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S.A.No.719 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 18 / 09 / 2024

JUDGMENT PRONOUNCED ON : 18 / 12 / 2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.NO.719 OF 2019

K.Muthusamy

... Appellant / Respondent/
Plaintiff

Vs.

1.P.Thangavel

2.P.Swaminathan

... Respondents / Appellants /
Defendants

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree made in A.S.No.5 of 2018 dated February 22, 2019 on the file of the Subordinate Judge, Udumalpet, reversing the Judgment and Decree dated February 14, 2018 made in O.S.No.66 of 2012 on the file of the District Munsif, Udumalpet.

For Appellant : Mr.R.Susendhiran
for M/s.K.Sudhakar

For Respondents : Mr.N.Umapathi



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J U D G M E N T

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This Second Appeal is directed against the Judgment and Decree dated February 22, 2019 passed in A.S.No.5 of 2018 by the 'Subordinate Court, Udumalpet' ['First Appellate Court' for brevity] reversing the Judgment and Decree dated February 14, 2018 passed in O.S.No.66 of 2012 by the 'District Munsif, Udumalpet' ['Trial Court' for brevity].

2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.

FACTUAL MATRIX

3. The Suit Properties and some other properties including those in Survey Nos.47 48, 49 and 50 of Pukkulum Village originally belonged to one Andimuthu Gounder, who had two children, namely daughter – Nagarathinam and son – Ramalingam. Andimuthu Gounder filed a Suit for partition in 'O.S.No.250 of 1946 on the file of Trial Court' ['1946 Suit' for short] in respect of Suit Properties herein and some other properties on August 31, 1946, against his son and daughter. During the pendency of the Suit, he executed a registered Settlement Deed in favour



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of his daughter in respect of the Suit Properties herein and some other properties. Preliminary Decree was passed on May 27, 1947. Final Decree Application viz., I.A.No.671 of 1949 was filed. During the pendency of the said Application, Andimuthu Gounder passed away and Nagarathinam/ 2nd defendant therein was recognised as his legal representative vide Order dated February 16, 1950 passed in I.A.No.1521 of 1949 in the said Original Suit. A Commissioner was appointed to divide the Suit Properties therein. At that time, parties therein entered into a Compromise (*Razinamah*) and filed the same before the Trial Court. Pursuantly, Final Decree was passed in terms of the Compromise.

3.1. As per the Final Decree, a portion of land in Survey No.47 along with easementary right of pathway through Survey Nos.48 and 50 fell into the hands of Nagarathinam. As per the Final Decree, the said pathway can be used by Nagarathinam to access the said portion in Survey No.47 including ingress and egress of Carts, Cattles *etc.* The said portion of land in Survey No.47 forms the Suit A Schedule property herein, and the said Cart Track forms the Suit B Schedule property herein.



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3.2. Further, in the said Final Decree, Ramalingam was allotted a portion of the property in Survey No.47 and the entire extents of Survey Nos.48, 49 and 50. To be noted, Survey Nos.47 to 50 are all adjoining lands.

3.3. Thereafter, on January 20, 1997, the plaintiff purchased the Suit A Schedule property from Nagarathinam. Similarly, the defendants' vendor purchased the properties in Suit Survey Nos.47 to 50 allotted to Ramalingam from him.

3.4. In the year 2009, the 2nd defendant herein filed a Suit in 'O.S.No.455 of 2009 on the file of Trial Court' ['2009 Suit' for short] against the plaintiff and plaintiff's brothers seeking permanent injunction in respect of the lands he purchased from Ramalingam. The said Suit was decreed *ex-parte* on April 12, 2011 in favour of 2nd defendant herein. In the said Suit Advocate Commissioner was appointed and he filed Report and Plan marked as Ex-A.4 herein.



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3.5. Thereafter, the present Suit has been filed by the plaintiff on February 15, 2012 seeking declaration of right of Cart Track, consequential relief of permanent injunction, as well as the relief of mandatory injunction to remove the stones put up by the defendants obstructing the Cart Track, which form the Suit C Schedule property herein.

