



S.A. No.694 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2024

DELIVERED ON : .03.2024

CORAM:

THE HON'BLE MR. JUSTICE P.B. BALAJI

S.A. No.694 of 2017

1.Rajkumar
2.Arunkumar

.... Appellants

Versus

1.Academy of Maritime Education and Training,
Rep by its Chairman,
No.135, E.C.Road,
Kanathur Reddy Kuppam,
603 112,.

2. Orchid India Pvt. Ltd.,
Rep by its Authorised Signatory,
Karathur Reddy Kuppam,
Chengalpattu Taluk

... Respondents

Second Appeal filed under Section 100 of the Civil Procedure code, against the decree and judgment passed in A.S. No.15 of 2015 dated 28.04.2016 on the file of Subordinate Court, Chengalpattu, confirming the judgment and decree dated 25.11.2014 in O.S.No.340 of 2007 on the file of District Munsif Court, Chengalpattu.



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For Appellants

: Mr.T.R.Rajagopalan
Senior Counsel for
Mr.S.T.Bharath Gowtham

For Respondents

: Mr.N.Jothi
Senior Counsel for
Mr.S.Vinod
for R.1
Mr.N.Manokaran
For R.2

JUDGMENT

The unsuccessful plaintiffs before the trial Court as well as the first appellate Court, in a suit for Declaration of Easementary Right, are the appellants herein. The parties are described as per their litigative status in the suit. The pleadings in summary, in order to appreciate the respective contentions of the parties and in order to adjudicate the above Second Appeal, are as follows:

(i) The plaintiffs stated that the suit property described in schedule “A”, originally belongs to one Raji Naicker, who had purchased the same under two registered sale deeds dated 05.02.1927 and 27.05.1937, along with one another property. The said Raji Naicker was blessed with a son by name



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Balaraman Naicker and daughter Kasi Ammal. The suit property, according to the plaintiffs, was allotted to Balaraman Naicker and the adjacent property was allotted to Kasi Ammal. After the demise of Balaraman Naicker, the suit property was transferred to his wife viz., Mrs,Rupavathi Ammal. The plaintiffs claim to be grand sons of Balaraman Naicker and Rupavathi Ammal, through their son Ranganathan. According to the plaintiffs, their grandmother, Rupavathi Ammal had executed a registered Will dated 27.12.2000, bequeathing the suit “A” schedule property to the plaintiffs. The said Rupavathi Ammal died on 28.02.2007 and her last Will dated 27.12.2000 became operational and the plaintiffs became the absolute and exclusive owners of the suit “A” schedule property. The plaintiffs have taken steps to transfer patta in their name and the same is pending with Revenue Divisional Officer.

(ii) According to the plaintiffs, the defendant had purchased the adjacent properties on the northern and western side of the suit “A” schedule property and that the defendant is running a College under the name and style of “Academy of Maritime Education and Training”.



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(iii) The plaintiff's specific case is that the suit "A" schedule property and all adjoining properties are all agricultural lands, however, the defendant has converted usage of the property into commercial purposes, but the plaintiffs are using "A" schedule property only for agricultural purposes.

(iv) The plaintiffs' specific case is that on the western side of the suit property, there is a canal road, which runs from East Coast Road and leads to the village and that from the said canal road, a cart track is running towards East Coast Road on the northern side of the "A" schedule property and only through the said cart track, the plaintiffs and other adjacent land owners bring agricultural materials and labourers too use the said cart track

(v) The suit "B" schedule property is the path way, which is situated on the western side of the suit "A" schedule property. According to the plaintiffs, the "B" schedule pathway is the only ingress and egress for the plaintiffs to their "A" schedule property and there is no other alternative way to reach "A" schedule property. Depriving the usage of the said cart track, the



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defendants raised a compound wall by annexing “B” schedule property and in the first week of July 2007, the plaintiffs visited the suit property, they found the offending construction and therefore, they have filed the suit to declare “B” schedule property as common pathway and also for mandatory injunction to demolish the compound wall put up by the defendant in “B” schedule property. However, in the plaint the prayer that has been sought for is as hereunder:-

(a) declare the Easementary right of “B”Schedule mentioned property as common pathway;

b) for mandatory injunction directing the defendants to demolish the compound wall put up in the “B” Schedule mentioned property.

