



S.A(MD)Nos.695 and 804 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 08.12.2022

Pronounced on : 06.01.2023

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) Nos.695 & 804 of 2014
and M.P.(MD) No.2 of 2014

S.A.(MD) No.695 of 2014:

V.Raman

... Appellant/Appellant/Defendant

Vs

1.Azhagammal

Nachammal (Died)

2.Nachan @ Parukki Nachan

3.Pitchan

4.Azhagan

5.Parvathi

6.Chinnammal

7.Thangaiah

8.Panchu

...

Respondents/Respondents/

Plaintiffs

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 19.09.2013 made in A.S.No.72 of 2012 on the file of the Additional Sub Court, Dindigul, confirming the judgment and



S.A(MD)Nos.695 and 804 of 2014

decree dated 28.06.2012 made in O.S.No.168 of 2006 on the file of the District Munsif cum Judicial Magistrate's Court, Natham.

For Appellant : Mr.H.Lakshmi Shankar
For R2 & R4 : Mr.S.Sarvagan Prabhu
For RR1, 3 & 5 to 8: No appearance

S.A.(MD) No.804 of 2014:

V.Raman
Appellant/Appellant/
Plaintiff

...

Vs

1.Parukki Nachan
2.Azhagammal

Nachammal (Died)

3.Pitchan
4.Azhagan
5.Parvathi
6.Chinnammal
7.Thangaiah
8.Panchu
Respondents/Respondents/

...

Defendants

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside



S.A(MD)Nos.695 and 804 of 2014

the judgment and decree dated 19.09.2013 made in A.S.No.70 of 2012 on the file of the Additional Sub Court, Dindigul, confirming the judgment and decree dated 28.06.2012 made in O.S.No.166 of 2006 on the file of the District Munsif cum Judicial Magistrate's Court, Natham.

For Appellant : Mr.H.Lakshmi Shankar
For RR1, 2, 3 & 5 : Mr.S.Sarvagan Prabhu
For RR4 & 6 to 8 : No appearance

COMMON JUDGMENT

1.1 There were two suits, which in fitness of things should have been tried together and should have been disposed of by a common judgment, but for reasons not known, they were tried simultaneously and were disposed of vide separate judgments. The details are as below:

- A certain Raman laid a suit in O.S.No.166 of 2006 seeking declaration of his easementary right of way over Sy.No.195/4 over an extent of 150 ft. x 10 ft. There were 9 defendants to this suit. (Henceforth, they would be referred to as defendants, for the sake of convenience).



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

- These defendants, on their part, have laid O.S.No.168 of 2006 against Raman for a decree of bare injunction to protect their peaceful possession over the entire extent of S.No.195/4.
- Sy.No:195/4 has a total extent of 54 cents. Raman does not dispute defendants' title to 54 cents in Sy.No.195/4, but only claims easementary right of way over a specific strip measuring 150 ft. x 10 ft along its northern boundary.

1.2 As stated earlier, both the suits were tried separately and were disposed of by separate judgments on the same day. The trial Court dismissed Raman's suit for easementary right of way, and decreed the defendants' suit for prohibitory injunction in O.S.No.168 of 2006. Raman preferred two separate first appeals in A.S.Nos.72 of 2012 and 70 of 2012. Both these appeals were dismissed by the first appellate Court, again vide separate judgments. Hence, Raman is before this Court with these second appeals.

2. Raman's case is as below:

- Raman has title over Sy.No.195/3A. This lies to the east of the



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

defendants' property in Sy.No.195/4. The main road is in Sy.No:198 and is to the west of defendants' property. Raman claims that the property in S.No.195/3A and another property in S.No.195/3B were originally blocked in Sy.No.195/3 and later, it was subdivided into S.No.195/3A and S.No.195/3B. In S.No.195/3B, there is a temple. According to him, this property was in the hands of his ancestors from time immemorial, and as a descendant of his ancestors, he has title to the property in Sy.No.195/3A. He would further allege that the pathway right he claims over the property of the defendants in S.No.195/4 has been used by his ancestors from time immemorial, and hence he claims easementary right of way by prescription.

