

**(2017) 02 MAD CK 0106**

**In the Madras High Court**

**Case No :** S.A. No.229 of 2011 and M.P. No.1 of 2011 and CMP. No. 18970 of 2016

Dravidamani

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

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**Date of Decision :** 08-02-2017

**Acts Referred:**

Easements Act, 1882 — Section 43

**Citation :** (2017) 2 LW 973 : (2017) 3 MLJ 211

**Hon'ble Judges :** Mr. T. Ravindran, J.

**Bench :** Single Bench

**Advocate :** Mr. Srinath Sridevan, Advocate, for the Appellants; Mr. T. Jayaramaraj Govt. Advocate (CS), for the Respondent No. 1; No Appearance, for the Respondent No. 2

**Final Decision :** Dismissed

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## **Judgement**

Mr. T. Ravindran, J.—The plaintiffs, in this second appeal, have impugned the judgment and decree dated 14.09.2010 made in A.S. No.8 of 2010 on the file of the Sub Court, Mannargudy, confirming the judgment and decree dated 11.11.2009 made in O.S. No.78 of 2005 on the file of the District Munsif Court, Thiruthurai Poondi.

2. The suit has been laid by the plaintiffs for declaration and permanent injunction.

3. The suit property is situated in Town Survey No.228/7, 63 cents of Kuttai Porampokku and out of the same, 4 cents on the northern bund of the Kuttai, East-West measuring 49 meters and north-south measuring 11 meters within the specific boundaries.

4. The plaintiffs claim right of easement by prescription over the suit property. According to the plaintiffs, they had been using the suit property as a pathway from 1959 onwards for having access to Uppukulam street and the same had

been in the continuous enjoyment of the plaintiffs for several years and accordingly, the plaintiffs have also planted coconut, lime trees in the suit property and enjoying the usufructary right of the same and further, the plaintiffs have also planted bamboo clusters at the intersection of the property belonging to the plaintiffs situated in Survey No.228/6A and the suit survey No.228/7 and been enjoying the bamboo clusters as such and inasmuch as the Kuttai Porambokku has been surrounded on all sides by patta lands and according to them, other than the suit property i.e. 4 cents northern bund of the Kuttai, there is no other access for the plaintiffs to reach Uppukulam street and inasmuch as the defendants, particularly, the second defendant had attempted to interfere with their possession and enjoyment of the pathway in the suit property by engaging an operation of annexing the pathway in the suit property along with the Kuttai, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5. Per contra, according to the defendants, the plaintiffs cannot claim or lay any right over the suit property, which is admittedly Kuttai Porambakku belonging to the Government and no one including the plaintiffs are entitled to claim ownership over the Kuttai Poramboku property or use the same as pathway and the defendants have also pleaded that the case of the plaintiffs that they had been using the suit property as a pathway for several years and thereby, prescribed thereon the easementary right by prescription over the same, is false. No such right is derived by the plaintiffs over the suit pathway and further according to the defendants, inasmuch as the plaintiffs, without any authority, had also put up construction on the suit property illegally, they had issued a notice to the plaintiffs to remove the encroachment made by them and according to the defendants, with a view to obstruct the defendants from removing the encroachment put up by the plaintiffs in the suit property, the suit has been falsely laid.

6. It is admitted that the suit property is a Kuttai Porambokku belonging to the Government. Now, according to the plaintiffs, they do not claim any ownership right over the suit property as such and on the other hand, they claim only easementary right over the suit property and according to the plaintiffs, inasmuch as they had been using the suit property as a pathway for having access to Uppukulam street from their house property from 1959 onwards, thus according to the plaintiffs, they are entitled to claim easementary right over the suit property by prescription and hence, the suit.

7. The plaintiffs, in order to establish that they had been using the suit property as a pathway, had relied upon the documentary evidence produced during the course of trial. In this connection, it is found that almost all the documents, barring a few, would not be relevant for determining the issue whether the plaintiffs have prescribed easmentary right over the suit property by prescription. As regards the so called relevant documents, now, according to the plaintiffs, the Revenue Divisional Officer, under Ex.A3 dated 25.09.1966, had directed the

plaintiffs" father Sambandham to acquire the patta lands adjacent to the suit property for claiming assignment in respect of the suit property. In other words, according to the plaintiffs, Ex.A3 has been sent by the Revenue Divisional Officer in response to the requisition made by Sambandham, the plaintiffs" father, for assigning the suit property in his favour. But, it has not been explained as to how the same could be construed to hold that the plaintiffs have been in possession and enjoyment of the suit property in derogation of the rights of the defendants in respect of the same. Therefore, it could be seen that Ex.A3 as such would not be useful to sustain the plaintiffs" case for upholding their easementary right by prescription for their claim to the suit property. As regards, the suits laid by Sambandham against the third parties in respect of his alleged right over the suit property in O.S. No.482 of 1970 and O.S. No.138 of 1987, admittedly, the defendants are not parties to the above said suits, therefore, it could be seen that the documents, pertaining to the above said suits, are not helpful to the plaintiffs" case.

