



S.A.No.557 of 2022

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	01.07.2025
Pronounced on	08.08 .2025

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.557 of 2022

Philip Mathew

...Appellant

Vs.

1. B. Mythile
2. V.K. Ravidass
3. Coonoor Municipality
Represented by its Commissioner,
Coonoor

...Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 to set aside the decree and judgment dated 30.09.2021 passed in A.S. No.28 of 2018, on the file of the Subordinate Court, Coonoor, confirming the Judgment and decree dated 04.07.2018 passed in O.S. No.96 of 2010, on the file of the District Munsif Court, Coonoor.

For Appellant : Ms. R. Maheswari
For Respondents : Mr. R. Subramanian
for Mr. B. Ravi for R1 and R2
Mr.P. Srinivas for R3.



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JUDGMENT

In this Second Appeal, challenge is made to the judgment and decree passed in A.S. No.28/2018 dated 30.09.2021 on the file of the Subordinate Court, Coonoor, confirming the judgment and decree dated 04.07.2018 passed in O.S. No.96/2010 on the file of the District Munsif Court, Coonoor.

2. The Second Appeal has been admitted on the following Substantial questions of law.

"(1) Whether the Courts below have substantially erred in law in ignoring Ex.A1 and Ex.A2 which are the registered documents and Title Deed to both the appellant and the 1st respondent in view of the well settled principle of law that the registered documents will prevail over the oral evidence of parties?"

(2) Whether the Courts below have failed to give their findings on the strength and evidence produced by the appellant?"



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(3) Whether the reports given by the two experts, viz., the Town Sub Inspector of Survey and the Government approved valuer (Licence No.F-8924) in Coonoor who are competent and have the requisite special expertise in this particular field, based on the physical features and factual aspects after the joint site inspection carried out in the presence of the Advocate Commissioner appointed by the trial court, appellant and the respondents, can be totally ignored.

(4) Whether the issue of encroachment can also be decided based on the continuous use of the common road for over four decades as easementary right to the appellant's property and the usage of common road emanating from the Parent Deed is legal and sustainable in Law?

(5) Whether the Subordinate Court was justified in passing the impugned Judgment, when the 1st defendant has purchased the common land for which the vendor to the 1st



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3. For the sake of convenience, the parties are referred to as per their ranking in the Trial Court.

4. The plaintiff has filed the above suit against the defendants for the following reliefs.

- a) Granting permanent injunction restraining the 1st defendant and their agent servants, subordinate, not to proceed with any construction work on the northern side of the common motorable road branching out from Bed Ford Main Road and ending with the plaintiffs property and in the common land.
- b) Directing the 3rd defendant to demolish the illegal construction on the Motorable Road and in the common areas ('B' schedule property) failing which enable the plaintiff to demolish the same by court of law.



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c) To declare the Motorable Road branching out from the Bed Ford Road is a common road.

5. Briefly stated, according to the plaintiff, he is the absolute owner of 'A' schedule property, i.e. 0.268/16 acre in R.S. No.933 and 3-4/16 acres of land in R.S. No.935/1, which he bought under a sale deed dated 10.03.1967. The vendor and the other owners partitioned the property under the partition deed dated 28.10.1985, wherein an extent of 1798 sq. ft of land was kept as common land which is described as 'B' schedule in the suit. The 1st defendant purchased the 'B' schedule property from the 2nd defendant, who had no title, and had put up barricade in the common road. Hence, the plaintiff was constrained to file the above suit.

5.1. The 1st defendant resisted the plaintiff's claim contending that the 1st defendant is the absolute owner of the 'B' schedule property to an extent of 1798 sq. ft. of land in Old Survey No.935/1 correlating to subdivided T.S. Nos.B/33/2/2 and B133/3/2 of Coonoor Town. He had



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purchased the same through Ex.B5 sale deed on 06.02.2009. Ever since the date of purchase, the 1st defendant has been in lawful possession and enjoyment of the same. She had constructed a dwelling house after obtaining due approval from the competent authorities. She has not made any encroachment in excess of her own property and the construction made by her was well within the boundaries and extent purchased by her. While so, this plaintiff filed W.P. No.2136/2010 before this Court and the same was dismissed on 15.12.2010. Since the claim of the plaintiff is without any right or title, in the absence of prayer for relief in the kind of easementary right, the suit filed by the plaintiff is liable to be dismissed.

5.2. The second defendant reiterated the defence taken by the 1st defendant. The 3rd defendant in counter stated that only after due verification they have granted plan approval for constructing a building on 'B' schedule property.



