



SA(MD)No.308 of 2012 and CRP(MD)Nos.3009 of 2023 and 2668 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 19/03/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

SA(MD)No.308 of 2012

and

CRP(MD)Nos.3009 of 2023 and 2668 of 2014

(1) SA(MD)No.308 of 2012:-

P.Selvaraj : Appellant/Appellant/
Defendant

Vs.

1.T.Natchathiram
2.K.Saroja
3.Padmathamgam
4.T.Murugesan
5.T.Rajan
6.T.Nagulesan : Respondents/Respondents/
Plaintiffs

PRAYER:- Second Appeal is filed under section 100 of the Civil Procedure Code to call for the records from the courts below and set aside the decree and judgment of the Subordinate Judge, Padmanabhapuram, dated 03/04/2007 in AS No.136 of 2005 confirming the decree and judgment of the Additional District Munsif, Eraniel, dated 09/02/2005 in OS No.123 of 1999.

For Appellant : Mr.Mr.Ashok Kumar
for Mr.H.Velavadas

For R2 to R4 : Mr.Xaveir Rajini

For 1st Respondent : Died



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(2) CRP (MD) No. 3009 of 2023 :-

P.Selvaraj

: Petitioner

Vs.

S.Thangarathinam (died)

1.T.Natchathiram

2.K.Saroja

3.Padmathamangam

4.T.Murugesha

5.T.Rajan

6.T.Nagulesa

: Respondents

Prayer-Civil Revision Petition has been filed under Article 227 of the Constitution of India to set aside the fair and decreetal order passed in EA No.2 of 2023 in EP No.21 of 2009 in OS No.123 of 1999 on the file of the District Munsif, Eraniel, dated 23/06/2023.

(3) CRP (MD) No. 2268 of 2014 (NPD) :-

P.Selvaraj

: Petitioner

Vs.

S.Thangarathinam (died)

1.T.Natchathiram

2.K.Saroja

3.Padmathamangam

4.T.Murugesha

5.T.Rajan

6.T.Nagulesa

: Respondents

Prayer-Civil Revision Petition has been filed under section 115 of the Civil Procedure Code to set aside the fair and decreetal order passed in EP No.21 of 2009 in OS No.123 of 1999 on the file of the Principal District Munsif-cum-Judicial Magistrate, Eraniel, dated 1811/2014.



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For Appellant : Mr.Mr.Ashok Kumar
for Mr.H.Velavadas

For R2 to R4 : Mr.Xaveir Rajini

For 1st Respondent : Died

COMMON JUDGEMENT

The second appeal is directed against the the decree and judgment, dated 03/04/2007 passed by the Subordinate Judge, Padmanabhapuram in AS No.136 of 2005, confirming the decree and judgment of the Additional District Munsif, Eraniel, dated 09/02/2005 in OS No.123 of 1999, whereas CRP(MD)Nos.3009 of 2023 and 2668 of 2014 have been filed against the order of the trial court as stated in the prayer portion.

2.The facts in brief:-

The defendant is the brother's son of the deceased first plaintiff namely Thangarathinam. 'B' schedule property is the ancestral property comprised in old Survey No.1941 to an extent of 15 cents. In that property, he constructed a house bearing No.10/17A. The property comprised in Survey No.1949 is also the ancestral property. During the family partition, he was allotted northern 8-5/8 cents and for the defendant's father on the southern side allotted 8-3/8 cents. After the death of the defendant's father, the defendant now in



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possession of the property allotted to his father. On the eastern side of the old survey number, Monday Market-Cheramangalam Road is running. In 1966, he sold 3-1/2 cents in old survey No.1949 to one Kasi Nadar. At that time, he left a pathway on the southern side measuring about 130 links length and 6 links breath to ingress and egress to the plaintiffs 'B' schedule property from Monday Market road. This pathway is mentioned as 'A' schedule in the plaint. From 1940 onwards, 'A' schedule property was used as a pathway. No other alternative pathway is available to him. He got right over 'A' schedule property, not only on the basis of the right, but also on the basis of prescription and necessity. The defendants have no right over the 'A' schedule property. On 09/02/1999, the defendants closed the entrance by using the wooden rafters, obstructing the ingress and egress. Again on 30/04/1999, the defendants constructed a latrine. From 21/06/1999, they are trying to close the pathway and put up a compound wall. So the suit is filed declaring that the 'A' schedule property is the pathway of the plaintiffs and for permanent injunction; mandatory injunction to remove the superstructure and construction in the 'A' schedule property.



