



S.A.(MD).No.245 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

S.A.(MD).No.245 of 2021 and
CMP(MD) No.3419 of 2021

P.Chinnathambi

... Appellant

Vs.

1.C.Vellaiyammal

2.A.Chinnu Naiker

3.C.Dhanalakshmi

4.Moorammal (died)

5.Devika

6.N.Thangam

7.A.Vijaya

8.Chinnaponnu

... Respondents

(Respondents 5 to 8 are brought on record as LR's of the deceased 4th respondent vide order dated 21.12.2021 in CMP(MD) No.10939/2021)



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PRAYER: The Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 01.05.2020 in A.S.No.1 of 2020 passed by the learned Sub Judge, Manapparai, Trichy reversing the judgment and decree of the Principal District Munsif, Manapparai, Trichy dated 15.10.2019 in O.S.No.394 of 2014.

For Appellant : Mr.P.Ganapathi Subramanian

For Respondents : Mr.AN.Ramanathan for R1

No appearance for R3 and R8

J U D G M E N T

This appeal is filed challenging the judgment in AS No.1/2020 on the file of the Sub Judge, Manapparai reversing the judgment in O.S.No.394/2014 on the file of Principal District Munsif, Manapparai.

2. The appellant/plaintiff filed the suit seeking declaration that plaintiff has ancestral right in 'B' Schedule property as pathway to reach his 'A' schedule property and for the consequential relief of permanent injunction restraining the defendants from interfering with the possession and enjoyment of 'B' schedule property.



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3. The case of the plaintiff in brief is that 'A' schedule property belongs to the plaintiff ancestrally. The plaintiff had constructed houses in 'A' schedule property and living there for more than 100 years, since the time of his father. Leaving the house portion, remaining portions are used for agricultural purposes. 'B' schedule property was originally, the Government tharisu land. The plaintiff and his family members have been using the 'B' schedule property as a pathway to reach 'A' schedule property for more than 100 years. The remaining portion in the 'B' schedule property is used for Kalam, Kattuthari etc. and is being enjoyed along with 'A' schedule property. Plaintiff has no other alternative way to reach 'A' schedule property. There is a common mayana pathai on the south of 'B' schedule property. Since the plaintiff is in possession and enjoyment of 'B' schedule property for a long time, he got title by long possession. The defendants have no right in 'B' schedule properties. The defendants have stated that they got patta in respect of 'B' schedule property and started disturbing the plaintiff's enjoyment in 'B' schedule property from 10.09.2014. They are trying to enjoy the 'B' schedule property along with other properties on the east of the said property. In the said circumstances, the suit was filed.



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4. In the written statement filed by the third defendant, it is stoutly denied that 'B' schedule property is waste land of the Government. It is stated that the plaintiff has got no manner of right over 'B' schedule property, especially, plaintiff has no right of pathway to 'A' schedule property at any point of time. 'B' schedule property is the agricultural punja and it was originally owned, possessed and enjoyed by one Chinniah Naicker. He sold the same to the second defendant through a registered sale deed dated 09.07.1980. Since the date of purchase, the second defendant was in possession and enjoyment and then, he sold it to the third defendant through a registered sale deed on 08.03.2010. Since the date of purchase, the third defendant is in possession and enjoyment of 'B' schedule property. Plaintiff has got access to his property through other lands. The 'B' schedule property was not used as pathway at any point of time. The suit is filed suppressing the true and material facts.

5. During trial, on the side of the plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A7 were marked. On the side of the defendants, D.W.1 was examined and Ex.B1 to Ex.B5 were marked. Apart from these documents, Ex.C1



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to Ex.C3 - commissioner's report, plan and surveyor's plan respectively were marked.

6. On the basis of the oral and documentary evidence, the learned trial Judge, mainly on the basis of the Advocate Commissioner's report, found that the plaintiff has no other pathway except the pathway in 'B' schedule property to reach his property in 'A' schedule and thus, decreed the suit. Aggrieved by the judgment, the defendants 3 and 4 filed appeal in A.S.No.1/2020. The appellate Court, on going through the oral and documentary evidence, found that the documents produced by the defendants show that the third defendant has title to 'B' schedule property. When that be the case, the claim of declaratory relief on the basis of long possessory enjoyment, without a pleading for acquiring right by adverse possession, is held to be not in accordance with law. It was also found that when it is true that plaintiff is not having title over 'B' schedule property and that it belongs to the third defendant, the suit filed seeking declaratory relief on the basis of possessory right and not seeking the relief of easementary right is not right. When it is stated in the plaint that the suit property was originally belong to the Government, the declaratory right cannot be sought without impleading the Government.



