Gounder (died)

2.Rajendran

3.Narayanasamy

4.Rangasamy

5.Subbammal

6.Saraswathi

...Appellants/Respondents/Defendants

(Appellants 4 to 6 brought on record as legal representatives of the deceased 1<sup>st</sup> appellant vide order of this Court dated 04.04.2012 in C.M.P.No.319 to 321 of 2022)

**Vs.**

1.P.S.Venkatachalam

2.P.S.Velusamy (died)

3.Rani

4.Banu

...Respondents/Appellants/Plaintiffs



(Respondents 2 to 4 brought on record as legal representatives of the deceased 2<sup>nd</sup> respondent vide order of this Court dated 26.07.2012 in C.M.P.Nos.322 to 324 of 2012 in S.A.No.73 of 2004)

**PRAYER:** Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 29.08.2003 in A.S.No.125 of 2002 on the file of the learned I Additional District Judge, Coimbatore, reversing the Judgment and Decree dated 07.12.2001 in O.S.No.978 of 1991 on the file of the learned III Additional District Munsif, Coimbatore.

For Appellants : Mr.A.S.Vijay Ragavan

For Respondents : Mr.C.Venkatesan

### **JUDGMENT**

The legal heirs of the defendants in O.S.No.978 of 1991 on the file of the learned III Additional District Munsif, Coimbatore, are the appellants before this Court.

2.The aforesaid suit was presented for the following relief:

*“(a)granting a mandatory injunction directing the defendants to remove the obstructions that were made in the suit passage*



*(b)granting a permanent injunction restraining the defendants from putting up any further construction on the suit passage*

*(c)granting a permanent injunction restraining the defendants from interfering with the peaceful possession, enjoyment and user of the suit passage in any manner whatsoever.”*

3.It is the case of the plaintiffs that they are the owners of the property bearing Door Nos.45, 45A and 45B of Pachapalayam Village, Padathurai Post, Madhukkarai Via, Coimbatore. The defendants are the owners of the properties situated at 46A, 46B and 46C of the same Village. All the houses were constructed 50 years ago. They lie immediate East of a North - South Road and South of the East - West 'Thadam' measuring about 15 x 25 feet. The said passage is a common passage to the plaintiffs and the defendants. The lie of the passage is described by way of a Plaint plan. It is the case of the plaintiff that no one has exclusive right over the suit passage. While such is the case, the defendants obstructed the plaintiffs from using the suit passage and put



up temporary constructions in and over the passage. In order to settle the matter out of Court, a Panchayat was called for and despite the intervention of the Village elders and the President of Panchayat, the defendants proceeded further and put up temporary constructions. As the first plaintiff died the legal representatives were brought on record in the suit.

4. On service of summons, the defendants stated that the properties are the joint family properties and the area which has been left open by 25 feet and 15 feet belonged to them absolutely. They claimed that they constructed a shed for tethering cattle reared by the 2<sup>nd</sup> defendant. According to them, the front way of their house had been described as Thadam and it is a cart track line that it is a common passage. It was further pleaded that originally the entries of the property were facing East and 15 years ago, they reconstructed house facing the North. They also pleaded about other alternative passages available for the defendants' use to reach the North – South road. They further asserted that the plaintiff has no right or interest subject over the property and the plaintiff has no right to take his bullocks through the front yard.



According to them, the existing structure had been there for over 24 years and that there was no Panchayat held on 02.04.1991 and the open space of 15 feet belongs to them and it is not a part of the common passage.

5.An Advocate Commissioner was appointed pending the suit in I.A.No.23 of 1996. After giving due notice to both the plaintiffs and the defendants, the property was inspected on 15.11.1996. The Advocate Commissioner pointed out that ABCDE in his Plan, where the houses of the parties in the suit and the Point AB is a single wall and the point UV in his Plan are the wall which has been divided by the petitioner and the respondent's property. He pointed out the newly constructed house belonging to the defendants on the Eastern side of the defendants house and marked it as point B1 to B6 in the Plan. He also pointed out that there was vacant site in front of the parties houses and it has been used to dry the agricultural products. He pointed out from the North - South road there is a East – West pathway behind the house of the parties.