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3. The appellant filed written statement with the following averments:-

The ownership of the property is not denied. The oral partition is admitted. But he denied that at the time of selling the property to one Kasi Nadar the plaintiff left space for using the same as pathway. In between 'B' schedule property and Kasi Nadar's property, one Sathianatham is having land. The fact that the plaintiff is enjoying 'A' schedule property as a pathway in survey No.1949 is also denied. Cause of the action pleaded in the plaint is not true and correct. Apart from that, pathway exist on the northern side of the property of Kasi Nadar. One another alternative pathway is also existence adjacent to the southern wall of the defendant's property. The electricity line runs to the defendant's house through his common pathway by erecting electric poles. With regard to the other averments that he put up a construction obstructing the free passage is also denied and disputed.

4. Before the trial court, on the side of the plaintiff, 2 witnesses were examined and 12 documents marked. On the side of the defendant, one witness was examined and 3 documents were marked. The Commissioner's report and plan were marked as Exs.C1 to C3.



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5.At the conclusion of the trial, the trial court declared that the plaintiff is having easementary right of pathway over 'A' schedule property having width of 4 links as shown in the Commissioner report (Ex.C3). Permanent injunction was granted. Apart from that, mandatory injunction to remove the superstructure and construction in the 'B' schedule property within three months was granted.

6.Against which, appeal is filed before the appellate court namely the Sub Court, Padmanapapuram. It came to be dismissed by judgment and decree dated 03/04/2007.

7.Against which this second appeal is preferred.

8.At the time of admitting the second appeal, the following substantial questions of law were framed:-

1.Whether the courts below are correct in granting easement right to the respondents in the A schedule as alternative relief without any pleading to that effect when the respondents/plaintiffs claimed exclusive declaration of right over the plaint A schedule property?



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(2) Whether the Courts below are correct in granting a relief of permanent injunction as against the appellant in the A schedule property having accepted the title of the appellant in the A schedule and granted easement right to the respondents without any pleadings?

3. Whether the courts below are correct in granting a relief of easement right to the respondents by solely relying upon the report of the commissioner exhibits C1 to C3 which is guiding factor in the process of decision making and can never be used as the basis of decision making as held in 2009(1)CTC 611?

9. To start with the learned counsel appearing for the appellant would straightaway rely upon the judgment of this court reported in ***K. Krishnamoorthy Vs. Nagammal and others [2015(1)CTC 417]*** and would make a preliminary objection that the both the title and the easement of necessity or by prescription will not go hand in hand. According to him, both are mutually, destructive in nature. For this purpose, he would draw the attention of this court to the plaint averment.



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10.As mentioned above in the plaint, the plaintiff has stated that after selling the northern 3-1/2 cents to one Kasi Nadar, he left an extent 130 links length and 6 links breadth on the souther side of Kasi Nadar's house and using the same as a pathway. So this is the first contention. On the very same line, he has stated that he got right of necessity and right of way by prescription. The relevant portion may be extracted for better appreciation.

"....The plaintiff has right over this 'A' Schedule pathway not only on the basis of the right but also on the basis of the prescription and necessity."

11.So this is the objectionable portion in the plaint. According to the learned counsel appearing for the appellant, the trial court without noticing the inconsistent plea has simply relied upon the Commissioner's report and passed the decree, which according to him, *per se* illegal.

12.Per contra, the learned counsel appearing for the respondents in SA(MD)No.362 of 2012 by relying upon the judgment of this court reported in the case of **Dhanu**



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Paudaram Vs. Kali Pandaram (1999-1-MJ 242) would submit that the right of election is recognized in such circumstances. If he could not be able to prove his title over the 'A' schedule property, but on the basis of the Commissioner's report, except the 'A' schedule property, no other pathway exists for him to reach the 'B' schedule property. He has rightly exercised the doctrine of election. So on that account, the plaintiff can not be non suited.

