



S.A.No.489 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.07.2023

Coram :

THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Second Appeal No. 489 of 2023

Elamathi

.. Appellant

Versus

1.State of Tamil Nadu,
Rep., by its District Collector,
Ariyalur.

2.The Revenue Divisional Officer,
Udayarpalayam,
Ariyalur District.

3.The Tahsildar,
Tahsildar Office,
Jayankondam, Ariyalur District.

4.The Commissioner,
T.Pallur, Udayarpalayam,
Ariyalur District.

5.Pushpavalli

6.Sengutuvan

7.Poiyamozhi

.. Respondents

Second Appeal filed under Section 100 C.P.C., against the judgment and decree dated 20.11.2018 made in A.S. No.99 of 2017 on the file of Subordinate Court, Jayankondam, Ariyalur District, confirming the



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judgment and decree dated 23.01.2017 made in O.S.No.342 of 2010 on the file of District Munsif Court, Jayankondam, Ariyalur District.

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For Appellant : Mr.S.Sarath Chandran
For Respondents : Dr. S. Suriya,
1 to 4 Additional Government Pleader

JUDGMENT

The unsuccessful plaintiff, who lost his case before the trial Court as well as lower appellate Court, has filed the present second appeal.

2. For the sake of convenience, the parties are referred to as they are arrayed in the original suit.

3. The case of the appellant/plaintiff is as under:-

Defendants 5 to 7 are the owners of the suit property and the house of the said defendants is situated in the suit property which is shown in the plan. The plaintiff is having a property in S.No.386/10A and originally, the said property belonged to one Arunachalam, who purchased the same on 24.07.1930. Later on, during partition, it was allotted to the plaintiff's father and after his demise, property in Survey No.386/10A was allotted to the plaintiff during partition between the plaintiff and his brother viz., Mathiyazhagan. To access the said Survey No.386/10A, there is a cart-



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pathway about 8 feet width and 70 feet length in the suit property, which belongs to defendants 5 to 7 in Survey No.386/8. The plaintiff and his predecessors have been using the suit property as a cart pathway from several years ago and now, the defendants are restraining the plaintiff from using the said pathway. Hence, the plaintiff filed the suit claiming right over the suit path-way by way of easement of necessity and for permanent injunction.

4. The third defendant had filed the written statement denying all the averments made in the plaint and contending as under:-

Defendants 5 and 6 had constructed the house in the suit property, for which, the fourth defendant has granted permission. The plaintiff had unnecessarily impleaded defendants 1 to 4 in the suit filed for easementary right. If the plaintiff has been enjoying the suit property, there is no need for defendants 1 to 4 to disturb him and seeking permanent injunction as against defendants 1 to 4 is legally unsustainable and the suit has to be dismissed with costs.



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5. Defendants 1, 2 and 4 had adopted the written statement filed by the third defendant.

6. Defendants 5 to 7 have filed a written statement contending as under:-

6.1. The rough plan filed along with the plaint is incorrect and the plaintiff has to prove that Survey No.386/10A belonged to him. Further, Survey Number has not been mentioned in the sale deed dated 4.07.1930 which stands in the name of Arunachalam and in the plaint there is no whisper as to which item relates to Survey No.386/10A and if it is true that the suit property is used as a path-way or cart track, the same would have found place in the sale deed itself and also in the partition deed dated 06.04.2010 entered into between the plaintiff and his brother, but there is no whisper about the cart path-way. The portion which was allotted to the plaintiff in the said partition was not stated in the partition deed. The plaintiff's brother Mathiyazhagan has not claimed any right over the pathway.

6.2. The plaintiff had never cultivated in the suit survey



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No.386/10A. The plaintiff and his predecessor had never enjoyed the suit property as pathway and the plaintiff and his predecessor had never taken their cattle through the suit property. It is false to state that the plaintiff does not have access to reach his land. He can very well reach his property by using northern to southern road which is situated on the western side of the suit property and then by entering into the property situated in S.No.386/7 and 6. There is no easmentary right to the plaintiff in the suit property. As stated by the plaintiff he never used the suit property either by walking or riding any vehicle. Therefore, the suit is liable to be dismissed.