- He also pleads that both his property and the defendants' property originally belonged to one Karutha Goundar and later it was sold in parcel to the forefathers of Raman and also to the defendants' branch.

Therefore, Raman claims right of way also by easement of necessity.

When he faced certain obstruction from the defendants, he laid the suit in O.S.No.166 of 2006 against the defendants.



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

3. The defendants in O.S.No.166 of 2006 have not only resisted Raman's claim of easementary right of way over their property, but also laid a separate suit in O.S.No.168 of 2006 for bare injunction. Their allegations are that:

- The entire property measuring 54 cents in S.No.195/4 exclusively belonged to the defendants and no pathway of the description as claimed by Raman, has ever existed on site.
- On 24.11.2006, Raman required the defendants to sell the entire property in S.No.195/4. Since some differences arose between the defendants and Raman, the suit in O.S.No.168 of 2006 came to be laid by the defendants in O.S.No.166 of 2006.

4.1 Even though the suits and the first appeals were tried separately and evidence was also recorded separately, it will be only ideal if both these second appeals are clubbed together and the evidence available in both the suits are taken together for a final adjudication. The details of the evidence adduced in both the suits before the trial Court is as below:



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

Suit No.	Name of the Plaintiff (s)	Oral Evidence	Documentary Evidence
166/2006	Raman	<u>Plaintiff's side:</u> (i) Plaintiff examined himself as P.W.1; and (ii) One Chelladurai was examined as P.W. 2 <u>Defendants'side:</u> Defendants 1 and 8 examined themselves as D.W.1 and D.W.2	<u>Plaintiff's side:</u> Ext.A.1 to Ext.A.6 <u>Defendants'side:</u> Ext.B.1 to Ext.B.7 <u>By the trial Court:</u> Ext.X.1 and Ext.X2 Commissioner's report and plan
168/2006	Azhagammal & 8 others	<u>Plaintiffs'side:</u> The 3 rd and 8 th plaintiffs examined themselves as P.W.1 and P.W.2 (who are D.W.1 and D.W.2 in O.S.No. 166/2006) <u>Defendant's side:</u> The defendant examined himself as D.W.1. Further, D.W.2 to D.W.4 came to be examined	<u>Plaintiffs'side:</u> Ext.A1 to Ext.A.8 <u>Defendant's side:</u> Ext.B.1 to Ext.B.8 <u>By the trial Court:</u> Ext.X.1, Survey Plan

4.2 As earlier outlined, on appreciating the evidence, the trial Court disbelieved the case of Raman and dismissed the suit, which necessarily meant that it decreed the suit filed by the defendants. Its line of reasoning is



S.A(MD)Nos.695 and 804 of 2014

that:

- Ext.A.5-survey plan, dated 15.05.1920 produced by Raman in O.S.No.166 of 2006 (= Ext.B.4 in O.S.No.168 of 2006 to be read with Ext.X.1 in that suit) shows the existence of a pathway through the property of the defendants in S.No.195/4 connecting it to Raman's property in Sy.No.195/3. However, the defendants have produced Ext.B.6-survey plan in O.S.No.166 of 2006 (= Ext.A.5 in their suit in O.S.No.168 of 2006) which is of the year 1917 and it does not show the suit pathway. Therefore, it opted to prefer the survey plan produced by the defendants in preference to the one Raman produced.
- The Advocate Commissioner does not report about the existence of the said pathway.
- In relation to the property of Raman, the defendants' property lies to its south-west. Raman has not claimed right of way through the property in S.No.195/2B which lies to the immediate west of Raman's property. In fitness of things, Raman should have asked for right of way only through S.No.195/2B, but he took a circuitous route through



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

the property of the defendants to reach the main road on the west.