13.We will deal about this point in the later portion of the judgment.

14.Now coming to the factual aspect, as mentioned above, it is admitted by both sides that 'A' schedule property originally belonged to them ancestrally. It was divided into north and south. Northern portion measuring about 5-3/8 cents was allotted to the plaintiff. Southern portion measuring 5-3/8 cents to the share of the defendant's father. The plaintiff sold 3-1/2 cents to one Kasi Nadar. The copy of the document is also marked on the side of the plaintiff as Ex.A2. Wherein we find the following recitals:-

“...எல்கை ரோடுக்கும் மேக்கு என் தனதுக்கும்
வடக்கு சத்தியநாதன் சொத்துக்கும் கிழக்கு
செல்லயா நாடர் சொத்துக்கும் தெக்குமாக கிழகு..”



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15.By drawing attention of this court, to this specific recitals of four boundaries, it is contended by the plaintiff before the trial court that southern portion was kept by him, while selling of the northern portion 3-1/2 cents to Kasi Nadar.

16.Now we will go to the oral evidence on this aspect.

17.It is admitted by both sides that on the eastern side of the old survey number, land was acquired by the Government for laying Monday Market Road. But what was the actual extent acquired by the Government was not stated by the plaintiff. But it is admitted in the evidence that now the defendant is in occupation and possession of 4-1/4 cents.

18.It is also admitted by the plaintiff namely PW1 during the cross examination that previously, they were using the pathway on the southern side of the defendant's house, through which electric line is laid. They used one Rassel's property to reach the portion sold to Kasi Nadar. So this portion of the evidence shows that before selling the property to Kasi Nadar, they were using the pathway on the southern side of the defendant's house.



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Now, as stated above, while selling the property to Kasi Nadar, they left the southern portion.

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19.A specific question was put to PW1, both were having pathway to reach the road; But after that, the plaintiff's husband sold the property to Kasi Nadar; Kasi Nadar constructed house on his boundary; but the plaintiff did not make any objection, while Kasi Nadar put up construction by encroaching the property belongs to the plaintiff.

20.By this cross examination, the defendants wants to make a defence that the present 'A' schedule property was never used as pathway by the plaintiff and Kasi Nadar encroached the southern portion, which belongs to the plaintiff.

21.But this is not supported by any evidence. The Commissioner has not taken out any measurement with reference to the actual extent sold to Kasi Nadar and remaining extent of the defendant's property. Because, there is no indication as to the actual extent acquired by the Government for laying the Monday Market road. Since it has not been brought on record by both sides, now the actual extent now available alone can be taken into consideration.



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22.In the Commissioner's report, he has clearly indicated that except the present 'A' schedule property' no other alternative way is available to the plaintiff.

23.For better appreciation, let me extract the report of the commissioner, since he visited the property for the second time also by taking into account the memo of instructions issued by the defendant.

"I have noticed no other alternative pathway available to the plaintiff reach his house from the main road except plaint 'A' schedule property.

2.As there is no other alternative pathway available to the plaintiff and thereby I have unable to answerer its nature and its age.

3.I have notice the electricity live line passes to the plaintiff's house just above the southern compound wall of the defendant which is shown in my plan.

4.I have unable to notice the existing pathway of the plaintiff as there is no alternative pathway to him.



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5. In between the plaint 'A' schedule property the house and house site of the defendant and one Kasinadar are situated. Plaint 'A' schedule property is connecting plaint 'B' schedule property of the defendant and the Monday Market to Cheramangalam Road. On my examination I have not noticed any other alternative pathway to the plaintiff except plaint 'A' schedule property I have very well described the same in my preliminary report and thereafter in above my preliminary report may be taken as part and parcel of this report.

6. No other facts I have been relevant and required."

24. This report is accepted by the trial court, which requires no interference. On the point whether the prayer of title and easement of necessity will co-exist or whether it will exist alternatively is a vexed question, which arose before various courts.

