



S.A.No.1796 of 2001

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 06.04.2023

JUDGMENT DELIVERED ON : 28.04.2023

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

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1.Marudai Gounder (died)
2.Palaniyammal
3.Piravayee
4.Chandra
5.Selvam
7.M.Mahamuni
(Appellants 3 to 7 are brought on record
as Legal Representatives of the
deceased 1st appellant vide Court Order
dated 08.01.2021)

... Appellants

Vs.

1.Velu Gounder
2.Palaniyappa Gounder (Died)
3.Perumal
4.F.M.Karuppusamy
5.Rathinam Aasari
6.Paramasivam Aasari



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7.Karuppayee
8.Nallusamy
9.Kalyanasundaram
10.Minor Sathiyamurthy
11.Minor Chithra
(Minors 10th and 11th are represented by
guardian and mother Karuppayee)
12.Muniammal
13.Mariappan
14.Periyakkal
15.Mariyammal
(Respondents 12 to 15 are brought on record
as Legal Representatives of the deceased
2nd respondent vide Court Order, dated
28.07.2020)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 26.02.2001 made in A.S.No. 69 of 1998, on the file of the Sub-Court, Kulithalai reversing the judgment and decree, dated 13.04.1998 made in O.S.No.167 of 1995, on the file of the District Munsif Court at Kulithalai.

For Appellants : Mr.K.Govindarajan
for M/s.Sarvabhauman Associates
For R1, R12 to R15 : Mr.S.Deenadhayalan
For R3 : Mr.H.Lakshmisankar
For R4 & R5 : Mrs.Jessi Jeeva Priya
for Mrs.D.Sathiasri



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J U D G M E N T

The appellants are the plaintiffs. The respondents 1 to 6 are the defendants 1 to 6. The appellants filed a suit in O.S.No.167 of 1995, on the file of the District Munsif Court, Kulithalai against the respondents for declaration declaring that the plaintiff is entitled to use the A schedule as cart-track by an easement of necessity and mandatory injunction directing the defendants 1 to 6 to remove the B schedule obstruction to reform the A schedule cart track in its original position.

2. After completing the pleadings and framing of issues, on the side of the plaintiffs, first plaintiff was examined as P.W.1 and 11 documents were marked as Ex.A1 to A11. On the side of the defendants, three witnesses were examined as D.W.1 to D.W3 and 7 documents were marked as Ex B1 to Ex.B7. Besides 4 Court documents were marked as C1 to C4.



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3. After trial, the trial Court granted judgment and decree in favour of the plaintiffs. Aggrieved by the judgment and decree passed by the trial Court, the defendants filed an appeal before the Subordinate Court, Kuzhithalai in A.S.No.69 of 1998. The learned Subordinate Judge, after hearing the arguments, allowed the appeal and set aside the judgment and decree passed by the trial Court. Now, challenging the said judgment and decree passed by the first appellate Court the plaintiffs have filed the present second appeal before this Court.

4. The learned counsel appearing for the appellants would submit that originally the properties are adjacent to the suit pathway total extent of 4.85 cents belongs to the three brothers, namely Chinnappa Rowther, Kadar Hussian Bhava Rowther and Ayyavu Rowther. Subsequently, they have divided each 1.47 cents by way of original partition and enjoying the property. At that time, the 'A' schedule property is earmarked as cart-track with a breadth of 35' formed by the three brothers for a comfortable and



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convenient enjoyment of their property in S.F.98 and 99 and 101 of Sembiyanatham Village. Therefore, suit pathway have been shown as 'A' and 'B' schedule properties. The appellants were in out of station, the respondents dug the Well which is adjacent to the suit pathway and sands were kept in the suit property. When they came to the native, they came to know that there was a obstruction in the 'B' schedule property by keeping new sands while digging the well and therefore, they asked to remove the same, the respondents also promised to remove the same but that was not removed. Therefore, the appellants filed the suit. The appellants are using the 'A' schedule property as pathway and the respondents should remove the obstruction kept in the 'B' schedule pathway. Therefore, the trial Court has rightly appreciated the evidence.

5. Even the Advocate Commissioner was appointed and the Commissioner was also inspected the suit property and filed a report stating that there was a newly digging Well in the 'B' schedule property and new sands were kept in the cart track and also he noted down the physical



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features which clearly shows that there was an existence of pathway, there was a new obstruction shown in the plan. Therefore, the trial Court decreed the suit in favour of the appellants. Aggrieved against the said judgment and decree, the respondents filed an appeal before the appellate Court and the appellate Court allowed the appeal. Therefore the appellants/plaintiffs are before this Court.