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7. With regard to the Commissioner's report, the appellate Court found that the Commissioner has just stated that there is no other pathway to the plaintiff land in 'A' schedule property from mayana pathai, except 'B' schedule property. However, he has not specifically stated that plaintiff has no other pathway. Had the suit been filed seeking easementary right, all these factors especially whether the plaintiff has any other alternative pathway to reach his property or not could have been found. When that is not done, on the basis of the present pleadings and evidence, the appellate Court reversed the finding of the trial Court and dismissed the suit. Challenging the dismissal of the suit, the second appeal is filed.

8. The learned counsel for the appellant submitted that the plaintiff had in fact claimed easementary right and necessary pleadings are available in Paragraph 5 of the plaint. The learned Advocate Commissioner had inspected the property and on a proper inspection of the properties, he found that there is no alternative pathway available except 'B' schedule pathway to reach the plaintiff's 'A' schedule property. When that be the position, the dismissal of the suit



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rejecting the commissioner's report is not correct. Thus, he prayed for setting aside the judgment of the appellate Court and for allowing this appeal.

9. In response, the learned counsel for the respondents 1 and 2 submitted that 'B' schedule property exclusively belongs to the third defendant. There is no pathway as claimed and as explained by the plaintiff. The commissioner's report has only stated that there is no pathway to reach 'A' schedule property from mayana pathai, except 'B' schedule property and it is not stated that there is no alternative pathway available at all to reach the 'A' schedule property. The first appellate Court has rightly rejected the commissioner's report and dismissed the suit along with the other finding, ie., the suit was not laid for the relief based on easementary right/adverse possession. Thus, he prayed for dismissal of this appeal.

10. I have considered the rival submissions made on either side and perused the materials available on record.

11. Admittedly, there is no dispute with regard to 'A' schedule property.



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The dispute is whether 'B' schedule property is a pathway and if so, whether it was enjoyed by the plaintiff, as claimed by him, for more than 100 years and whether he acquired right in 'B' schedule by his long possession and enjoyment. It is seen that the plaintiff has specifically pleaded that 'B' schedule property is a Government tharisu land and it was used by the plaintiff and his family members from the time of his father fore more than 100 years as pathway and for other activities, like, keeping kalam, kattuthari etc. Thus, he claims that he acquired possessory right in the suit property by long enjoyment. Admittedly, there is no pleading or prayer that plaintiff claims easementary right by prescription by long and continuous enjoyment of the 'B' schedule property for more than the statutory period. It is also not the case of the plaintiff that he acquired title to the suit property by adverse possession by the long and continuous enjoyment of the suit property to the knowledge of its true owner for more than the statutory period.

12. As stated above, the defendants case is that 'B' schedule property was an agricultural punja owned and enjoyed by Chinniah Naicker and then sold to the second defendant by Chinniah Naicker, The second defendant then sold the property to the third defendant. In support of this claim, the defendants have



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produced Ex.B1 to Ex.B5 sale deeds and revenue records in the name of the defendants 2 and 3. Plaintiff has produced Ex.A1 to Ex.A6 belong to 'A' schedule property. As stated earlier, there is no dispute with regard to 'A' schedule property. Ex.A7 has been produced to show that 'B' schedule property was originally shown as Tharisu.

13. 'B' schedule measures 34 cents in S.No.456/4. It is shown as Tharisu in Ex.A7. In Ex.B1 sale deed in favour of D2, the vendor Chinniah Naicker says that the properties covered in the sale deed belong to him ancestrally and also by his possessory enjoyment. This property was again sold to the third defendant through Ex.B2 - sale deed. Ex.B3 - patta shows that patta was issued in respect of 'B' schedule property to the second defendant. After purchase by the third defendant, patta was issued in his favour in respect of 'B' schedule property. Ex.B1 to Ex.B4 documents show that 'B' schedule property was sold by Chinniah Naicker to the second defendant and then the second defendant to the third defendant. There is a recital in Ex.B1 - sale deed that he got patta in respect of 'B' schedule property. This patta is not produced in this case. But the fact remains that Ex.B3, Ex.B4 patta had been issued in favour of D2 and D3 in respect of 'B'