2. The defendant filed a written statement and resisted the suit contending that they are not aware of the claim to right and title of the plaintiffs and put the plaintiffs to strict proof of the tracing of title, right from Raji Naicker to Rupavathi Ammal and also from Rupavathi Ammal, under



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whom the plaintiffs claim right under an alleged Will. According to the plaintiffs, they have leased 6 acres and 28 ½ cents from Orchids India Limited, a Public Limited Company, incorporated under the provisions of Companies Act 1956 and the defendant is under the control of M/s Srimathi Pattammal Educational and Charitable Trust, which runs the defendant Academy.

3. It is further stated by the defendant that the said Trust purchased 0.22.5 Hectares in Survey No.65/3 in order to develop the facilities of the College and they have constructed a compound wall around the entire extent of the property in order to consolidate the land held by the Trust, running the educational institution.

4. The defendant has also stated that the lands in S.Nos.65/8B1 and 65/9, Kanathur Village, which are situate outside the compound wall on the southern side of the property, held by the Academy, where the College has been run, is being used as play ground for the students and in order to access the said play ground land, the defendant has provided a grill gate on the



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southern side of the land in Survey No.65/3 and the same is not a thorough fare.

5. According to the defendant, there is no available access, as claimed by the plaintiffs much less any access that has been in their enjoyment for the past several years as alleged in the plaint.

6. It is the further case of the defendant that all lands in S.Nos.66/3A and 66/4 should have access to East Coast Road only through Panchayat Road, running on the southern side of the property and most of the lands on the southern side have already been converted into lay outs and the plaintiffs can have access to their lands only using the panchayat road and not across the revenue channel and not through the patta land, belonging to the defendant Academy.

7. The defendant has also specifically denied the existence of “B” schedule property set out in the plaint and according to the defendant, the suit “B” schedule property itself is only an imagination of the plaintiffs in order to



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stake a false claim against the property of the defendant.

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8. The defendant has also stated that the compound wall was constructed in March 2006 and the claim of the plaintiffs is that they visited the suit property in July 2007 and only then they came to know about the construction of the compound wall, depriving their alleged access was totally false. According to the defendant, the plaintiffs' claim also only disproves their self serving averment that they are carrying on agricultural operations in the suit property. Thus, the defendant prayed for dismissal of the suit.

9. In view of the stand in the written statement that a portion of the property was owned by Orchid India Pvt Ltd, the said Company was impleaded as second defendant before the trial Court.

10. The trial Court, after assessing the pleadings, oral and documentary evidence available on record, found that the plaintiffs had not established their easementary right viz., “B” schedule common pathway and dismissed the suit and had also taken note of the Commissioner's Report, which had



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indicated that there was no pathway on the western side of “A” schedule property and also found that there was an alternate access available to the plaintiffs, which was admitted by P.W.1 himself and therefore held that the plaintiffs were not entitled to easementary of necessity and dismissed the suit.

11. On appeal in A.S.No.15 of 2015, the first appellate Court concurred with the findings of the trial Court and held that the plaintiffs had not established their right by way of easementary of necessity and consequently no relief could be granted in favour of the plaintiffs. In fact, the first appellate Court found fault with the judgment of the trial Court on the ground that the suit ought to have been dismissed on the ground of absence of proving the prescriptive period of enjoyment to claim “B” schedule property as common pathway, instead of dwelling into the aspect of easement of necessity. However, the first appellate Court dismissed the appeal. As against the concurrent findings of the Courts below, the plaintiffs have preferred the above Second Appeal.

