



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **26.07.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)NO.177 OF 2006

- 1.Sammanasu(died)
- 2.Edward Jacob Poornanathan
- 3.Sahaya Tamilselvi
- 4.Joseph Pushpanathan
- 5.Nirmal Vinod Amalanathan

(Appellants 2 to 5 are brought on record as legal representatives of the deceased sole appellant as per order of this Court made in C.M.P(MD)No.2731 of 2017 in S.A(MD)No.177 of 2006, dated 3.4.2017)]

:Defendant/Respondent/Appellants

.vs.

- 1.M.Cashmir
- 2.Soosai Fathima(died)
- 3.C.Albert Seelan
- 4.Gilbert Sinu
- 5.C.Joseph Antony Suresh
- 6.Silvester Vinod
- 7.C.Helena
- 8.C.Mary Jerold Viola
- 9.D.Tivina



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10.D.Tisona

:Plaintiffs/Appellants/
Respondents

(Second respondent died and the first respondent who is already on record, is recorded as legal representative of the deceased second respondent as per order of this Court made in C.M.P(MD)No.102423 of 2023 in S.A(MD)No.177 of 2006, dated 2.11.2023)

(Respondents 3 to 10 are brought on record as legal representatives of the deceased second respondent as per order of this Court made in C.M.P(MD)No.10230 of 2023 in S.A(MD)No.177 of 2006, dated 2.11.2023)

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.31 of 2004, dated 24.6.2005, on the file of Sub-Court, Tuticorin reversing the judgment and decree made in O.S.No.114 of 1999, dated 21.7.2003, on the file of Additional District Munsif Court, Turicorin.

For Appellants	:Mr.M.P.Senthil
For Respondents 1 and 3 to 10	:Mr.A.Arumugam for M/s.Ajmal Associates
Respondent-2	:Died

JUDGMENT

The Second Appeal is directed against the judgment and decree made in A.S.No.31 of 2004, dated 24.6.2005, on the file of Sub-Court, Tuticorin reversing the judgment and decree made in O.S.No.114 of 1999, dated 21.7.2003, on the file of Additional District Munsif Court, Turicorin.

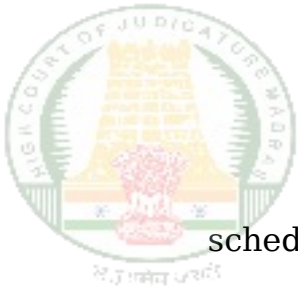


2.The defendant in the suit is the appellant. The respondents/plaintiffs filed a suit for declaration of title and injunction in respect of suit second schedule property. They also sought for a declaration that suit third schedule property was common pathway for both the parties and for injunction restraining defendant from interfering with plaintiff's common right over suit second third schedule property. The Plaintiff also sought for mandatory injunction directing defendant to remove the constructions put up by him in suit third schedule property. The trial Court partly decreed the suit in respect of suit second schedule property. The plaintiffs filed an appeal and the First Appellate Court reversed the finding of trial Court regarding third schedule property and granted the decree as prayed for in respect of suit third schedule property also. Aggrieved by the same, the defendant is before this Court by way of this Second Appeal.

3.It is seen from the records that the defendant has not questioned the decree granted by the trial Court in respect of suit second schedule property by filing any first appeal. Therefore the arguments in the Second Appeal are confined only to the dispute concerning the suit third schedule lane.



4. According to the respondents/Plaintiffs, they purchased the suit first schedule property (suit second schedule property is part of first schedule property) under sale deed, dated 15.07.1994 from one Mary Panchavarnam. The vendors of the plaintiffs in-turn purchased the suit A schedule property from one Mary Panchavarnam under sale deed, dated 16.7.1941. It was claimed by the plaintiffs that after the purchase, they demolished the old construction stood in the property and constructed a new house leaving vacant space on the western side. The vacant space left by the plaintiffs on the western side of his house was shown as suit second schedule of the suit property. The suit second schedule property is part and parcel of the suit first schedule property. The defendant is the western neighbour of the plaintiffs. It was the case of the plaintiffs that in between the house of the defendant and the property of the plaintiffs purchased under Ex.A1, there was a common lane and the same had been described as suit third schedule property. It was claimed by the plaintiffs that they and their predecessor-in-interest had been using the suit third schedule property as a common lane with the owner of the property on the western side. It was also claimed that the suit third schedule property was mentioned in the title document of the plaintiffs as a common lane. The plaintiffs further claimed that they had been in exclusive possession and enjoyment of the suit first and second



schedule property and the suit third schedule property had been used as a common lane. The defendant attempted to interfere with the plaintiffs' enjoyment of the third schedule property and hence, the plaintiffs were constrained to file the suit for declaration and injunction. Pending suit, the defendant encroached a portion of the suit third schedule property and constructed a latrine and hence, the plaintiffs have amended the plaint seeking the relief of mandatory injunction to remove the construction put up by the defendant.