3.6. According to the defendants, there is no such existence of a Cart Track as alleged by the plaintiff on the ground, and the plaintiff has failed to mention the dimensions of the alleged Cart Track. The plaintiff has no right in defendants' Survey Nos.48, 49 and 50 in any manner. Since the plaintiff and his brothers illegally entered the defendants' properties in Survey Nos.48 to 50, and attempted to take carts and vehicles through the same, the 2nd defendant filed O.S.No.455 of 2009 for permanent injunction and the same was decreed as stated *supra*. Hence the said Decree would bind the plaintiffs. Moreover, if the reliefs sought by the plaintiffs are granted and if the plaintiff is permitted to use the defendants' land as a Cart Track, the ridge formed by the defendants would get damaged and the defendants' land would get flooded causing hardship to the defendants. Accordingly the defendants prayed to dismiss the Suit.



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TRIAL COURT

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4. At trial, plaintiff – Muthusamy was examined as P.W.1 and Ex-A.1 to Ex-A.8 were marked on the side of the plaintiff. On the side of the defendants, the 2nd defendant – Saminathan was examined as D.W.1 and Ex-B.1 and Ex-B.8 were marked.

4.1. After full-fledged trial and hearing both sides, the Trial Court based on Ex-A.1 – Final Decree passed in the 1946 Suit, decreed the Suit in part and thereby granted declaration of easementary right in respect of Suit B Schedule property and consequential relief of permanent injunction. Since the Suit C Schedule property was removed subsequent to the Suit, Trial Court dismissed the Suit *qua* Suit C Schedule property.

FIRST APPELLATE COURT

5. Feeling aggrieved, the defendants preferred an appeal in A.S.No.5 of 2018 before the First Appellate Court. The First Appellate Court after hearing both sides and perusing the documents available on record, concluded that the plaintiff did not plead and specify as to declaration of which right he is seeking over the Suit Cart Track, whether



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easement by grant, or necessity or prescription. Instead he has sought for declaration of title over the same. The Trial Court ought not to have granted a relief not prayed for by the plaintiff. Accordingly, it allowed the Appeal Suit, set aside the Trial Court's Judgment and Decree and dismissed the Suit.

SECOND APPEAL

6. Feeling aggrieved by the dismissal of the Suit, the plaintiff has preferred this Second Appeal, which was admitted on August 21, 2024 on the following substantial questions of law:

- “(1) Whether the first appellate court is right in dismissing the suit for declaration, permanent injunction besides mandatory injunction against the appellant herein by setting aside the decree and judgment of trial court dated 14.02.2018 in O.S.No.66 of 2012 in spite of the fact that the appellant/plaintiff has proved his case by letting oral and documentary evidence in trial court?”*
- (2) Whether the first appellate Court is right in dismissing the suit for insufficient pleadings when the parties to the suit have understood the nature of issues?*
- (3) Whether the first appellate court is right in dismissing the suit for not taking steps to appoint advocate commissioner by the appellant herein in trial court?”*



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7. During the pendency of Second Appeal, this Court vide Order dated June 26, 2024, appointed an Advocate Commissioner to inspect the Suit Properties and file a Report regarding the lie and location of the properties of plaintiffs and defendants. Paragraph No.5 of the said Order reads thus:

“5. The Advocate Commissioner is requested to submit a report regarding the lie of the properties of the plaintiff and the defendants and whether there is a pathway or whether there are remnants of a pathway that exist over the 'B' Schedule property. Both the parties agreed that they will cooperate with the Advocate Commissioner during his visit.”

8. Pursuant to the Order, the Advocate Commissioner inspected the Suit Properties along with taluk Deputy Surveyor and submitted his Report and Plan along with the Taluk Surveyor's Sketch. The same were received on July 16, 2024. The defendants filed an objection dated September 9, 2024. The said documents are hereby marked as Court documents in Exs-C.1, C.2 and C.3 respectively.



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ARGUMENTS:

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9. Mr.R.Susendhiran representing Mr.K.Sudhakar, learned Counsel for the appellant / plaintiff would argue that the 2009 Suit filed by the 2nd defendant is one for permanent injunction and the same was decreed on April 12, 2011. The Judgment and Decree are marked as Ex-B.4. This Suit was filed on February 15, 2012. Since this Suit is one for declaration and consequential permanent injunction filed within three years from Ex-B.4, this Suit is maintainable and in time.

