



S.A.No.1088 of 1998

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.04.2023

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.1088 of 1998
and
C.M.P(MD)No.12282 of 2022

- 1.Sama Naicker
- 2.Vijayakumar(Died)
- 3.Krishnamoorthy
- 4.Angammal
- 5.Paul Naicker
- 6.Jeneme Jeyam
- 7.Prema
- 8.V.Karthikeyan

...Defendants 1to6/

Respondents 1to6/Appellants 1to6

(A7 & A8 are brought on record as LRS of the deceased 2nd appellant vide Court order dated 23.03.2022)

(Minor 6th respondent is declared as major and guardianship of his father & Natural guardian(5th appellant) is discharged, vide Court order dated 01.02.2022)

-Vs-

- 1.Perumal Naicker(Died)
- 2.Paulsamy

...Plaintiffs/Appellants1 & 2/Respts.



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3.Ettammal(Died)

4.P.Balasamy

5.Konalammal(Died)

6.Vellaiammal

7.Smt.Thamil Ammal

(R3 to R7 are brought on record as LRS of the deceased 1st Respondent vide order dated 10.09.2003)

8.V.Palanichamy

9.Vijaya

(R8 & R9 are brought on record as LRS of the deceased 5th respondent vide Court Order dated 21.01.2022)

10.G.Amsaveni

(R10 is brought on record as LRS of the deceased 7th respondent vide Court order dated 01.02.2022)

11.P.Chandra

12.P.Mohan

13.P.Sanjay

(R11 to R13 are brought on record as LRS of the deceased R8 vide Court order dated 31.03.2022)

(Memo Dt.14.02.2022 in USR No.4410 is recorded as R2 died and respondents 4 to 7 who are already on record, are recorded as LRS of the deceased R3 vide Court order dated 31.03.2022)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 23.02.1998 passed in A.S.No. 176 of 1996 on the file of the Principal District Judge, Dindigul District at



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Dindigul, in reversing the judgment and decree dated 24.09.1996 passed in O.S.No.791 of 1995 on the file of the District Munsif Court, Vendasandur.

For Appellants : Mr.G.Gomathi Sankar

For R2, R4&R9 : Mr.J.Alaguram Jothi

For R6,R11to13 : No appearance

For R1,R3,R5,
R7 & R8 : Died

For R10 : No appearance

J U D G M E N T

The first and second respondents are the plaintiffs filed a suit in O.S.No.791 of 1995, before the District Munsif-cum-Judicial Magistrate, Vedsanthur, for declaration declaring 'B' schedule property in the plaint as pathway and also for permanent injunction restraining the appellants/defendants from interfering with their peaceful enjoyment of 'B' schedule pathway. The trial Judge, after the trial, dismissed the suit. Aggrieved by the said judgment and decree, the first and second respondents herein filed an appeal before the Principal District Judge,



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Dindigul, in A.S.No.176 of 1996. The lower appellate Court, after hearing the parties, allowed the appeal and set aside the judgment and decree passed by the trial Court. Against the judgment and decree passed by the lower Appellate Court, the appellants/defendants have filed the present second appeal before this Court, raising the following substantial question of law:

“(A)Whether the lower appellate Court having held that none of the documents of title under which the plaintiffs had acquired title to their property and other documents mention about the alleged existence of suit pathway, is right in granting the relief as prayed for at the sufference of the defendants especially in the absence of any implied grant?

(B)Whether the lower appellate Court erred in law and misdirected itself in decreeing the suit in its entirety as prayed for on the basis of Ex.C1 to C4, Advocate Commissioner's reports and plans without properly advertng to and considering Ex.C1 report when the alleged suit pathway is mentioned as only 1 ½ feet East to West?

(C)Whether the plaintiffs by their conduct in



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dispose of the property comprised in S.No.535/5 A under Ex.A4 dated 16.07.1974 along with other co-sharers is entitled to claim Easement as of necessity under Section 13 of the Indian Easements Act, 1882 at the sufferance of third party defendants and in the absence of proof of apparent and continuous enjoyment?

(D)Whether the lower appellate Court is correct in appointing the Advocate Commissioner U/O 26 R 9 CPC and relying upon the said report and plan without following the procedure as contemplated under Order 41 Rule 27 read with 107(2) C.P.C?”