6.The following issues were framed by the trial Court for consideration:

*“(1)Whether the plaintiffs are entitled to the relief of mandatory injunction as prayed for?*

*(2)Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for?*

*(3)To what relief the plaintiffs are entitled?”*

7.The parties went to trial and the plaintiff examined PW1 and PW2 and marked 14 documents. The defendants examined two witnesses and marked six documents.

8.The learned trial Judge after giving the following findings,

”ஆரம்பத்தில் கிழக்கு பார்த்தபடி இருந்துள்ளது என்பது தெரிய வருகிறது. மேலும் சுமார் 20 வருடங்களுக்கு முன்பாக வடக்கு பார்த்தபடி கட்டப்பட்டுள்ளது என்பதும் இவ்வழக்கில்



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விசாரிக்கப்பட்ட சாட்சியங்களில் இருந்து  
தெரியவருகிறது. ஆக கடந்த 20 வருடமாக  
வாதிகள் தங்கள் தாவாவில் கூறியுள்ளபடி தாவா  
பொது பாதையில் சென்று வந்துள்ளார் என்பது  
தெரிய வருகிறது. அவ்வாறு சென்று வரும்  
பொதுபாதையை தவிர வேறு பாதையும் வாதிகள்  
சென்று வருவதற்கு உள்ளது என்பது வா.சா.1,2  
மற்றும் பி.சா.1,2 ஆகிய சாட்சியங்கள் மூலமும்  
இவ்வழக்கில் நீதிமன்ற ஆணையர் தாக்கல்  
செய்துள்ள நீ.ம.சா.ஆ.1,2 ஆகிய ஆவணங்கள்  
மூலமும் நன்கு தெரியவருகிறது.”

dismissed the suit on the ground that as the plaintiff had failed to prove his case and the suit stands dismissed. The matter was taken on appeal to the file of the learned I Additional District Judge, in A.S.No.125 of 2002. The First Appellate Court reversed the Judgment of the trial Court and granted a decree as prayed for. Aggrieved by the same, the present appeal has been preferred.



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9.This Second Appeal was admitted on the following Substantial Questions of Law:

*“Is not the decree of the lower appellate Court liable to be set aside as the plaintiffs failed to plead and prove that the entire property was a single tenement originally and the same got divided into distinct and separate tenements later and their portion cannot be used at all without enjoying an easement over the portion of the defendants.”*

10.I heard Mr.A.S.Vijay Ragavan, learned counsel represented the appellants and Mr.C.Venkatesan, learned counsel appointed by the Legal Services Authority to represent the respondents.

11.Mr.A.S.Vijay Ragavan, learned counsel appearing for the appellants would argue that the learned District Judge was wrong because the evidence of PW1 and PW2 reveal alternate lanes and existence of passages leading to the house. He would also contend that



the plaintiffs had not proved the title to the suit property and therefore, the suit has to fail. He would further contend that the report of the Advocate Commissioner and Plan are not evidence of a common passage and cannot be read as evidence in the suit. He would further claim that the plaintiffs have not sought declaration for the easement of necessity and since he had alternate approaches to the property they are not entitled to any relief on the ground of easement of necessity. He would further argue that the plaintiffs had not proved that they had bullocks and bullock cart and they are not entitled to any relief for carrying bullocks and bullock cart through the common passage. He would further argue that as none of the documents marked on the side of the plaintiffs to show the existence of the common pathway, the Lower Appellate Court fell in error in placing reliance upon the Advocate Commissioner's report and the photographs under Ex.P.12 and 13 to grant the decree.

12.Per contra, Mr.C.Venkatesan, learned counsel appointed by the Legal Services Authority to represent the respondents would submit that neither the plaintiff nor the defendants denied the existence of the



common pathway and that both of them were enjoyed the common passage to the length of 25ft to 15 ft. He added that under Ex.C.4 – ABCDE is marked as the house of the plaintiffs and the defendants and all the documents to show that the property was enjoyed in common. He would heavily rely upon the Commissioner's report to argue that the Lower Appellate Court has rightly relied upon the same for the purpose of proving the existence of the open area and that there is no necessity for the Court to going into the issue of easement of necessity when that is not the case of the plaintiff. He would also submit that since the case of the defendants is the 'Thadam' belongs to them they have not let in any evidence to prove that the owners of the area, they are not entitled to put up any construction over the same.