Hence, the claim appears illogical.

When the matter reached the first appellate Court at the instance of Raman, it concurred with the findings of the trial Court and dismissed the appeals.

Hence, these Second Appeals by Raman.

5. The appeals were admitted for considering the following substantial questions of law:

“(i) Were not the Courts below in egregious error in ignoring the fact that the facts as proved in the case establish an existence of easementary right of pathway by necessity, inasmuch as there is a disintegration of unity of title of the original owner of the property?”

(ii) Were not the Courts below erred in ignoring the fact that pre-existing right of way by necessity cannot be altered merely because a better option might be possible? And

(iii) Were not the Courts below went wrong in misconstruing the Commissioner's report?”



S.A(MD)Nos.695 and 804 of 2014

6. The learned counsel for the appellant made the following submissions:

- The Courts below went wrong in laying over emphasis on Ext.B.6 and Ext.B.7 survey plans produced in O.S.No.166 of 2006. They are the survey plans of the years 1917 and 1986 obtained by the defendants from the permanent record section at Chennai. The records produced by the permanent record section may have all the current corrections in the record.
- At the end of the day, the suit is for easement of necessity which does not necessarily require a marking in the survey plan. All that the law requires is existence of a dominant servitude and a servient servitude and right of user over the servient servitude for the benefit of the dominant servitude. Admittedly, Raman's property is landlocked with properties in S.No.195/2 on the west and S.No.195/4 on the south west, and inasmuch as both the properties were held under one single title holder, under Section 13 of the Easement Act, when the unity of title gets disintegrated, easement of necessity is born as of necessity. This is more an aspect of law, and if this aspect is appreciated then



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

non-marking of a pathway at a particular place in the survey plan will be of no consequence. After all, Raman does not and cannot claim title to any portion of the property belonging to the defendants.

- The Commissioner has filed two reports. His first report showed the existence of pathway on the northern extremity of Sy.No.195/4. This commission has gone on 24.11.2006. It is the date of first visit of the Commissioner which is used by the defendants as the date of arising of cause of action for instituting their suit in O.S.168 of 2006. And, after obtaining an interim order of exparte injunction in O.S.No.168 of 2006, the defendants have destroyed the pathway and planted coconut saplings therein. This was noticed by the Commissioner in his second visit, which he has made after some five years, on 13.08.2011, to be precise.

7. In response, the learned counsel for the defendants submitted that:

- Raman had relied on Ext.A.3 survey plan for Sy.No.195 and the Courts below have come to a firm conclusion that this document cannot be relied on, as it has certain artificial insertion in different



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

ink. (Note: So far as Ext.A.5 is concerned, it is matched by Ext.X.1 produced at the instance of the defendant in O.S.No.168 of 2006).

- Anything that does not match Ext.B.6, the survey plan of the year 1917, does not deserve consideration and hence neither Ext.A.5 nor any other document can be relied on. Indeed the defendants have also produced Ext.B.7 survey plan dated in 1986, and this matches Ext.B.6 plan. Even this document does not refer to any pathway which Raman claims in S.No.195/4.
- So far as planting of coconut sapling is concerned, it is not as if the defendants have planted saplings only at the place where Raman claims right of pathway. Indeed they have planted saplings in the entire 54 cents that belonged to them. They being the owner of the property, has every right to use the property to the best use which they considers appropriate to their interest.
- The Commissioner has ascertained a pathway in the southern extremity of S.No.195/2B that lies next adjacent to the defendants' property in S.No.195/4 to its north. The trial Court has taken note of



S.A(MD)Nos.695 and 804 of 2014

WEB COPY

this fact and hence, it has found that Raman's claim through the defendants' property is artificial.

- In O.S.No.168 of 2006, Raman had examined an official of the Revenue Department as D.W.3, and he in his evidence has confessed that he could not ascertain the alleged pathway as claimed by Raman in S.No.195/4.