5.The appellant/defendant filed a written statement denying the right of the plaintiffs over the suit third schedule property. It was claimed by the defendant that he was entitled to the property with east-west measurement of 35.34 ft(13 carpentry feet) and north-west measurement of 17 Carpentry feet. It was claimed by the defendant that he had been in exclusive possession and enjoyment of the suit third schedule property as part and parcel of the property purchased by him and the plaintiff had no right to claim the suit third schedule property as a common lane.

6.Before the trial Court, the first plaintiff was examined as P.W.1 and ten documents were marked as Ex.A1 to Ex.A10. On behalf of the defendant, the defendant was examined as D.W.1 and



an independent witness was examined as D.W.2 and on the side of the defendant, three documents were marked as Ex.B1 to Ex.B3. The Advocate Commissioner's report and plan have been marked as Ex.C1 and Ex.C2. The Survey Plan furnished by the Town Surveyor was marked as Ex.C3.

7. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiffs proved their right and possession over the suit first and second schedule property and granted the decree for declaration and injunction in respect of suit first and second schedule property. As far as the suit third schedule property is concerned, the trial Court rendered a finding that the plaintiffs failed to prove their right and possession over the same and consequently, dismissed the suit in respect of suit third schedule property. Aggrieved by the dismissal of the suit in respect of suit third schedule property, the plaintiffs filed an appeal in A.S.No.31 of 2004, on the file of Sub-Court, Tuticorin. The First Appellate Court reversed the findings of the trial Court insofar as the suit third schedule property is concerned and came to the conclusion that the plaintiffs were entitled to easementary right by grant in respect of suit third schedule property. As a necessary consequence, the appeal was allowed and a decree for declaration and mandatory injunction to



remove the construction put up by the defendant was passed.

Aggrieved by the same, the defendant has come forward by filing this Second Appeal.

8.At the time of admission, this Court formulated the following substantial question of law, by order, dated 8.3.2006:

When there is no pleading regarding the easement right over prescription, a decree in that connection is lawful or not?

9.The learned counsel for the appellants submitted that the First Appellate Court came to the conclusion that the plaintiffs entitled to easementary right by grant over the suit third schedule property and the said conclusion is vitiated by misreading of the pleadings of the plaint. The learned counsel submitted that nowhere in their plaint, the plaintiffs claimed right of easement by grant by admitting the exclusive title of the defendant over the suit third schedule property. The learned counsel further submitted that the plaintiffs only claimed common right over the suit third schedule property and the same has not been established by any acceptable evidence available on record. Therefore, the learned counsel submitted that the judgment and decree passed by the First Appellate Court regarding suit third schedule property is vitiated by misreading of the plaint and sought for allowing the



Second appeal.

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10. In support of his contention, the learned counsel for the appellants relied on the following judgments:

1. *Bachhaj Nahar .vs. Nilima Mandal and another reported in (2008)17 Supreme Court Cases 491.*

2. *Hero Vinod(minor) .vs. Seshammal reported in (2006) 5 Supreme Court Cases 545.*

11. The learned counsel did not advance any argument on the substantial question of law framed at the time of admission. On the basis of the submission of the learned counsel for the appellants, the following substantial questions of law are taken up for consideration in the Second Appeal.

1. Whether the Lower Appellate Court is correct in law in its finding that the plaintiffs/Respondents are entitled to right of user over suit third schedule property by way of easement of grant without any pleading or evidence on the side of the plaintiffs/Respondents that they are entitled to right of user over suit third schedule property by way of easement of grant?

2. Whether the Lower Appellate Court is correct in law in its finding that the recitals in Ex.A1 would amount to an easement of



grant over the suit third schedule property when Ex.A1 is not executed by the servient owner, the defendant/appellant or her predecessor in title?

12.The learned counsel for the respondents is heard on the questions of law taken up for consideration.