6. Further, the learned counsel for the appellants would submit that pending trial, the Advocate Commissioner inspected the suit property on two occasions and clearly mentioned the North-South cart-track and the East-West cart-track was obstructed by the respondents 1 & 2 and the same was proved by the appellants. The appellants and their vendor entitled to cart-track and they used the same to reach their lands. They are claimed the pathway right as easement by prescription as well as the easementary right by necessity. However, the lower appellate Court erred in coming to the conclusion that the easements by prescription and easements by necessity are inconsistent as such rejected the claim of the appellants. The right of



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the appellants also mentioned in various documents and the vendor sold the property excluding the cart-track to the respondents and as such, the appellants are having a right to use the cart-track. There is change in cart-track only near the Panchayat road and the remaining cart-track are in existence for long time. When the respondents totally denied the existence of cart-track and once the Court accept the existence of cart-track and its usage by the plaintiffs the burden is on the respondents to prove that there is no cart-track in existence. Even in the documentary evidence clearly shows regarding the existence of cart-track and the Advocate Commissioner report also clearly stated about the existence of cart-track. The trial Court appreciated the oral and documentary evidence and granted the decree whereas, the first appellate Court failed to consider the evidence and allowed the appeal. Therefore, the appellants have filed the second appeal raising the following substantial questions of law:-

“1. When the existence of the suit cart track has been found whether the Lower Appellate Court is correct in non-suiting the plaintiffs by holding that the plea raised by them are inconsistent?



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2. Whether the Lower Appellate Court in law in holding that the plea of easement by prescription and easement of necessity are inconsistent especially when one is acquired Under Section 13 and the other Under Section 15 of the Easement Act?

3. Whether the Lower Appellate Court is justified in reversing the Judgment and decree of the Trial Court without assigning any reason, and differing from the reasons given by the trial Court?”

7. While admitting the second appeal, this Court has formulated the following substantial questions of law:-

“1.When the existence of the suit cart track has been found whether the lower appellate Court is correct in non-suiting the plaintiffs by holding that the plea raised by them are inconsistent?

2) Whether the lower appellate Court is correct in law in holding that the plea of easement by prescription and easement of necessity are inconsistent especially when one is acquired under Section 13 and the other under Section 15 of the Easement Act?”



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8. The learned counsel for the respondent would submit that the right of use of pathway by the appellants is denied and there is no existence of the cart-track as on date. Even the Commissioner report also clearly shows that there is no continuity of pathway as claimed by the appellants. Even the Commissioner's report clearly shows that in the South of Well some crops have been cultivated and the pathway is not in the even procedure. Therefore, the appellants have not proved that they have got right by prescription and title over the pathway. It is for the appellants have to establish over and above the statutory period and therefore, they could not prove that over and above the statutory period the appellants were allowed to enjoy and use the cart-track. The Revenue Records also does not show the existence of pathway. Though the trial Court failed to appreciate the oral and documentary evidence including the report of the Commissioner with plan, erroneously decreed the suit whereas, the first appellate Court rightly appreciated the oral and documentary evidence and dismissed the appeal and there is no merit in the appeal.



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9. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents and perused the materials available on record.

10. The case of the appellants is that 'A' and 'B' Schedule properties are shown as cart-track. The plaint 'A' schedule used as cart-track which is shown in the plaint schedule as GHIJKLCD. Item 2 of A schedule is CDEF. Item 1 of A schedule is north-south cart-track with 15' breadth and item 2 of A schedule is with east-west cart-track 15' breadth. This A schedule property has been used by the plaintiffs and the defendants as a common cart-track. The appellants claim from original owner under different sale deed and the appellants have been using the cart-track given in A schedule openly, continuously and uninterruptedly since their date of purchase on 11.10.1973 without any interference and the appellants have prescribed the right by long continuous usage. Further, the appellants are enjoying the same for more than 20 years and the defendants obstructing the



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pathway by digging Well and keeping sands. Therefore, the appellants have filed the suit for declaration regarding the A schedule property and the mandatory injunction regarding the B schedule property.

11. The defendants 5 to 7 are the subsequent purchaser, that is why, they have been impleaded as necessary parties in the said suit. Since the said cart-track was clearly mentioned in the sale deeds between the parties, they have right by prescription.

12. The case of the respondents are that the appellant never used as a pathway and there is no pathway in existence and GHIJKL pathway never in existence and the appellants have not given the correct boundaries and B schedule properties have not been demarcated. Even, in the village revenue field map also A and B schedule pathways have not been shown and therefore, they have not been properly pleaded and proved. It is the duty of the appellants to prove their case that the appellants enjoyed the cart-track more than the statutory period as pleaded by them, otherwise they



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are not entitled.

13. Based on the pleadings, oral and documentary evidence, findings of the trial Court as well as the first appellate Court, this Court formulated the above stated substantial questions of law.

14. The first appellate Court mainly relied on the commissioner's report and also the boundaries regarding the pathway mentioned in the suit. In sale deed namely, Ex.B4 and Ex.B7. Further, in the plaint, the appellants are not sure about the existence of the pathway either they are entitled to use the pathway as easement of necessity or the right by prescription. In one place, they have stated that all the three brothers divided the common property and at the time created a pathway for their convenient use if that being the case of the brothers are subsequent purchasers are successors entitled to right by way of title on the basis of the severance of tenements and they have a right to easement of necessity or if the easement of necessity is not proved if the persons who were allowed to use the pathway over and above the statutory period, they have the right by prescription.