25. We started our discussion from the earliest judgment, which is available on this point.



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26.We can come to the judgment of the Calcutta High Court, a Full Bench decision rendered in Narendar Nath Barari Vs. Abhoy Charan Chattopadhyaya (1907)ILR 34 Cal51), wherein earlier orders are also referred.

27.The point before the Calcutta Full Bench was, the reference with reference to the inconsistency in the judgements. The points are:-

"10.Whether a suit is liable to be dismissed because the plaintiff claims in the alternative over the same plot.

(1)of ownership and

(2)of easement?"

28.The dispute in that matter referring to ditch. The plaintiff asserting that he got right namely property right at one place. In the next place, he has submitted that if it is negative, then the easement right must be recognized. So, it is a case of alternative or inconsistent plea. It was decided that the suit cannot be dismissed on the ground of alternative plea of proprietary ship and the right of easement. The reference was answered accordingly.



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29.It was submitted by the respondent that the plaintiff ought to have been called upon the election. But the election was made before the lower appellate court. A similar situation arose before the Full Bench of this court in the case of (Pannala) Subba Rao Vs. (Parupudi) Lakshmana Rao and others (1926 MWN (Civil)923). Wherein the judgment of the Full Bench of the Calcutta High Court is also referred. The judgment of the Madras High Court in Konda Vs. Ramaswami [(1915)36 Mad. 1) is also referred. The relevant portion is extracted hereunder:-

"8.As against this body of authority the respondents quote Konda V.Ramaswami [1915] 38 Mad. 1, the decision of Sundara Ayyar and Sadasiva Ayyar, JJ, wherein it is held that

"There is no reason why a person who walks along a certain land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription."



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30. Similarly, the case of Venkata Varahia Dikshitar Vs. Subbarova Pillai [1911] 1 MWN 95 is also referred. Wherein it was observed that a false belief of ownership does not unnecessarily preclude acquisition of a right of easement. But the Full Bench of this Court does not approve the judgment rendered in *Konda V. Ramaswami* [1915] 38 Mad.1 as referred above. The Full Bench of this court referred to the English cases and was of the view that there was no conflict of section 15 of the Indian Evidence Act and the English Law. Para 12 can be reproduced here for better appreciation:-

“12. We think that some of the expressions of opinion in *Konda v. Ramasami* [1915] 38 Mad.1, cannot be supported. They are clearly in conflict with the English cases of *Lyell v. Lord Hothfield* [1914] 3 K.B. 911 and the *Attorney General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* [1915] A.C. 599. There is nothing inconsistent with these two decisions to be found in *Earl De La Warr v. Miles* 17 Ch.I). 535. because in that case the right was exercised as a right of a dominant over



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a servant tenement even though the owner of the dominant tenement was in error as to the exact origin of the right he possessed and exercised. Though the English cases are of course decisions either under the [English Prescription Act](#) or the common law, we are satisfied that their principles apply to [Section 15](#) of the Indian Easements Act. It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner however strong evidence such a claim might be against him. The learned judges in [Konda v. Ramasami](#) [1915] 38 Mad. 1, seem to imply that the assertion of ownership during the period, of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the



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question quo animo egerit to what purported character are the acts of user to be ascribed is 'one which the Court must answer, and if Konda v. Ramasami [1915] 38 Mad.1 implies the contrary we think it is wrongly decided. We agree with the conclusion, of Shearman, J., in Lyell v. Lord Holhfield [1914] 3 K.B. 911 that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this ease is one of fact which must be determined in the light of these, observations by the Division Bench to which the case will be sent back."

31.From the above said latest judgment, the point which emerges is that *animus* is the deciding factor. So, it must be decided on the basis of the evidence adduced by the parties.



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32. So following these principles, a specific question was put to the learned counsel appearing for the respondents herein as to whether they exercised the doctrine of election.

33. For that purpose, he would straightaway rely upon the judgment of this court reported in the case of Dhanu Pandaram Vs. Kali Pandaram (1999-1-MLJ-242).

34. The doctrine of election is always available to the people like the plaintiff, who failed to assert title over the disputed property. But having lost the evidentiary proof, suddenly they cannot fall back upon the issue of easement of right namely easement of necessity.