2.The case of the first and second respondents/plaintiffs is that the father of the first plaintiff and the grandfather of the first defendant are the brothers. The father of the first plaintiff, viz., Vellainayaikar, got three brothers, viz., 1.Muruga Naicker, 2.Vellaiya Nicker and 3.Perumal Naicker. All the three brothers separated their ancestral properties through oral partition. The father of the first plaintiff separately enjoying his share after the oral partition and he died intestate leaving behind the



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respondents/plaintiffs. All the three brothers died and their legal heirs are only enjoying the properties. After the partition, the respective brothers were enjoying the properties separately and in the northern side of the properties, there is a pathway, which is a public road. The shares allotted to the first appellant/defendant abetting the road to reach the respondents/plaintiffs' properties immediately by way of south western public road. The properties of the first and second respondents/plaintiffs are behind the first appellant/defendant properties. The shares allotting to the first defendant was given larger extent for the purpose of using pathway. In order to reach the first and second respondents/plaintiffs properties, except ABC pathway as mentioned in the plaint plan, no other pathway is available. During the life time of three brothers, there was no obstruction and after the death of three brothers, the first appellant/defendant restrained the first and second respondents/plaintiffs from using the said pathway. Therefore, they were constrained to file a suit to claim pathway and absolutely there is necessity to reach the first and second respondents/plaintiffs lands. Therefore, the first and second



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respondents/plaintiffs have filed the present suit.

3.The case of the appellants/defendants is that the plaintiffs have got separate pathway and they can reach their land from the said road through Odai and there is no pathway. ABC pathway shown in the plaint is only the land of the first appellant/defendant. If the first and second respondents/plaintiffs have alternative pathway to reach their land, there is no easement of necessity would arise. Therefore, since the first and second respondents/plaintiffs have separate pathway, they never used ABC pathway. Therefore, the first and second respondents/plaintiffs are not entitled to get relief as sought for in the plaint.

4.In order to prove the case of the plaintiffs during the trial, on the side of the plaintiffs totally 4 witnesses were examined as P.W.1 to P.W.4 and 7 documents were marked as Ex.A.1 to Ex.A.7. On the side of the defendants 2 witnesses were examined as D.W.1 and D.W.2 and three documents were marked as Ex.B1 to Ex.B.3 and besides two Court



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documents were marked as Ex.C.1 and Ex.C.2.

5.The trial Court, after trial, dismissed the suit stating that the suit pathway has not been mentioned either in the partition deed or in the sale deeds and the witnesses have also admitted that no documents have referred the suit pathway. The first and second respondents/plaintiffs, aggrieved by the said judgment and decree, filed an appeal before the Principal District Court, Dindigul, on the ground that the trial Court failed to see the Commissioner's Report and also failed to know the first and second respondents/plaintiffs lands are servient lands and the appellants/defendants lands are dominant lands, which is abutting to the road. Even then, the first appellant/defendant have larger extent of shares for the purpose of using ABC pathway as common pathway to reach the other land and in the commissioner's report also pointed out that there is no alternative pathway. Therefore, the trial Court erroneously passed the burden of proof on the first and second respondents/plaintiffs. Since the claim under the easement of necessity under Section 13 of the Indian Easements Act, 1882, a person,



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who pleads that there is an alternative pathway to reach the other land, has to prove the same. Whereas, the trial Court failed to consider the settled preposition of law and erroneously held that the first and second respondents/plaintiffs did not prove the alternative pathway, which is against the proposition of law. Since the first and second respondents/plaintiffs alone pleaded the alternative pathway to reach the land, the lower Appellate Court allowed the appeal and set aside the judgment and decree passed by the trial Court and granted the relief to the first and second respondents/plaintiff as sought for. Therefore, the present second appeal is before this Court.

6.The scope of the second appeal is very limited. The Court while admitting the appeal, has formulated the following substantial questions of law:

“(a)Whether the plaintiffs by their conduct is dispose of the property comprised in S.No.535/5A under Ex.A. 4 dated 16.07.1974 along with other co-sharers is entitled to



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claim easement as of Necessity under Section 13 of the Indian Easements Act, 1882 at the sufference of third party defendants and in the absence of proof of apparent and continuous enjoyment? And

(b)Whether the lower appellate Court is correct in appointing the Advocate Commissioner U/O 26, R9, CPC and relying upon the said report and plan without following the procedure as contemplated under Order 41 Rule 27 read with 107(2) CPC?”

7.It is not in dispute that the first appellant/defendant grandfather and the first respondent/plaintiff's father are the brothers and they enjoyed all the properties as a common properties. It is also not in dispute that three brothers were divided the properties orally ie., ABC and it is not in dispute that the appellants/defendants' property in S.No.535/5B is pertaining to road and also not in dispute that the first and second respondents/plaintiffs' properties is behind the first appellant/defendant's property. After the oral partition among the brothers, the properties were subdivided, as per the easement of necessity.