12. On 30.10.2023, the above Second Appeal was admitted on the



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following substantial questions of law: -

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(a) Whether the findings of the Lower Appellate Court that the appellants/plaintiffs have not claimed easement necessity is the result of misreading of pleadings?

(b) Whether the judgment of the Courts below are vitiated by non-consideration of material evidence available on record namely, the Advocate Commissioner's report and plan?

13. I have heard Mr.T.R.Rajagopalan, learned Senior Counsel appearing for Mr.S.T.Bharath Gowtham, counsel for the appellants and Mr.N.Jothi, learned Senior Counsel, appearing for Mr.S.Vinod, counsel for the first respondent and Mr.N.Manokaran, learned counsel for the second respondent. I have also gone through the entire records, including the pleadings, oral and documentary evidence adduced by the parties before the trial Court, the report of the Advocate Commissioner along with Plan, the objections to the said Report and also the judgments of the trial Court as well as the first appellate Court.



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14. Mr.T.R.Rajagopalan, learned Senior Counsel for the appellants would first and foremost take me through the pleadings viz., the plaint. He would refer to paragraph Nos.8 and 9 and contend that there was a clear pleading that there was no other alternate approach to “A” schedule property, excepting through “B” schedule property and therefore, the plaintiffs' specific contention was only an easement of necessity and not an easement by prescription. However, according to the learned Senior Counsel, the first appellate Court has proceeded entirely on the basis that the plaintiffs claim was based on easement by prescription and not having established the requirements to succeed in a suit based on easement by prescription, the first appellate court has non-suited the plaintiffs. He also further took me through the prayer sought for in the plaint and in order to explain the ambiguous relief sought for viz., easement by necessity and common pathway, both not going together in a suit based on easementary right, he would state that the suit was filed before the District Munsif Court, Chengalpattu and plaints are drafted by lawyers and not by the litigants who approach the Court and therefore, there has to be some relaxation when it comes to pleadings in moffusil court. He would also place reliance on the decision of the Hon'ble Supreme Court in the



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case of ***Devasahayam (dead) by Lrs vs P.Savithramma and Others***

reported in [***(2005) 7 SCC 653***], where the Hon'ble Supreme Court has observed that pleadings should be construed reasonably and culled out from reading the entire plaint or written statement as a whole, keeping in mind that different considerations on construction of pleadings are bound to arise between the pleadings in a Mofussil Court and the pleadings in the original side of the High Court. For the same proposition, the learned Senior Counsel would also place reliance on the decision of the Hon'ble Supreme Court in the case of ***Des Raj and Others and Bhagat Ram (dead) by Lrs. And Others*** reported in [***(2007) 9 SCC 641***], where the observations of the Hon'ble Supreme Court in ***Devasahayam's*** case found favour with the Hon'ble Supreme Court in this later decision and the Hon'ble Supreme Court held that Mofussil pleadings must be construed liberally, by construing the pleadings as a whole.

15. This apart, the learned Senior Counsel would state that the trial Court had discussed the entitlement of the plaintiffs on both necessity as well



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as prescription and found that the plaintiffs' case would fall under easement of necessity only and finding that the plaintiffs had not established their right to an easement of necessity, dismissed the suit. However, the first appellate Court, without discussing the pleadings and evidence with regard to the plaintiffs' claim, based on easement of necessity, had erroneously dismissed the appeal, holding the the plaintiffs have not proved their prescriptive right, which was never the case of the plaintiffs. Finally, the learned Senior Counsel would take me through Advocate Commissioner's Report and plan which clearly indicated, according to the learned Senior Counsel, that excepting "B" schedule pathway, the plaintiffs were not having any other access and therefore, concluded his arguments stating that the Courts below have failed to take into account the findings of the Advocate Commissioner and have proceeded to erroneously dismissed the suit, on a misreading of the plaint and also omitting to refer to the material evidence viz., Advocate Commissioner Report and the plan.