8. On evaluating the rival submissions, one in aid of the right of way and the other opposing it, this Court has least difficulty in concluding that both the courts have misaddressed the issue before them. Raman has claimed only an easementary right of way over the defendants' property and not the title to it. And he claims it both as a prescriptive right under Sec.15 of the Easement Act, and as an easement of necessity under Sec.13 of the Act. The availability of the right for sustaining its claim needs to be investigated within the contours of the specific parameters statutorily provided for these two classes of easements, which both define and distinguish them.

9. Raman's counsel did not press the accelerator on the easementary right



S.A(MD)Nos.695 and 804 of 2014

by prescription much as his line of arguments indicated his preference for easement of necessity. The pivot on which the easement of necessity is fitted by the statute is the unity of title of a property and its subsequent disintegration. Accordingly, when a property is held together under one title, and later the property is divided either by partition or alienation, then the statute declares that there would come forth into existence an easement out of sheer necessity to sustain the advantage of any portion of the land that was disadvantaged due to division.

10. Accordingly, if Raman's property and the defendant's property are held under one title, and if due to later division of title by alienation, and in the process the portion over which Raman has the title is put to a disadvantage of being without an access to the main road that runs to the west of the defendants' property, then easement of necessity springs into existence. The only rider is that Raman should have an alternate pathway, and if it is so available, then he cannot impose a burden on the defendants' property. Therefore, all that Raman is required to establish is, (a) that his property and defendants' property were held under a unity of title; (b) that on division, the



S.A(MD)Nos.695 and 804 of 2014

portion he has lost right of access to the main road; and (c) that he does not have any alternate way.

11. Raman has pleaded that both his property and the property of the defendant's on the west originally belonged to one Karuthagounder and it is not disputed. And the fact that the western portion in Sy.No.195/4 is with the defendant and the eastern portion in Sy.No.195/3A with Raman indicates that the first two condition required for establishing the easementary right of way by necessity is established. So far as the third aspect is concerned, the Commissioner has not noted any alternate right of way. With all the three conditions spelt out in Sec.13 of the Easement Act staring on their face, the burden shifts to the defendants to resist the inference that Raman's case suggests.

12. What have the defendants done? They managed to destroy the topography of their land, and chose to develop their land *pendente lite*, after Raman has instituted his suit. This could be gathered on a comparison of



S.A(MD)Nos.695 and 804 of 2014

the first and second commission reports, both of which are separated by about five years. The conduct of the defendants demonstrates how far it is distanced from the standards of fairness that the judicial process requires in its forensic exercise. Here are the defendants who destroy a material evidence, a physical evidence in that, available on the field, seen displaying temerity to defend an action against them. The Courts below were painfully in error in ignoring it, but not this Court. The Court neither appreciates, nor is it in a mood to be swayed by the the distractions which the defendants provide through their Ext.B-6 survey plan of 1917. Indeed, for deciding the issue, neither Ext.A-5 nor Ext.B-6 plans are required. Since when the survey officials have begun to denote easementary right of way in the survey plan? And, what authority have they to note it? Easement of necessity is a legal consequence born of disintegration of unity of title, and it does not depend on the commission and omission of a survey official.

13. In the result both S.A.(MD) No.804 of 2014 and S.A.(MD) No.695 of 2014 stand allowed. The judgment of the trial Court in O.S.No.166 of 2006 is decreed and the judgment of the trial Court in O.S.No.168 of 2006 is



S.A(MD)Nos.695 and 804 of 2014

reversed. No costs. Consequently connected miscellaneous petition is closed.

06.01.2023

Index: Yes/No
abr

N.SESHASAYEE, J.

abr

To

- 1.The Additional Sub Judge,
Dindigul.
- 2.The District Munsif cum Judicial Magistrate,
Natham.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.

Pre-delivery Common Judgment made in
S.A.(MD) Nos.695 & 804 of 2014



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S.A(MD)Nos.695 and 804 of 2014

06.01.2023