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WEB COPY 5.3. Before the trial court, on the side of the plaintiff, P.W.1 to P.W.3 were examined and Ex.A1 to Ex.A3 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B1 to Ex.B8 were marked and the Court document was marked as Ex.C1 series.

5.4. The Trial court based on the pleadings, evidence and the arguments advanced by the respective counsel for the parties, dismissed the suit by its judgment and decree dated 04.07.2018.

5.5. The unsuccessful plaintiff filed an appeal under Order 41 Rule(1) of Section 96 of the Code of Civil Procedure under various grounds. The first appellate court dismissed the appeal suit vide its order dated 30.09.2021 thereby confirmed the judgment and decree passed by the trial court.

6. Aggrieved by this, the plaintiff has preferred the Second Appeal by stating that the courts below have substantially erred in law in ignoring Ex.A1 and Ex.A2 registered title documents in view of the well



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settled principles of law that the registered documents will prevail over the oral evidence of parties. The courts below also ignored the reports given by the experts who are competent and have the requisite subject expertise in this particular field based on the physical features and factual aspects after the joint site inspection carried out in the presence of Advocate Commissioner appointed by the Trial Court. It is further submitted that the issue of encroachment can also be decided based on the continuous use of the common right for over four decades as easementary right to the appellants and the usage of common road emanating from the parent deed is legal and sustainable in law. The further contention of the appellant is that the vendor of the 1st defendant had no absolute right to sell the disputed land in terms of the parent title deed, the partition deed dated 28.10.1955 which is a registered document.

6.1. The learned counsel for the appellant further submits that the court has discretion to order for local investigation where there is boundary disputes and disputes about identity of lands. In the present



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case, the trial court has specifically directed the Advocate Commission to submit his report as regards the factual position of the suit property. The Advocate Commissioner also submitted his report supported with a map. The same cannot be construed to be for collecting evidence. The courts below failed to take into consideration the pleadings of the parties and the evidence placed on record. The plaintiff has been granted right to use the passage in the sale deed. Thus it is not easement of necessity being claimed by the plaintiff and it is a right granted to the plaintiff in the partition deed and sale deed and therefore, such right will not extinguish in terms of Section 41 of the Easements Act 1882. In support of her contentions, she has relied upon the following judgments.

- i. Yeshwant Bhaduji Ghuse vs. Vithobaji Laxman Ladekar reported in 2010 (3) Mh.L.J .
- ii. Kalyan Santram Kawade and others vs. Khanderao alias Khandu Ganapati Kawade and others reported in 2015(4) Mh.L.J.
- iii. Haryana Waqf Board vs. Shanti Sarup and others reported in (2008) 8 Supreme Court Cases 671.



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WEB COPY iv. Dr.S. Kumar and others vs. S. Ramalingam reported in (2020) 16

Supreme Court Cases 553.

7. On the other hand, the learned counsel for the defendants/respondents submits that the documents under Ex.A1 and Ex.A2 relied upon by the plaintiff does not mention about any common road and therefore, the plaintiff cannot seek for declaration of title in view of the above documents. His further submission is that the proceedings of Revenue Divisional Officer in Ex.A3 will not support the case of the plaintiff since the Revenue authorities have no jurisdiction to decide the title of the property. Similarly, the Advocate Commissioner or surveyor has no authority to speak about the alleged encroachment. The trial court as well as the first appellate court has rightly come to the conclusion that there is no proof of evidence to show that the plaintiff has right of way in 'B' schedule property and that by virtue of dismissal of the Writ Petition in W.P. No.21361/2010 for the same relief, the present suit for declaration of title in 'B' schedule property is not maintainable; that the plaintiff has neither sought for cancellation of

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Ex.B1 sale deed executed in favour of the 1st defendant nor he took any steps to cancel the approval given by the municipality for construction of building. The trial court also observed that the plaintiff has not purchased the 'B' schedule property and therefore, he cannot claim any right of way in the said property and that the report of the Advocate Commissioner is based on surveyor report which does not mention about the length and breadth of the common road and except for the FMB sketch, the surveyor has not verified any other documents to come to a conclusion that 'B' Schedule property is a common road. Even the report of the surveyor does not refer to the description of the common road. On the other hand, the trial court has rightly concluded that the first defendant has proved that she has purchased 1798 sq. ft from her vendor under Ex.B5 and the same is not a common road. The first appellate court also confirmed the findings of the trial court by stating that there is no reference to any common road either in Ex.A1 partition deed or in Ex.A2 sale deed and that the plaintiff who seeks for the relief of declaration of title in “B” Schedule property has to prove his right in 'B' Schedule property, but failed to do so by means of any documentary evidence. It is



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further submitted that the substantial questions of law raised in the Second Appeal is more of factual aspects and there is no substantial questions of law in the second appeal and therefore the same is liable to be dismissed.