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8.The learned counsel appearing for the appellants would submit that the right of the pathway through the appellants' lands have been reserved in Ex.A.3 and Ex.A.4. The lower Appellate Court granted a decree only based on the report of the Advocate Commissioner. The lower Appellate Court has not followed the legal procedure on examining the evidence adduced by the respective parties that S.No.535/5B exclusively belongs to the appellants. The alleged existence of pathway is enjoyed by the respondent herein was not pointed out by any document of title or the revenue records to prove the same. In the absence of any document or any other evidence, the lower Appellate Court, only based on the report of the Advocate Commissioner, simply has given the findings. Ex.C.1-the report of the Advocate Commissioner which clearly shows that the suit pathway is a “bund” of the field to an extent of 1 ½ feet, and the property situated immediately on the east of its S.No.535/5B, which belongs to the appellants. Therefore, the findings of the lower Appellate Court is erroneous. The learned counsel further submitted that all the witnesses examined on the side of the respondents are interested witnesses against whom criminal case



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and civil case are pending. Really, if the first and second respondents/plaintiffs have no other pathway to reach their lands, they would not have sold the property comprised in S.No.535/5A, which are situated adjacent to the alleged pathway, to the third party under Ex.A.4 dated 16.07.1974. Therefore, the conduct of the first and second respondents/plaintiffs, which discloses the property comprised in S.No. 354/A under Ex.A.4, dated 16.07.1974 along with other co-sharers are not entitled to claim easement of necessity under Section 13 of Indian Easements Act. In the absence of proof of appellants continuous enjoyment, the lower appellate Court failed to follow the procedure under Order 41 Rule 27 C.P.C., r/w. Section 107(2) of C.P.C. Therefore, the judgment of the lower appellate Court is erroneous and the same is liable to be set aside and the judgment of the trial Court is to be restored and the second appeal is to be allowed.

9.The learned counsel appearing for the first and second respondents/plaintiffs would submit that the property in S.No.535/5B



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originally belonged to the father of the first respondent/plaintiff and grandfather of the first appellant/defendant and subsequently, they entered into oral partition and divided the properties between them and they were enjoying separately. Therefore, during the life time of the brothers, there was no dispute. After the life time of the brothers, their legal heirs are enjoying the property and the appellants/defendants' property is servient owner, since his land is abutting to the main road. The appellants/defendants' property is a servient owner and without using ABC pathway shown in the plaint plan, the respondents/plaintiffs cannot reach their land. The Commissioner Report also clearly shows that there is no alternative pathway to reach the land of the first and second respondents/plaintiffs. Though the appellants/defendants have stated alternative pathway, the first and second respondents/plaintiffs can reach their land through Odai, which was situated to the southern side of the lands of the respondents. The Commissioner report also clearly shows that there is no pathway or cart-track in the said odai and it cannot be used as either pathway or cart-tack to reach the first and second respondents/plaintiffs



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land. Therefore, the first and second respondents/plaintiffs filed a suit for easement of necessity and proved that originally all the properties belonged to one of the same person subsequently, devolved into several persons and the lands also subdivided. Therefore, once tenements is proved and admitted, even though there is no document as mentioned regarding the pathway, the dominant tenement is entitled to get a benefit from the servient owner.

10.Further, though the trial Court fastened the onus of proof on the first and second respondents/plaintiffs, it is a settled preposition of law that those who claim easement of see the necessity under Section 13 of Indian Easements Act has to prove the same. It is for the appellants/defendants have to prove the alternative pathway. In this case, the appellants/defendants have pleaded the alternative pathway. Therefore, it is the onus of the appellants/defendants to prove the alternative pathway to reach the lands of the first and second respondents/plaintiffs. In this case, the appellants/defendants failed to prove the alternative pathway to reach



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the first and second respondents/plaintiffs' lands. The first and second respondents/plaintiffs proved, through oral evidence as well as the report of the Advocate Commissioner, that there is no alternative pathway and the appellants/defendants had not established that there was an alternative pathway. Therefore, the trial Court failed to appreciate the legal proposition and dismissed the suit. However, the lower Appellate Court rightly re-appreciated the oral and documentary evidence and also considering the averments made in the plaint that the appellants have not proved the alternative pathway and there is no existence of alternative pathway and allowed the appeal. Therefore, without mentioning the pathway or pathway right in the document will not bar the first and second respondents/plaintiffs to claim right under easement of necessity. Therefore, second appeal is to be dismissed.

11. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondent and perused the materials available on record.



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Question no.1

12. Admittedly Survey No.535/5B was originally owned by a single person and thereafter, three brothers divided the property by way of oral partition. Admittedly, the share of the appellants was abutting to the road and the lands of the respondent south to the land of the appellants, which is behind the lands of the appellants and naturally the first and second respondents have to reach their land through the lands of the appellants. Therefore, the first and second respondents/plaintiffs have pleaded that ABC shown in the plaint plan is a pathway, which is used as a cart-tract and the first and second respondents used to reach their lands through that pathway and except that, no other pathway is available. Though the case of the appellants/defendants that there was a Odai on the southern side of the land of the first and second respondents/plaintiffs and they can reach their land through Odai. The report of the Advocate Commissioner shows that there was a water tank and no cart-tract and from both side of the water tank, trees and bushes. Both bunds of the said Odai cannot be used neither



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as a pathway nor as a cart-track and the only way to reach the first and second respondents' lands through ABC pathway, which is shown in the plaint as ABC. Therefore, the witnesses, who have been examined on the side of the plaintiffs, have categorically stated that they have used to reach their lands through the suit pathway is the only pathway and the report of the Advocate Commissioner also clearly indicates the same. Therefore, once the appellants take a plea that there is an alternative pathway to reach the lands of the first and second respondents/plaintiffs, it is for the appellants to prove the same. However, the appellants have not proved the alternative pathway.

13.As per the judgment of the Hon'ble Supreme Court in the case of ***JASMINE ENNASI-VS-THAIYALNAYAGI AMMAL AND OTHERS***, reported in ***2019 SCC Online Mad 28092***, the Hon'ble Supreme Court has held as follows:

“19. As far as the Easement by grant, the learned counsel appearing for the appellant relies upon



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the judgment of the Hon'ble Supreme Court in Hero Vinoth (Minor) vs Seshammal reported in (2006) 5 SCC 545, wherein the Hon'ble Supreme Court has held as below:

“29.....An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but, it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternative access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognised in section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant by Section 41 is not applicable in



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such case.”

14. Therefore, a bare reading of the entire oral and documentary evidence, it shows that the first and second respondents/plaintiffs have established that all the properties originally owned by a single person and subsequently, divided by three brothers by way of oral partition and thereafter, the appellants/defendants and the first and second respondents are inherited. The fourth respondent has purchased the suit property from one of the legal heirs of three brothers. Once the dominant and servient tenement is also established, the alternative access is not available and the same was not proved by the appellants, then the first and second respondents is automatically entitled to get the relief under Section 13 of Indian Easements Act. Therefore, the first and second respondents are entitled to easementary right of necessity. It is a dispute regarding the right of pathway as already stated from the oral and documentary evidence, it is proved that they are entitled to the right of easement of necessity. Therefore, on earlier occasion this Court also dealt with the similar case and answered the substantial questions of law regarding the Easement of Necessity



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followed the decision of the Hon'ble Supreme Court in ***HERO VINOTH (MINOR)-VS-SESHAMMAL*** reported in ***(2006) 5 SCC 545***. Therefore, this Court finds that the first and second respondents/plaintiffs have established the easementary right of necessity. Therefore, substantial question of law No.1 is answered accordingly.

Question No.2

15.As far as the second substantial question of law is concerned, already the trial Court itself appointed the Advocate Commissioner, even during the trial. Before the trial, the Advocate Commissioner also inspected the property and filed a report. The commissioner report was marked as Ex.C.1 and the plaint was marked as Ex.C.2. Therefore, the contention of the learned counsel for the appellants/defendants regarding the second substantial question of law is concerned not acceptable which is not a substantial question of law. On reading of the plaint annexed with the report of the commissioner, which clearly proves that the respondent/plaintiff is entitled to get right of easement of necessity for using the disputed pathway,



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which shown in the plaint plan as ABC. The commissioner report and plan has also clearly proved that there is no alternative pathway as already discussed that the appellants have not established the alternative pathway to reach the lands of the respondents without using the disputed pathway shown in ABC in the plaint plan. Therefore, substantial question of law No. 2 is answered accordingly.

16.In view of the above, the second appeal fails. The Substantial questions of law formulated by this Court in the second appeal, are answered accordingly as against the appellants. Hence, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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NCC:Yes/No

Index:Yes/No

Internet:Yes/No



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P.VELMURUGAN,J.

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To

- 1.The Principal District Judge,
Dindigul District
- 2.The District Munsif Court,
Vedasandur.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

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