9.1. He would further argue that the plaintiff claims easementary right by grant, granted vide Ex-A.2 -registered Settlement Deed and Ex-A.1 – Final Decree passed in the 1949 Suit. The plaintiff never claimed title over the B Schedule property *i.e.*, Suit Cart Track. He claims only the easement by grant granted to Nagarathinam in respect of Suit A Schedule property vide Exs-A.1 and A.2. The First Appellate Court misread the plaint pleadings and Exs-A.1 and A.2, and erroneously allowed the appeal and dismissed the Suit. Hence, he would pray to allow the Second Appeal, set aside the Judgment and Decree of First Appellate Court, and confirm the Judgment and Decree of the Trial Court.



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9.2. He would rely on the following decisions in support of

his contentions:

- (i) Ram Sarup's Case** - Judgment of Hon'ble Supreme Court in Ram Sarup Gupta (Dead) by LRs. Vs. Bishun Narain Inter College and Others, reported in (1987) AIR (SC) 1242 ;
- (ii) Seshammal's s Case** - Judgment of Hon'ble Supreme Court in Hero Vinoth (Minor) Vs. Seshammal, reported in 2006 (43) AIC 577 (S.C.) ;
- (iii) Anandavally's Case** - Judgment of the Hon'ble Supreme Court in Sree Swayam Prakash Ashramam and Another Vs. G.Anandavally Amma and Others, reported in (2010) 2 MLJ 191 (SC) ;
- (iv) Narain Prasad's Case** - Judgment of the Hon'ble Supreme Court in Narain Prasad Aggarwal (D) by LRs' Vs. State of M.P., reported in (2007) AIR (SC) 2349 ;
- (v) Bachhaj's Case** - Judgment of the Hon'ble Supreme Court in Bachhaj Nahar Vs. Nilima Mandal and Another, reported in (2008) 17 SCC 491
- (vi) Chinnan's Case** - Judgment of this Court in Chinnan Vs. Marappan, reported in (2004) 1 MLJ 651 ;
- (vii) Nachimuthu's Case** - Judgment of this Court in Nachimuthu Vs. Rengasamy, reported in (2017) 3 MLJ 526



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10. Mr.N.Umapathi, learned Counsel for the respondents /

defendants would argue that there is no such pathway available on the ground as allegedly mentioned in Exs-A.1 and A.2. The plaintiff has an alternate East-West Cart Track on the north-western corner of Survey Nos.17 and 18 to reach Suit A Schedule property. Further the Advocate Commissioner appointed by this Court clearly mentioned the alternate pathway in his Report and Plan (Exs-C.1 and C.2). The plaintiff did not prefer any application to set aside or appeal against Ex-B.4 – Judgment and Decree. Until it is set aside or varied, the Ex-B.4 – Judgment and Decree holds good and the present Suit would not be maintainable as barred by *res judicata*. The Trial Court erroneously decreed the Suit. The First Appellate Court appreciated the evidence in the right perspective, allowed the appeal and dismissed the Suit. There is no reason to interfere with the same. Accordingly, he would pray to dismiss the Second Appeal, and confirm the Judgment and Decree of First Appellate Court.

10.1. He would rely on the following decision in support of his contentions:



- (i) **Manisha's Case** - Judgment of Hon'ble Supreme Court in Manisha Mahendra Gala and Others Vs. Shalini Bhagwan Avatramani and Others, reported in 2024 (3) MLJ 97 (SC)

DISCUSSION:

11. This Court has heard on either side and perused the materials available on record in light of the Substantial Questions of Law.

12. It is settled law that the pleadings has to be read comprehensively. The object and purpose of pleadings is to enable the other party to know the case of the plaintiff (*vide Ram Sarup's Case*). Upon a comprehensive reading of the plaint and plaint documents through the lens of facts and circumstances of the case, it could be seen that the plaintiff is claiming the right of easement by grant over the Suit Cart Track, granted in respect of Suit A Schedule property vide Ex-A.1 – Final Decree and Ex-A.2 – registered Settlement Deed. Relevant portion of Ex-A.1 reads thus:

' . . . கச.48, 50 நெ. காலைகள் வழியாக
வண்டி கால்நடை வகையறா கொண்டுபோகும்
வழிநடை வகையறா பாத்தியம் உள்படவும். . . '



13. The Suit Properties and other properties originally owned

by Andimuthu Gounder were partitioned between his son and daughter vide Ex-A.1-Final Decree, whereby an easement by grant in respect of a Cart Track through Survey Nos.48 and 50, to access the property allotted to Nagarathinam in Survey No.47 (Suit A Schedule property), including usage by ingress and egress of carts, cattle *etc.*, was granted in favour of her. The plaintiff purchased the Suit A Schedule property from her. The defendants' vendor purchased the properties in Survey Nos.48 and 50, which were allotted to Ramalingam vide Ex-A.1, from him.