8. The next document would be the "B" memos issued in favour of the plaintiffs and marked as Exs.A11 and A45. It is stated that inasmuch as the plaintiffs had been in possession and enjoyment of the suit property as a pathway and acknowledging the same, "B" memos had been issued in their favour and so, based upon the same, the court should hold that the suit property had been in possession and enjoyment of the plaintiffs as a pathway right from 1959 onwards. However, as rightly put forth by the defendants" counsel, by the issuance of "B" memos, it could be seen that the defendants have asserted their right and title over the suit property as such and under the "B" memo"s, they have called upon the plaintiffs to pay necessary charges for using the Government property and accordingly, it could be seen that the plaintiffs have also been acknowledging the ownership of the defendants in respect of the suit property, resultantly had been paying penalty charges paying to the Government and in such circumstances, the "B" memo by itself would not be helpful to hold that the plaintiffs have established their easementary right over the suit property by prescription and that they had been in possession and enjoyment of the suit property as a pathway from 1959 onwards. That apart, in the "B" memo"s, there is no description of the suit property as such found in the plaint and therefore, it could not be construed that the plaintiffs had been using the entire suit property from 1959 onwards on the basis of the "B" memos filed by them.

9. The next documentary evidence relied upon by the plaintiffs are Exs.X1 and 2. Exs.X1 and 2 are the "A" register and Adangal copy in respect of the survey number 228/7. Exs.X1 and 2 have come to be marked through PW4. PW4 is the Village Administrative Officer and PW4, in his evidence, has deposed that the same stand in the name of Sambandham from the beginning and also, deposed about the planting of coconut trees etc., in the suit property. During the cross-examination, it has been admitted by PW4 that Ex.X1 denotes that the suit property is only a pond belonging to the Government and as per Ex.X2 Adangal, it stands in the name of Arumuga Thevar, Sambandham, Parvathi, Rajagopalan,

Susila and Ganapathi and he has also mentioned that the trees are planted in the suit pathway and "B" memos are issued by the Government, and the Government at any point of time, would be entitled to reclaim the possession of the property, after issuing due notice. Therefore, Exs.X1 and X2 and also the evidence of PW4, as such, would only go to indicate that the suit property belongs to the Government and no doubt, the adangal, with reference to the same, stands in the name of Sambandham and others and it is also found that trees have been planted in the suit pathway and as seen earlier, the Government had issued "B" memos in respect of the Government property and it is common that the Government is the owner of the property and at any point of time, the Government could reclaim the possession from the trespassers, after issuing due notice. In such view of the matter, it could be seen that the evidence of PW4 and the documents marked through him viz., Exs.X1 & 2 would not be sufficient to hold that the plaintiffs have prescribed easementary right over the suit property by prescription. The courts below have accordingly found that the plaintiffs have failed to establish that they had prescribed right over the suit property by way of easement by prescription as provided under Section 15 of the Indian Easement Act, 1882. As per the Explanation I appended to Section 15 of the Indian Easement Act, it could be seen that:

"Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfillment of which it is to cease."

10. Therefore, it could be seen that the Government having asserted their right over the suit property by issuance of "B" memos and accordingly, no doubt permitted the plaintiffs and others to use the same on the payment of necessary penal charges, it could be seen that the right of Sambandham and others in the enjoyment of the suit property as a pathway can be deprived as they had not been enjoying the right of way peacefully and openly, as an easementary right without interruption during the prescribed period. Inasmuch as the Government has often asserted their right over the suit property by issuing "B" memos, it could be seen that the plaintiffs' case that they had been enjoying the suit property as a pathway peacefully and openly claiming title thereto as easement and also, as of right without interruption as such cannot be accepted. Therefore, it could be seen that the plaintiffs' case that they have prescribed easementary right over the suit property by prescription as such cannot be countenanced.

11. As seen from the averments, it could be seen that the plaintiffs and their predecessor have been planting coconut, lime trees etc., and also have planted bamboo clusters at the junction of their property and the suit property and been enjoying usufruct of the same and therefore, the plaintiffs are to be seen using the suit property for other purposes than the one for it is intended to be

used and claimed to be used and such being the position, the courts below have held that the plaintiffs are not entitled to lay a claim over the suit property as an easement. In this connection, as per Section 22 of the Indian Easement Act, it could be seen that:

The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

12. Further, as per Section 23 of the Indian Easement Act, it could be seen that :

"Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception: The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage."

13. Therefore, from the above provisions of law, it could be seen that the dominant owner should not impose any additional burden on the servient heritage. Further, as per Section 43 of the Indian Easements Act, it could be seen that:

"Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless -

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used: or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage."