13.I have carefully gone through the pleadings, records and perused the Judgment of the trial Court and the Lower Appellate Court. This is the suit for injunction not based on title, but one based on long usage and possession. The defendants though had raised the plea of easement in the Second Appeal to unsuit the plaintiffs, this Court is not going into the issue of title or easement as it is not the case projected



before the trial Court or the Lower Appellate Court. The question of title can only to be incidentally go into the suit for injunction and in this case, I am not going into the question of title because though the defendants had pleaded title to the portion of 15ft by 25ft, they had not filed any documents to substantiate the same. The issue that has to be considered is the pathway shown in the Commissioner's Report whether the Commissioner's report can be taken as evidence and the suit be decreed on that basis. I feel the answer lies under Order 26 Rule 10 of the Code of Civil Procedure which reads as follows:

*“10. PROCEDURE OF COMMISSIONER.*

*(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

*(2) Report and deposition to be evidence in suit.*

*Commissioner may be examined in person- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or,*



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*with the permission of the Court, any of the parties to suit may examine the Commissioner personally in open Court touching any part of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

*(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”*

14.A perusal of the Order 26 Rule 10 of the Code of Civil Procedure shows that the proceedings and the report of the Commissioner shall be read in evidence. If a party to the suit or the Court itself is dissatisfied it can always give a further direction to the Commissioner either to redo the work or scrap the report and to appoint a fresh Advocate Commissioner for the purpose of satisfying itself with regard to the matter in issue. In this case, no objection had been taken to the Advocate Commissioner's report by either party and it is not open to the appellant to agitate its correctness of the first time in the Second Appeal. When the Code of Civil Procedure directs that the report of the



Commissioner shall be an evidence in the suit and shall form part of the record, to argue that the Court cannot rely upon the same as evidence, is not acceptable. In this case, the Advocate Commissioner has found that the area of 15ft by 25 ft is being used as a passage and it is substantiated by Ex.A.12 and Ex.A.13 – Photographs to show the existence and obstructions. The inscription on the building reads “1994” and it is a practice in this part of the Country to inscribe the area of the construction of the building. The fact that the house of the parties were originally facing North and subsequently, changed to East would show that the passage would be 25 ft and 15 ft for the entrance of the properties. The question of easement would arise only if there is a dominant owner and a servient user. As pointed out above, I am refraining from going into the issue of title or easement because the suit is not based on either but on the basis of long enjoyment. The Lower Appellate Court has applied its mind and reversed the Judgment of the trial Court after proper appreciation of evidence. The findings given in Paras 22 to 25 of the Lower Appellate Court Judgment are based on material facts and evidences. The Lower Appellate Court is the last



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Court of the appeal on facts sitting in Section 100 of the Code of Civil Procedure, unless the finding is perverse, I am afraid I cannot exercise the power of reversal. The fact that the plaintiffs did not produce evidence that he was earning bullocks or bullock cart does not make the difference to the suit because it was his right to use the passage common which was in issue. Therefore, the argument of easement of necessity do not stand for consideration.

15.The entire Second Appeal is predicated on the plea of easement as it does not arise in the present situation and the question of law does not arise. In any event, the question of law framed is not a substantial question of law and therefore, this Court need not answer an academic question.

16.In fine, the Second Appeal fails and it is dismissed. The Judgment and Decree of the Lower Appellate Court reversing the Judgment and Decree of the trial Court stands confirmed.



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This Court places on record the assistance given to it by Mr.C.Venkatesan, Advocate appointed by the Legal Services Authority to conduct the appeal. He had argued the matter with all fairness and vehemence and the Court records its appreciation for the same. As the matter was argued by a Counsel engaged by the Legal Services Authority and since the issue involved is a passage of 25 ft by 15ft, this Court is not inclined to order costs.

**14.03.2023**

Index : Yes/No  
Internet : Yes/No  
Speaking order / Non speaking order  
mps

To

1.The I Additional District Judge,  
Coimbatore.

2.The III Additional District Munsif,  
Coimbatore.



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**V. LAKSHMINARAYANAN, J,**

mps

**Pre-delivery Judgment in**  
**S.A.No.73 of 2004**

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