14. In short, the plaintiff and the defendants trace their title through Ex-A.1, whereby easementary right of Cart Track was granted in respect of Suit A Schedule property. Hence, the said property is the dominant heritage and the Survey Nos.48 and 50 are servient heritage. In Ex-A.1, it has been clearly mentioned that Nagarathinam is entitled to use the Cart Track to access Survey No.47, including ingress and egress of carts, cattle *etc.*, through the Survey No.48 and 50. Further close reading of Ex-A.1 would show that the said Cart Track and boundaries were formed and fixed before passing Ex-A.1. The easement granted vide Ex-A.1 is a permanent arrangement which is uncontrolled by any condition



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and thus, imposes a perpetual liability on the servient tenement. Easement by grant does not get extinguished under any provision of the Indian Easements Act, 1882 unless the dominant owner himself abandons the same [See *Hero Vinoth's Case* (cited *supra*) and the Judgment of this Court in *V.K.Ramasami Gounder -vs- P.Ramasami Gounder*, reported in *1997 2 MLJ 223*].

15. Advocate Commissioner was appointed in the 2009 Suit as well as in this Second Appeal. Ex-A.4 as well as Exs-C.1, C.2 and C.3 shows the lie and location of the properties of plaintiff and defendants. Further it shows that a 'footpath' which branches off from East -West Main Road, passes through Survey No.50 and then through Survey No.48 to reach Survey No.47/1C. There is some gap on the eastern side of the well in Survey No.47/1C to reach Survey No.47/2. Earlier Advocate Commissioner has noted in Ex-A.4 that there are traces of vehicle passing through the pathway. He has also mentioned that there were coconut trees, whose age would be around two years and that there are sufficient gap between the coconut trees for carts and cattle to pass. On the other hand, Ex-C.1 to Ex-C.3 show the existence of only a footpath. Naturally, there



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would not any need for frequent vehicle passing in coconut farms and therefore, the Cart Track might have gradually taken the appearance of a footpath with growth of weeds and grass over time. To be noted, Ex-A.1 proceedings were concluded only after forming the Cart Track and boundaries. It is also to be noted that Ex-A.4 made in 2009 shows the presence of a Cart Track and not a footpath, and that there is sufficient gap between the coconut trees for a Cart Track. Further, easement right by grant will not be extinguished due to presence of another pathway. Moreover, even as per Exs-C.1 and C.2, the said alternate pathway belongs to a third party and not the plaintiff. Hence, the contentions of the defendants in this regard are to be rejected. Further, there is no dispute with the law laid down in the cases relied on by the both sides.

16. In these circumstances, this Court is of the view that the plaintiff has proved the existence of Suit Cart Track and his right of easement by grant over the same. The Trial Court was right in decreeing the Suit. The First Appellate Court failed to appreciate the pleadings as a whole in light of the facts and circumstances of the case, and erroneously allowed the appeal and dismissed the Suit. Dismissal of the Suit by the



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First Appellate Court is not justifiable in law. Substantial Questions of Law are answered accordingly.

CONCLUSION:

17. Resultantly, the Second Appeal is allowed. The Judgment and Decree of the First Appellate Court is hereby set aside. The Judgment and Decree of the Trial Court is hereby confirmed. Keeping in mind the facts and circumstances of the case, there shall be no order as to costs.

18 / 12 / 2024

Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
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LIST OF ADDITIONAL DOCUMENTS MARKED IN THE SECOND APPEAL AS ADDITIONAL EVIDENCE

<i>S.No.</i>	<i>Dated</i>	<i>Exhibits</i>	<i>Description of documents</i>
1	16.07.2024	Ex-C.1	Advocate – Commissioner's Report in original
2	16.07.2024	Ex-C.2	Advocate – Commissioner's Plan in original
3	10.07.2024	Ex-C.3	Surveyor's Sketch in original

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To

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1.The Subordinate Judge
Udumalpet.

2.The District Munsif
Udumalpet.



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R. SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN

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