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15. In this case on pleadings they have stated that they have right by prescription and they are using the pathway for more than 20 years. If once the party pleads that they are using the pathway over and above the statutory period of more than 20 years, therefore, they have got the right to use the said pathway by prescription, whereas, no materials produced to show that the appellants were using the pathway for more than 20 years and further they don't come forward to the Court by specifically claims under what right they are enjoying the property. In one place they have stated that they are enjoying the property over and above the statutory period and hence, they are entitled and in another place they have stated that they are having right by easement of necessity.

16. The appellate Court on considering the entire oral and documentary evidence, finds that the appellants have not established the right as pleaded by them and the substantial question of law No.1 is answered.



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17. As far as the second substantial question of law is concerned, though they have stated in the pleadings that they are entitled to get right by prescription, whereas, in the evidence, they stated that right by easement of necessity. The right by easement of necessity and and right by prescription, both are inconsistent. In order to establish the right of easement of necessity, the persons, who claims must plead and prove that there is no other alternative pathway, whereas, under Section 15 the right by prescription is concerned, the persons who claims the right by prescription, must plead and establish that over and above the statutory period i.e for more than 20 years, they are without any interruption continuously enjoying the pathway. The easement of necessity is required under Section 13 of the Easement Act. Easement by prescription acquired under Section 15 of the Easement Act.

18. A reading of the plaint, the appellant pleaded that they are enjoying the suit property for and above 20 years and which means they



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pleaded that they are enjoying the pathway for more than 20 years and therefore, they have the right of pathway by prescription.

19. If that being the case, the appellants have to establish that from what date they are enjoying continuously without any interruption for more than 20 years.

20. Even the Commissioner report shows that there is no continuity of A and B Schedule pathway, or where the obstruction and the growing up of trees were also admitted.

21. The appellants have pleaded that they are enjoying the pathway for more than 20 years continuously, they should establish the same on the side of the appellant only one of the appellant was alone examined as P.W.1 and no independent witnesses were examined. Further, the revenue records, like, field map or Adangal has not been produced to prove that there was a car-track or pathway for more than 20 years. If any lands



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allotted for pathway and if its sub-divided and used as a pathway it should be described in the revenue records or otherwise in the Adangal. It would be established that what are the extent being cultivated and what are the extent being pathway and what are the extent of well and name of the cultivators, whereas, in this case, none of the documents to show that except in the sale deed in Ex.B5 and Ex.B7 one of the boundaries are shown as pathway which is not proved. Therefore, it is not proved that the said pathway was enjoying by the appellants over and above the statutory period i.e., for more than 20 years. Admittedly, the suit itself is filed for mandatory injunction in B schedule property and the appellants only stated that they were out of station at the time taking advantage of their absence the respondents filled up the new sand while digging the well and the same was not established. In these circumstances, it is the duty of the appellant to prove that prior to the filing of the suit over and above the statutory period they were using the pathway as common car-track continuously without any interruption till filing of the suit.



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22. Whereas, the plaintiff has not proved any documentary evidence in the manner known to law and also not examined any neighbours of common man as a witness and however, the trial Court granted the decree. The first appellate Court re-appreciating the evidence found that the appellant has not proved as pleaded by them and also it is not the consistent stand of the appellant. Either they are entitled to right by title through document or right by prescription like granting the portion to use as a pathway over and above the statutory period or they have a easement of necessity based on the severance of tenements. Therefore, under these circumstances, the plea of easement of necessity and plea of easement by prescription are contrary to each other and both cannot go together. The easement of necessity arise where there no alternative pathway, whereas the easement of prescription even though the alternative pathway is available for convenience sake if the parties allowed to use the pathway over and above the statutory period they are entitled to use the pathway by right by prescription. Therefore, the lower appellate Court rightly concluded that



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both the easement of necessity and easement of prescription are entirely contrary to each other. Therefore, the substantial questions of law are answered accordingly.

23. As discussed above, when the appellants filed the suit for declaration that they are entitled to use the pathway by prescription they should prove that they were enjoying the suit property over and above the statutory period of 20 years continuously and without any hindrance and obstruction, whereas, in this case, a careful perusal of the materials it is found that the appellants have not proved that they were enjoying the A and B schedule pathway without any interruption over and above the statutory period, namely for more than 20 years continuously prior to the filing of the suit. Therefore, this Court finds that they have not proved the same and the second appeal is dismissed. No costs.

NCC : Yes/No

Index: Yes/No

Internet: Yes/No

28.04.2023



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To

- 1.The Sub-Judge,
Kulithalai.
- 2.The District Munsif,
Kulithalai.
3. The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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