16. Per contra, Mr.N.Jothi, learned Senior Counsel for the first respondent /Academy of Maritime Education and Training (AMET) would



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contend that when the plaintiffs claim their right based on the Will of Rupavathi Ammal, the original Will was not filed, much less proved. Therefore, according to the learned Senior Counsel, the plaintiffs have upfront failed to even establish their title to their property and without doing so, they could not approach the Court, seeking the relief of declaration of an alleged easementary right available to them. He would also state that the original Will was never filed before the trial Court and none of the attesting witnesses to the said Will were also examined, which raise a doubt even with regard to the genuineness of the document of title over suit "A" schedule property. He would also invite my attention to Section 13 of Easements Act, 1882 which relates to easement of necessity. Section 13 of the Easements Act, 1882 is extracted hereunder:-

"13. Easements of necessity and quasi-easements.

Where one person transfers or bequeaths immovable property to another,--

(a) if a easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or



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(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferer or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,--

(e) if an easement over the share of one of them is necessary for enjoying the share of the another of them, the latter shall be entitled to such easement, or



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(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee. ”

17. According to the learned Senior Counsel, Mr.N.Jothi, the plaintiffs have miserably failed to establish their easementary right, be it, by way of necessity or by prescription. He would take me through Ex.A.1 Will, where no easementary right is available or can also be inferred from the reading of the Will. He would also state that the concept of easementary right would arise only in a case where there is a dominant tenement and servient tenement. The fundamental requirement in order to claim a right under Section 13 of Indian Easementary Right is that there must be a common



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ownership in place for a creation of an easement of necessity. He would place
reliance on the following decisions:-

i) *Murugesu Moopanar vs Sivagnana Mudaliar* (1997
(1) CTC 348)

ii) *K.Kolandaisami Gounder (decd). And another vs Manickam* (2001 (4) CTC 193

(iii) *Ponnan and Others vs Peraman and another*
(2006 (5) CTC 573

(iv) *Bachhaj Nahar vs Nilima Mandal and Another*
(2008) 17 SCC 491

(v) *Arangasamy vs Valarmathy and another* (2009) (3)
CTC 442

(vi) *T.V.Ravi vs B.R.Mohan and 2 others* (2016) (6)
CTC 541

(vii) *K.Kaianna Gounder and Another vs Sundararaj
and another* (2019) (5) CTC 80

(viii) *Revathi vs Kathan* (2020) (1) MWN (Civil) 82

(ix) *T.R.Meyvel (died) and 3 others vs Duraisamy and
4 others* (2020) (2) MWN (Civil) 630

(x) *K.Rajasekara Kumar vs Yasodha Purushothaman
(died) and Others* (2020) (5) MLJ 94

(xi) *Saraswathy Ammal and 3 Others vs Govindan
and Another* (2020) (5) CTC 781



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(xii) Raja vs Vedi Raj (died) and 16 others (2020) (6) CTC 192

(xiii) Nallammal and Others vs Sengoda Gounder and Others (2022) (3) MLJ 684

18. The principles that can be culled out from the above decisions are that:

i) For an easement of necessity to arise, there has to be cessation of ownership;

ii) Both the servient and dominant tenements were under one common ownership;

iii) By disposition, the tenement get disintegrated, by transfer or bequest or partition;

(iv) As a result of such disintegration, there is impossibility of enjoyment of one of the tenement, excepting by usage of the other tenement;

(v) Mere pleading that there is no alternative way to enter the property is not sufficient to establish easement of necessity;

(vi) Grant of easement of necessity may be express or even by implication.



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and

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(vii) Pleadings that would be necessary to establish easement by prescription are different from pleadings and proof necessary for establishing an easement of necessity.

19. Only if the above requirements are satisfied by the plaintiffs approaching the Court, seeking the right of easement to be declared in their favour and establishing that there is no access to their land except through the servient tenement viz., “B” schedule property in this case and that “A” schedule property would become totally unusable if the right of passage is deprived through “B” schedule property.