35. Here, in the above said principles of law, now we will go to the factual aspects.

36. As narrated above, at the cost of repetition, it is not disputed that the old survey No.1949 is the ancestral property of the parties. There was a family arrangement, in which the plaintiff was allotted northern 8-5/8 cents and the defendant allowed 8-3/8 cents. Whether proper demarcation was made on ground is not



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available on record. It is also nobodies case to the effect that proper demarcation was made subsequent to the oral partition. Out of 8-5/8 cents allowed to him, the plaintiff sold 3-1/2 cents in favour of one Kasi Nadar in 1966. He would say that at that time, he left on the southern 130 links length and 6 links breadth running from east-west direction for reaching the 'B' schedule property from the Monday Market road. The Commissioner has also inspected the property. At that time, it appears that measurement was taken. It is also admitted that the Government had acquired a portion on the western portion of survey No.1949 for laying Monday Market road. After the acquisition, the exact extent available is also not clear on record.

37.That important factual aspect was not brought on record. When this important aspect failed the notice not only the parties, but also the court during the trial process, naturally the the plaintiff can fall back upon the right of necessity of easement.

38.Even though, it is stated by the defendant that the plaintiff got alternative pathway, it is not established during the trial process. There is a clear finding to the effect that not only the trial court, but



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also the appellate court. The finding of facts unless it is parallel in nature, this court cannot interfere in the second appellate stage. Absolutely, there is no misreading or non-reading of evidence. So, absolutely there is no other alternative pathway available to the plaintiff between his house property namely the 'B' schedule property and the Monday Market road, certainly he got the easement of necessity.

39.The breadth of the property now is only 6 links and that was also obstructed by the defendant to the fullest extent possible blocking the egress of the plaintiff during the pendency of the second appeal. But later to assess the block only, Commissioner was appointed by the execution court.

40.Now on coming to the factual position, as mentioned above, the learned counsel appearing for the respondents has asserted that now they are electing right of easement of necessity and not the proprietary right, since they could not prove the documents over the disputed property with the trial court because of the defects in the Commissioner's report. So, the ground on which, the second appeal has been preferred by the appellant that inconsistent plea would not lie will not



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arise in view of the specific election made by the respondent herein.

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41. Against that execution proceedings and the appoint of proceedings, two civil revision petitions are filed by the appellant herein. Now those two civil revision petitions now become infructuous, since the Commissioner already appointed. He made his report also.

42. So the first substantial question of law is framed by this court is answered that the trial court has not committed any illegality in granting decree of easement of necessity as confirmed by the appellate court.

43. Subsequently, the second question of law is also answered to the effect that no illegality has been committed by the trial court in granting permanent injunction in respect of 'A' schedule property. So, the third question of law is also answered to the effect that the Commissioner report was accepted by the trial court to show that there was no alternative pathway available to the plaintiff to reach the 'B' schedule property from Monday Market road. The trial court has not solely rest upon the Commissioner report to grant the relief, but



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have extensively and thoroughly analysis of the evidence, both oral and documents placed and come to the correct conclusion that the plaintiff has exercised the right of easement of necessity over the 'A' schedule property for more than a statutory period of several decades, right from the selling of a portion of the property to Kasi Nadar in 1966. The suit was filed in the year 1999. After a lapse of 33 years, throughout those 33 years, the plaintiff was using the 'A' schedule property to reach his 'B' schedule property. From his oral evidence, supported by the evidence of PW2, it is stand established that the plaintiff was using the 'A' schedule property as a pathway. So, third question of law is answered that the trial court did not grant the decree solely on the basis of the commissioner's report, but on the oral evidence. So, this point is answered accordingly.

44.In the result, the second appeal fails and the same is **dismissed** with costs. Consequently, both Civil Revisions Petitions are **dismissed as infructuous**. No costs. Consequently, connected Miscellaneous Petitions are closed.

19/03/2024

Index:Yes/No
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To,

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1.The Subordinate Judge,
Padmanabhapuram.

2.The Additional District Munsif,
Eraniel.



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G.ILANGO VAN, J

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