8.Heard on both sides, records perused.

9.Both the Courts below held that the plaintiff failed to establish his right of way in the 'B' Schedule property and also failed to prove, whether he is entitled to such right of way by prescription, grant or by necessity.

10.It is the specific case of the plaintiff that he is the absolute owner of 'A' Schedule property purchased under a sale deed dated 10.03.1967 in R.S.No.933 to an extent of 0.268/16 acre and in R.S.No.935/1 to an extent of 34/16 acres of land. His further submission is that the vendor and the other owners partitioned the property under the partition deed dated 28.10.1985, wherein an extent of 1998 sq. ft., of land was kept as common land which is described as 'B' Schedule in the suit.

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His further contention is that the 1st defendant has purchased the 'B' schedule property from the 2nd defendant who had no title, had put a barricade in the common road.

11.Per contra, the defendants together submits that the 1st defendant had purchased the 'B'schedule property through Ex.B.5 sale deed on 06.02.2009 and ever since the date of purchase, the 1st defendant has been in lawful possession and enjoyment of the same by constructing a dwelling house after obtaining due approval from competent authorities. The writ petition filed by the plaintiff on the same subject matter was also dismissed on 15.12.2010. In the absence, of prayer for relief in the kind of easementary right, the suit filed by the plaintiff is liable to be dismissed, since the claim of the plaintiff is without any right or title.

12.The deed of the partition deed dated 28.10.1955 was marked as Ex.A.1 and the sale deed in favour of the plaintiff was marked as Ex.A.2 before the trial Court. According to the plaintiff, from the recitals of the

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partition deed and the sale deed it is clear that a common land was left to use the same as private passage and for all purposes with or without horses carts, carriages, wagons or Motor cars, laden or unladen to go pass and re-pass upon the road leading from the Government road. The common land included the motorable road of 5 meters breadth branching out from the Bedford Main Road, near Union Bank and ending with the plaintiff's property and the same was used by the plaintiff from the date of his purchase that is from 10.03.1967 at the time when the plaintiff was a minor represented by his father. The plaintiff also relied upon Ex.A.1 to A.3 to establish that the above documents throw light on the common road that existed even since the deed of partition dated 28.10.1955. The said common road has been described to be for the purpose of ingress and egress of motor cars and wagons from the plaintiff's property. Hence, the common road has been in use by the plaintiff as easementary right to his property from the date of purchase in the year 1967. Further, the plaintiff's contention is that the sub-division in favour of the 1st defendant was also canceled. Thus, it is submitted on the side of the plaintiff Ex.A.1 to A.3 are vital documents evidencing the existence of the road. Apart



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from that, the report of the Advocate Commissioner and Town surveyor also supports the case of the plaintiff.

13. On a bare perusal of Ex.A.1 partition deed and Ex.A.2 sale deed there is no reference to any common land allotted by the parties. In fact, P.W.1 also admitted that in Ex.A.1 and A.2 no land is earmarked as common land. Nothing is mentioned in the above documents about the 5 meters width of land is a common land. Therefore, the well settled principle of law that the registered documents will prevail over the oral evidence of parties is not applicable in the present case. The plaintiff claims that he was in continuous use of the common road for over four decades. But failed to establish such right of way was acquired by him by prescription or grant or by necessity. When it is found that the plaintiff documents marked as Exs.A.1 and A.2 do not contain any reference about the common road in old survey no.935/1 correlating to sub division T.S.No.B/33/22 and B/33/3/2 of Coonoor town and when the plaintiff has failed to establish that he has been enjoying the easmentary right qua the common road from the days of his predecessors in interest



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continuously beyond the statutory period in such view of the matter, the plaintiff claim to the so called easementary right by way of prescription over the 'B' Schedule property, as such, cannot be believed and accepted.

14. Furthermore, the plaintiff has sought for demolishing of portico constructed by the defendant. The Advocate Commissioner and the surveyor have stated that the 1st defendant has constructed portico in T.S.No.2/2 which is in the common road. But, according to the defendants, the 1st defendant has constructed her house in T.S.No.B/33/3/2 and her portico in T.S.No.B/33/2/2. To prove that the defendant had constructed portico measuring 108 sq. ft., and the said land is in T.S.No.2/2, the plaintiff has to first prove that the common road comes within T.S.No.2/2. The exact length and width of the common road has to be stated. None of the documents relied by the plaintiff, mention about 5 meters width road. The Advocate Commissioner also failed to mention as to how the 108 sq. ft., of land in T.S.No.2/2 comes within the common road. The Advocate Commissioner's report is based on the surveyor report. The report of the surveyor also do not refer to the