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schedule property. If the plaintiff claims right against the Government, the Government should have been made as a party to the suit. However, the Government is not a party to the suit. The suit is filed only against the defendants on whose names the sale had been executed and patta was granted in respect of the suit property. On the date of filing the suit, there are documents to show that third defendant was the owner of 'B' schedule property. When the third defendant is the owner of the suit property, the plaintiff can only claim right by other means, ie, either by the claim of adverse possession or easementary right. That is not the case here.

14. The trial Judge had mainly decreed the suit on the basis of commissioner's report without proper discussion on the right claimed by the plaintiff for the declaratory relief. Commissioner's report reads among other things that except 'B' schedule, pathway show as 'G,H,I,J' in the plan, there is no other pathway available to reach plaintiff's land and building in 'A' schedule property from mayana pathai. It is not stated that there is no other alternative pathway available at all to reach the 'A' schedule property. It is relevant to note that in the description of property, it is mentioned that there is vari on the east of



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'A' schedule property. Commissioner's plan also confirms the presence of Vari on the east of 'A' schedule property. There is no doubt that plaintiff can reach his 'A' schedule property through Vari. Therefore, this Court is of the view that the decision on commissioner's report by the first appellate Court is correct.

15. The Hon'ble Supreme Court in the case of ***Bachhaj Nahar v. Nilima Mandal, (2008) 17 SCC 491*** explained the essence of pleadings and laid out certain principles as follows:-

1. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings.
2. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court. A court cannot suo moto make out a case not pleaded.
3. The court should confine its decision to the question raised in pleadings. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, the court cannot grant such relief.
4. No party should be permitted to travel beyond its pleading and that all



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necessary and material facts should be pleaded by the party in support of the case set up by it.

5. The court can consider a case not specifically pleaded only where the pleadings, in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon.
6. A factual issue cannot be raised or considered for the first time in a second appeal.
7. ***Pleadings for establishing Easementary rights:-***
 - a. A dominant owner seeking any declaratory or injunctive relief on an easementary right should plead and prove the nature of easement, manner of acquisition and disturbance or obstruction to the easementary right.
 - b. For easement by prescription, the plaintiff should plead and prove that he was in peaceful, open, uninterrupted enjoyment of the right for a period of twenty years and the right was enjoyed independent of any agreement with the owner of the property over which the right is claimed.
 - c. For easement of necessity, the plaintiff should plead that his dominant tenement and the defendant's servient tenement originally constituted a single tenement and the ownership thereof



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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.

16. As stated earlier, the suit is filed merely on the basis of long possession and enjoyment claiming proprietary right in the 'B' schedule property. It is stated that the Government is the owner of the 'B' schedule property. When that be the case, the Government ought to have been made as a party to the suit but Government is not a party to the suit. The plaintiff has not pleaded and prayed either title by adverse possession or easementary right. In this view of the matter, this Court is of the view that the appellate Court was right in dismissing the suit for not properly framing the suit and claiming the relief. There is no reason to take a different view of the matter.

17. In *Sir Chunilal V. Mehta and Sons v. The Century Spinning Co. Ltd.*, 1962 reported in AIR 1962 SC 1314, the Hon'ble Supreme Court formulated what amounts to a substantial question of law, as follows:

1. Whether it is of general public importance (or)
2. Whether it directly and substantially affects the rights of parties *and if so*,



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3. Whether it is ***either*** an open question (in the sense not finally settled by this Court or Privy Council or Federal Court) (***or***)

4. The question is not free from difficulty and calls for discussion of alternative views.

17. In the case before hand, the appellant has not made out any of the aforesaid grounds to formulate substantial question of law. There is no substantial question of law arises for consideration in this second appeal. The judgments of the first appellate Court is hereby confirmed and the appeal stands dismissed. No costs. Consequently connected Miscellaneous Petition is closed.

23.11.2023

NCC : Yes/No
Index : Yes/No
RR



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To

- 1.The Sub Judge, Manapparai, Trichy
- 2.The Principal District Munsif, Manapparai, Trichy
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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G.CHANDRASEKHARAN,J.

RR

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