7. On the above pleadings, the Trial Court framed the following issues:-

1. Whether the plaintiff has easementary right in the suit property?
2. Whether the plaintiff is entitled for the relief of consequential permanent injunction in respect of the suit path-way?
3. To what other relief?

8. Before the trial Court, the plaintiff examined himself as PW1



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and one Chakaravarthy as PW.2 and marked Exs.A1 to A5 in support of his case. On the side of the defendants, the sixth defendant examined himself as DW1 and one Ethirasan was examined as DW2 and Exs.B1 to B11 were marked. The Advocate Commissioner's Report and Plan were marked as Exs.C1 and C2.

9. On scrutiny of the oral and documentary evidence, the trial Court dismissed the suit. Challenging the judgment and decree of the trial Court, the appellant/plaintiff has filed A.S.No.99 of 2017. The Subordinate Judge, Jayankondam, by judgment dated 20.11.2018, confirmed the judgment and decree of the trial Court and dismissed the Appeal Suit. Questioning the correctness of the judgment and decree made by both the Courts below, the appellant/plaintiff has filed the present second appeal.

10. Mr.S.Sarath Chandran, learned counsel appearing for the appellant, would submit that the Courts below had failed to consider the easementary right of the plaintiff and the pathway was used over several years by his predecessors and the plaintiff does not have any other way to reach his agricultural land except the suit pathway. He would further submit



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that the Courts below had failed to appreciate the Advocate Commissioner's Report, which were marked as Exs.C1 and C2. He would also submit that the Courts below had erred in holding that the appellant has not impleaded his brother for claiming easementary right though his brother died even before filing of the suit. He would further submit that the findings of the Courts below are against the settled principles of law and hence, the second appeal has to be allowed.

11. Per contra, Dr.S.Suriya, learned Additional Government Pleader appearing for the respondents 1 to 4, would submit that the plaintiff has never used the suit property as a pathway and he can very well reach his property by using the northern to southern road which is situated on the western side of the suit property and then by entering into the property situated in S.No.386/7 and till now, he is using the above pathway to reach his suit property. She would also submit that even though the Advocate Commissioner has noted the path way in the suit property, he had never stated that the plaintiff is using the suit property as a pathway. Further, the learned Additional Government Pleader would submit that the pathway which was noted by the Advocate commissioner is used by defendants 5 to



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7 to reach their house from road and simply because the Advocate Commissioner has noted the pathway in the suit property does not mean it is the pathway used by the plaintiff and hence, the appeal is liable to be dismissed.

12. Heard the learned counsel appearing for the parties and perused the judgments of the courts below in the light of the substantial questions of law raised by the Appellant.

13. It is the case of the plaintiff that he is having a property in S.No.386/10A and originally, it belonged to one Arunachalam, who had purchased the same on 24.07.1930 and later during partition, it was allotted to the plaintiff's father and after his demise, during partition between the plaintiff and his brother viz., Mathiyazhagan, Survey No.386/10A was allotted to the plaintiff. To access the said Survey No.386/10A, there is a cart-pathway about 8 feet width and 70 feet length in the suit property, which belongs to defendants 5 to 7 in Survey No.386/8. He is using the pathway as cart track to reach his property which is situated on the southern side in survey No. 386/10A. Further the plaintiff has stated that from time



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immemorial his predecessors and himself have been using the suit property as cart pathway and therefore, the plaintiff had perfected his title by way of necessity.

14. Though the plaintiff has claimed right over the suit property, which belongs to the defendants stating that he is enjoying the suit property as a pathway for several years, no document has been filed by the plaintiff to show that the plaintiff and his predecessors have been using the suit property as a pathway. The plaintiff had simply stated that he is entitled to the suit pathway as an easement, the same was not noted in the FMB issued by the Revenue Authority. The main contention of the plaintiff is that the Advocate Commissioner has noted the pathway in the suit property. To the contrary, it is clear that the pathway which was noted by the Advocate Commissioner is used by the defendants to reach their house from road which is situated in the suit property. Further, merely because there is an existence of pathway in the suit property and his predecessors and himself had been using the suit property as cart track for several years, it does not mean that the plaintiff is using the suit property as a pathway. Therefore, the trial Court has not taken into consideration the pathway noted by the



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Advocate Commissioner and rightly dismissed the suit holding that the extent of the pathway was not clearly mentioned and the brother of the plaintiff was not added either as a party or examined as witness on the side of the plaintiff.