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15. Moreover, the plaintiff has laid the suit seeking the relief of declaration in the 'B' Schedule property and for permanent injunction. To sustain his alleged claim of right over the suit property, other than vaguely stating that he has easementary right over the suit property by way of necessity and prescription, the plaintiff has not come out clearly as to on what basis he has claimed the above said easementary right in the plaint. A perusal of the plaint clearly shows that entire case of the plaintiff was that he is the owner of the suit property and that the defendants have encroached upon it. The plaintiff had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over 'B' Schedule property. The facts to be pleaded and proved



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for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. The Hon'ble Apex Court in the decision reported in **(2008) 17 Supreme Court Cases 491 (Bachhai Nahar Vs. Nilima Mandal and another)** has outlined the position of law with reference to the same as follows:

"A.Civil Procedure Code, 1908 - S.100 Second appeal - New case made out - Propriety-High Court in a title suit granting relief based on easementary rights which was not pleaded -Sustainability of Respondent-plaintiffs' suit for declaration, possession and injunction dismissed by first appellate Court on the ground that neither there was encroachment by appellant-defendants nor did the suit land belong to respondent-plaintiffs High Court though holding that respondent - plaintiffs had not title over suit land, granted injunction by making out a new case that plaintiffs had an easementary right to use the schedule property as a passage -in the absence of pleadings and an opportunity to the first defendant to deny such claim, held, High Court court not have granted the relief of injunction by assuming that plaintiffs had an easementary right to use the schedule property as a



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passage At best liberty could have been reserved to plaintiffs to file a separate suit for easement - Easements Act, 1882-Ss.33 and 35-Relief under, different from relief under provisions of Specific Relief Act, 1963 - Specific Relief Act, 1963-Ss.36 & 37. B.Civil Procedure Code, 1908 - S.100 and Or.6 R.1, Or.7 R.7, Or.14 R.1 and Or.18 R.2 - Second appeal - Relief - Relief on the strength of evidence alone (without pleading and an opportunity of hearing) - Permissibility - Without pleading and an opportunity of hearing to defendant, no amount of evidence, held, can be looked into to grant any relief - Exceptions and Practice and permissible limits, stated Procedure - Relief - Basis for

C.Civil Procedure Code, 1908 - S.100 -Second appeal - Relief - Expeditious justice, by flouting fundamental rules of CPC, held, is not permissible.

D.Civil Procedure Code, 1908 - Or.6 Rr.1 to 3, Or.2 Rr.1 & 2 and Or.14 Rr.1,3 & 4 -Pleadings and issues - Object and purpose, stated



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The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. The object of issues is to identify from the pleadings the questions or points required to be decided by the Courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief.

18. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary



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right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

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 a watercourse etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by 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



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easement by prescription, are different from the pleadings and no proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally ally-constituted constituted a single single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to watercourse. We have



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referred to these aspects only to show that a court cannot assume or infer a case of easementary right, right, b by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

21. A right of easement can be declared only when the servient owner is a party to the suit..."

16. Applying the above said principles of law to the case at hand, when it is noted that the plaintiff has failed to come forward with the necessary facts enabling him to make out a particular claim of easementary right and thereby, the defendants are prevented from placing their defence version adequately or enabling them to repudiate the claim of the plaintiff to the alleged easementary right and as above pointed out, when the plaintiff has also miserably failed to establish and substantiate the claim of easementary right putforth by him by acceptable and reliable materials and when as above discussed, the plaintiff having not sought the relief of declaration qua the same in all, it is found that the plaintiff cannot be granted the relief prayed for. Above all, the writ petition filed by the plaintiff in W.P.No.21361 of 2010 for the same relief was also



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dismissed. The reasonings and conclusion of the Courts below for rejecting the plaintiff's case warrants no interference by this Court. The substantial questions of law formulated in this second appeal are accordingly answered in favour of the defendants and against the plaintiff.

17.In the result, the second appeal is dismissed. The judgment and decree dated 30.09.2021 passed in A.S.No. 28 of 2018 on the file of Subordinate Court, Coonoor, confirming the judgment and decree dated 04.07.2018 passed in O.S.No.96 of 2010 on the file of the District Munsif Court, Coonoor is upheld. No costs.

08.08.2025

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
vsn

To

1. The Subordinate Judge, Coonoor
2. The District Munsif Judge, Coonoor.
3. The Section Officer, V.R.Section , High Court, MAdras

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K.GOVINDARAJAN THILAKAVADI,J
vsn

Pre-delivery judgment made in
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