20. It is also settled law that doctrine of easement of necessity would not apply in a case where the defendants own adjacent lands, having separate pathway to access their land.

21. Testing the facts of the present case in the light of the above principles, first and foremost, the only document on which the plaintiffs rely



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is the copy of the Will executed by Rupavathi Ammal. Admittedly, the said Will has not been proved by examining any of the attesting witnesses. Moreover, the original Will was also not filed before the trial Court. Further, even on reading of Ex.A.1 Will, it is clear that there can be no presumption drawn with regard to any express grant of easement of necessity or even remotely, by implication. Moreover, it is a case where the plaintiffs do not claim that both the plaintiffs and the defendants had a common ancestor. The property that belongs to the defendants has a separate line of predecessor-in-interest and the property, under which, the plaintiffs claim trace title through Raji Naicker, is not a common ancestor and there has been no disintegration of common property, in order to bestow the plaintiffs with a right of easement of necessity.

22. Even though the trial Court has discussed the plaintiffs' claim, based on easement of necessity only and found that the plaintiffs had not established their right, the first appellate Court, while confirming the judgment and decree of the trial court, gave different reasoning that the plaintiffs have not proved the easement by prescription by establishing the enjoyment of "B" schedule path way for a statutory period of twenty years, as



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required under the provisions of Indian Easements Act. The property of the defendants, even according to the plaintiffs, has no connection with the property of the plaintiffs and their predecessor-in-title and interest and therefore, the question of seeking easement of necessity does not arise at all.

23. The next ground contended is that the first appellate Court has not applied its mind to the report of the Advocate Commissioner, who had also filed plan and it is one of the substantial questions of law that has been raised in the above Second Appeal. However, insofar as the Advocate Commissioner's Report is concerned, Mr.N.Jothi, learned Senior Counsel would submit that the defendants had filed objections to the Commissioner's Report and the same has not been considered by the trial Court or the first appellate Court and Mr.N.Manokaran, learned counsel for the second respondent would further submit that the Advocate Commissioner's Report is only a piece of evidence and cannot be wholly relied upon by the Courts to give relief to the plaintiffs. He would place reliance on the decision of this Court in the case of *Vemba Gounder vs Pooncholai Gounder* reported in *1996 Vol .I The Madras law Journal Reports 426*, where this Court has



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discussed the scope of Commissioner's Report and the objections filed thereon either by the plaintiffs or by the defendants. This Court has held that whenever objections have been raised on the Report, it is the duty of the trial Court to enter into a finding on the said objection before calling upon the parties to let in on the merits of the case and even mere examination of Advocate Commissioner would not be sufficient. Here, admittedly, the Advocate Commissioner was not examined and the Report has also not been marked before the trial Court. However, as rightly contended by Mr.T.R.Rajagopalan, learned Senior Counsel for the appellants, extensive cross examination of the plaintiffs have taken place based on the Advocate Commissioner's report and therefore, I do not think that in the present case, non-filing of the Advocate Commissioner's Report, as an exhibit, would be fatal. However, as laid down in the above decision of this Court, the trial Court ought to have given a finding on the objections that were admittedly filed by the defendants. In any event, the trial Court has only proceeded to dismiss the suit, not accepting the findings of the report of the Advocate Commissioner . The Report of the Advocate Commissioner is only to be of assistance to the Court and cannot be a substitute for both oral and



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documentary evidence of the litigating parties before the Court.

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24. The trial Court disbelieved the report of the Advocate Commissioner based on the evidence of P.W.1 alone. The trial Court has taken note of the admission of P.W.1 that the plaintiffs have been using adjacent lands in order to access “A” schedule property. Even though the Commissioner has mentioned that “B” schedule property is the only access through which the plaintiffs can have access to their property in “A” schedule, even assuming the Report can be used in support of the case of the plaintiffs, when the plaintiffs have failed to establish common ownership in the first place and subsequent disintegration of tenements and also that schedule “A” property is not one of such disintegrated tenement, the question of declaring easementary right of necessity in favour of the appellants does not arise at all.