15. It is admitted by both parties that defendants 5 to 7 are the owners of the suit property. The plaintiff is claiming the pathway in the suit property belonging to the defendants 5 to 7 by way of easement of necessity. The plaintiff has stated that his predecessor and himself had been using the pathway over several years. Had there been a pathway by way of easement of necessity, it would have been very well be mentioned in the relevant documents viz., Partition deed. As rightly argued by the learned Additional Government Pleader, simply because the Advocate Commissioner has noted the existence of pathway, it does not mean that it is used as pathway by the plaintiff. Of course, existence of a **முங்கில் பாதல்** on the southern side of the suit property has been relied on by the appellant/ plaintiff to contend that the suit property is used as the pathway, but that itself does not mean that the pathway in the suit property is used by the plaintiff. The plaintiff claims right over the pathway in the suit property



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stating that his predecessors and himself had been using the suit property as cart track for several years. Had the suit property been used as a cart track as stated by the plaintiff, there would not have been a small opening (முக்கில்லு) on the southern side of the suit property, through which, the cart cannot enter. Further, there is no supporting material placed by the plaintiff to establish that there is a cart pathway in the suit property. It seems that the plaintiff is claiming easement right both by prescription and necessity, stating that the plaintiff and their predecessors have been using the suit property as pathway over several years and further stating that he is claiming pathway by way of necessity. The very claim by necessity itself is inconsistent. An easement of necessity means an easement without which the property cannot be used at all. Mere convenience is not the test of an easement of necessity. A man cannot acquire a right of way as an easement of necessity, if he has got other means of access to his land. The easement of necessity is not to be granted merely on the ground of convenience, but solely on the ground of absolute necessity. The easement of necessity cannot be claimed on the ground that other available ways are inconvenient. The plaintiff, who is claiming the right of pathway over the suit property of the defendants, must produce a valid and documentary evidence to show



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that the plaintiff is enjoying the suit property as a cart track from the time immemorial. As far as this case is concerned, the plaintiff has not filed any document to show that the suit property is used as a cart pathway by the plaintiff. Simply because the Advocate commissioner has noted the existence of pathway, it does not mean that it is used as path way by the plaintiff. As concluded by the trial Court the plaintiff has not clearly mentioned about the extent of pathway and the plaintiff has not chosen to implead his brother neither as a party nor examined as a witness. Having carefully analysed the materials available on record and on elaborate discussion, the appellate Court has arrived at the conclusion that when there is an alternative pathway for the plaintiff, the plaintiff is not entitled to claim the suit pathway on the ground of easement of necessity and the appellate Court has rightly dismissed the Appeal Suit.

16. In view of the above discussion, this Court is of the view that both the Courts have rightly rejected the claim of the plaintiff both on law and facts. Accordingly, this Court finds that there is no question of law much less substantial question of law involved in the appeal requiring admission.

17. The Hon'ble Apex Court in ***Kirpa Ram (D) Tr.Lrs. vs***



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Surender Deo Gaur (2020 Scc OnLine SC 935) has categorically held as

under:-

"23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or re- formulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings



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recorded by the First Appellate Court."

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18. In view of the above, no question of law much less substantial question of law arises for consideration, the Second Appeal fails and the same is dismissed at the admission stage itself. No costs. The connected Miscellaneous Petition is closed.

19.07.2023

raa

To

- 1.The District Munsif,
Jayankondam.
- 2.The Subordinate Judge,
Jayankondam.
- 3.The Record Keeper,
V.R.Section, High Court, Madras.



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A.D.JAGADISH CHANDIRA,J.

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