13.The learned counsel for the respondents 1 and 3 to 10 submitted that Ex.B1-sale deed was not referred to in the pleading of the defendant and hence, the defendant is not entitled to lead any evidence by producing ExB1 without the foundation plea. The learned counsel by taking this Court to the boundary description found in Ex.A1 and Ex.A2, submitted that in both the documents, the suit third schedule property which lies on the western side of the property purchased by the plaintiffs was mentioned as a common lane and the same has been properly appreciated by the First Appellate Court while granting the decree in respect of suit third schedule property.

14.As far as the description of the suit property in Ex.A1 and Ex.A2 as common lane is concerned, the defendant was not a party to Ex.A1 and Ex.A2. In the title document of the defendant, the suit third schedule property has not been shown as a common lane. The property of the defendant has been described as west of house



of Pavazhachamy Pernard and hence, no land portion was shown on the eastern side of the property purchased by the defendant under Ex.A1. When neither the defendant nor their predecessor-in-title were party to Ex.A1 and Ex.A2, the Plaintiffs' contention in view of boundary description found in title documents they have got the right to treat the suit third schedule property as a common lane cannot be accepted. The Plaintiffs also failed to lead any evidence to show that as per boundary description in their title documents(Ex.A1 and Ex.A2), the suit third schedule property had been enjoyed as a common property. The plaintiffs could have examined neighbours or other independent witnesses to prove that the suit third schedule property has been enjoyed by them as a common property. Except interested own testimony of plaintiffs, there is no other oral evidence to support the case of plaintiffs that suit third schedule property was enjoyed as a common property. Hence, based on boundary description found in Ex.A1 and Ex.A2, to which defendants or his predecessors-in-interest were not party, plaintiffs cannot claim that the suit third schedule property was common property.

15.A perusal of the plaint averments would suggest that the plaintiffs claimed right over the suit third schedule property by seeking declaration that the suit third schedule property as a



common lane. In respect of the said plea, the plaintiffs produced Ex.A1 and Ex.A2, wherein, the suit third schedule property which lies on the western side of the property purchased by the plaintiffs was described as a common lane. Therefore, it is clear that the plaintiffs have not admitted the title of the defendant over the suit third schedule property and claimed easmentary right by way of grant. However, the First Appellate Court, in its judgment has observed that the plaintiffs did not claim any right over the suit third schedule property and they claimed only easementary right by necessity. After taking into consideration Ex.A1 and Ex.A2, the First Appellate Court came to the conclusion that the plaintiffs are entitled to easementary right by grant in respect of suit third schedule property and consequently, decreed the suit granting declaration that the suit third schedule property was a common lane. It is settled law that claim of title and claim of easement cannot go together and both pleas are mutually destructive in nature. The person who claims easementary right must admit the title of adversary and claim easement right in any one of the mode known to law. In this regard, it would be appropriate to refer to the judgment of the Apex Court in ***Bachhaj Nahar's case*** referred to supra and the relevant observation of the Apex Court reads as follows.

19.Easements may relate to a right of way, a



right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to watercouse etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement of prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.

20.The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant.....

21.....

22.....

23.....

24.In the asbence of a claim by the plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easmentary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right.”(Emphasis supplied by this Court)



16. In the case on hand, the plaintiffs claim right over the suit third schedule property and sought for declaration as a common lane and they never claimed easementary right in respect of suit third schedule property. However, the First Appellate Court by misreading the pleadings, came to the conclusion that it was a case of easement by grant and granted declaration and injunction as prayed for. The finding of the First Appellate Court is the result of misreading of the plaint averments. The Plaintiffs no-where in their pleadings admitted the title of the defendant and sought for declaration of easementary right by grant. Had the plaintiffs pleaded easmentary right by grant, the defendant would have got an opportunity to repel the same at the time of trial. When there was no plea regarding easementary right by grant, it is not open to the First Appellate Court to convert the suit for title (claiming common right) into a suit for declaration of easementary right by grant and decree the suit regarding easementary right not pleaded by plaintiffs. Therefore, the questions of law are answered in favour of the appellants and the second Appeal is allowed by setting aside the judgment and decree passed by the First Appellate Court. No costs.

26.07.2024



Index:Yes

Internet:Yes

NCC:Yes

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To

- 1.The Subordinate Judge,
Tuticorin.
- 2.The Additional District Munsif,
Tuticorin.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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JUDGMENT MADE IN
S.A(MD)NO.177 OF 2006

26.07.2024