25. Regarding the prayer Mr.T.R.Rajagopalan, the learned Senior Counsel would state that only with the specific pleading with regard to “B” schedule property being the only pathway to access suit “A” schedule property, the suit was filed, therefore, the first appellate Court ought to have



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seen that the claim was only by way of easement of necessity and ought not to have been carried away by the prayer sought for in the plaint. For this, he has also relied on the decisions of the Hon'ble Supreme Court with regard to Moffusil pleadings.

26. I have also culled out the prayers sought for by the plaintiffs in the suit. Admittedly, the relief of necessity and common pathway cannot go hand in hand. Once the case of the plaintiffs is that it is common pathway, then they would automatically become entitled to a right in the said pathway. Only when it is the case of the plaintiffs that they have no right in the suit “B” schedule pathway and it is absolutely necessary for them to use the “B” schedule even to access “A” schedule property, then alone, it will be a question of easement of necessity. However, giving leverage to the not happily couched prayer, taking note of the fact that the suit was filed only for declaring easementary right of the plaintiffs by way of necessity only, in view of the above circumstances, especially, there being no common owner or ancestor at any point of time, the plaintiffs' claim for easement of necessity cannot be accepted.



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27. Though Mr.N.Jothi as well as Mr.N.Manokaran, would attack the validity of Ex.A.1 Will, I do not deem it necessary to even to go into these aspects, since the plaintiffs have not been able to establish the primary and fundamental requirement for becoming entitled to declaration of easement of necessity. Though pleadings are available in the plaint with regard to easement of necessity, the plaintiffs have not satisfactorily proved and established the requisite conditions, unless those of which proved would alone entitle the plaintiffs to declaration of their easementary right of necessity.

28. Learned Senior Counsel Mr.N.Jothi also placed reliance on the decision of this in Court in *V.Mariappan and Others vs Marudan and Others* reported in 1999 MLJ (Supp.) 260 and *K.Ramasami vs Chinnammal and Another* reported in 2007-3-L.W.224 with regard to exercise of power under Section 100 of Civil Procedure Code.

29. It is now settled position of law that unless substantial questions of law arise for consideration in the Second Appeal, the High Court should not



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interfere with concurrent findings rendered by the trial Court and the first appellate Court, as long as the Courts below have based their decisions on the material pleadings and evidence adduced by the parties, both oral and documentary. In the present case, I do not find any grave error, infirmity, irregularity or perversity in the findings arrived at by the trial Court as well as the first appellate Court in declining relief to the plaintiffs, even though the first appellate Court has proceeded to discuss easement of prescription also which was never claimed by the plaintiffs and dismissed the appeal.

30. Even though the first appellate Court has erroneously found that the plaintiffs claim was based on easement by prescription, yet, on, re- appreciation of oral and documentary evidence, the first appellate Court has rightly concluded that the plaintiffs have not produced any materials to show that “B” schedule property was used by their predecessors as claimed in the plaint and the plaintiffs have failed to make out their claim for declaration by easement of right of necessity or even by prescription and the first appellate Court has clearly found that the plaintiffs were not entitled to both



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easement of necessity as also prescription.

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31. For the above reasons, all the substantial questions of law are answered against the appellants and the Second Appeal stands dismissed. No costs.

08.03.2024

Index: Yes/No
Speaking Order/Non-Speaking Order
sr

To

1. The Subordinate Court, Chengalplattu
2. The District Munsif Court, Chengalpattu
3. The V.R.Section, High Court, Chennai.

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P.B.BALAJI,J.

sr

Pre-Delivery Judgment
in S.A.No.694 of 2017

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