14. Therefore, it could be seen that if any permanent structure had been put up in the dominant heritage, thereby, the burden on the servient heritage is materially increased, it could be seen that the easement gets extinguished. In so far as this case is concerned, it could be seen that the permanent change has been admittedly made on the servient heritage itself by the plaintiffs by their act of planting various trees viz., coconut, lime trees, bamboo clusters etc, this would only go to show that the plaintiffs are not utilising the suit property as a pathway and on the other hand, per contra, it could be seen, they have made

use of the suit property for putting up trees, enjoying the usufruct of the same now and then. That apart, it is also found from the pleadings and also from Exs.B1 & 2 that the plaintiffs have illegally put up house construction also in the suit property, on being pointed out that the same would constitute a permanent structure, the plaintiffs have cleverly pleaded that they are ready to remove the said construction. According to the defendants, inasmuch as the plaintiffs have put up permanent construction, such as house structure, and are also planting trees etc., it could be seen that they have issued the statutory notice calling upon the plaintiffs to remove the same and in such view of the matter, it is clearly seen that the plaintiffs' claim of easementary right, even if true, gets extinguished by their above said acts.

15. In this connection, the plaintiffs' counsel relied upon the decisions reported in 2012-5-L.W.101 (Tiruvarur Municipality, Tiruvarur, Represented by its Commissioner v. A.K.M.Towers Private Limited Rep. by its Managing Director, J.Kasinatha Devar, Rep.by its General Power of Attorney, Mr. Muppall, No.54, New St.Thiruvarur Town, Thiruvarur and 2012 (3) MWN (Civil) 574 (M.Palanisamy and another v. The District Collector, Collectorate, Erode and three others). The above two authorities are relied upon to show that even as regards the Municipality or the Government, the plaintiffs would be entitled to seek easementary right over the public street.

16. Further, the plaintiffs' counsel has also placed reliance upon the decisions reported in ILR Vol. L I Bombay Series page 635 ( Manchersha Sorabji v. Virjivallabhdas Jekisondas) and 1931 LW page 369 (Mahammad Beari and others v. Badava Beari and another). In the decision reported in ILR Vol. L I Bombay Series page 635 (Manchersha Sorabji v. Virjivallabhdas Jekisondas), on findings that the dominant owner claiming right of way over the servient heritage for agricultural uses of his land sought to use that right of way for non agricultural purposes, in such circumstances, it has been held that he has a right to do so, provided the additional burden is not thereby imposed on the servient heritage. Similarly, in the decision reported in 1931 LW page 369 (Mahammad Beari and others v. Badava Beari and another), it is found that the dominant owner is entitled to maintain his right of way in respect of a passage used for approaching his residential house even after the use of the residential house has been altered as a ware house without making structural changes as by the same, he has not imposed additional burden on the servient heritage. However, as rightly put forth by the defendants' counsel, the above said two authorities would not be applicable to the facts and circumstances of the present case.

17. In so far as the present case is concerned, it is found that on the servient heritage itself the plaintiffs have planted various trees like coconut, lime trees and bamboo trees and using its usufruct, thereby making use of the suit property for some other use, than as a pathway for reaching Uppukulam street and the act of the plaintiffs in planting the tress above mentioned would definitely amount to changing the nature and character of the easementary right, if any, on

the servient heritage and therefore, it could be seen that Section 43 of the Indian Easement Act would squarely apply to the present case. That apart, even as per admitted case of the plaintiffs, they have put up house superstructure in the suit property and only upon the defendants calling upon them to remove the same, the plaintiffs have come forward with this case as if they ready to give an undertaking that they would remove the same. However, the putting up of house structure the and also planting of trees etc., on the suit property found to be of permanent structure and thereby, the plaintiffs have put the servient heritage to a use other than for the alleged intended use and when it is found that thereby, the burden on the servient heritage has been materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, it could be seen that the alleged easementary right, if any, claimed by the plaintiffs over the suit property gets extinguished and the exceptions to Section 43 of the Indian Easements Act are found to be not applicable to the plaintiffs. Therefore, it could be seen that the Courts below have rightly found that the act of the plaintiffs in putting the suit property to a different use and thereby heavily burdening the servient heritage to the discomfort of the defendants, even assuming that the plaintiffs had any right over the suit property as a easement, the same gets extinguished by the above said facts and hence, it could be seen that no exception could be taken to the findings of the courts below in rejecting the plaintiffs' claim over the suit property by way of the easementary right by prescription.

18. The plaintiffs counsel also contended that the first appellate court has not adverted to the evidence adduced by the respective parties in detail as required under Order 41, Rule 31 CPC and inasmuch the first appellate court has disposed of the matter in a cryptic manner without discussing the evidence and also analysing the issues in a detailed manner as expected to it, as the final court of facts, according to him, the judgment and decree of the first appellate court requires to be set aside and the matter has to be remitted back to the first appellate court for fresh reconsideration of the matter. In this connection, he placed reliance upon the decisions reported in (2007) 14 Supreme Court Cases 326 (Union of India and another v. Ranchod and others), 1993 Supp (3) Supreme Court Cases 497 (Bhagwan Sharma v. Bani Ghosh (Smt) and (2001) 3 Supreme Court Cases 179 (Santosh Hazari v. Purushottam Tiwari (Deceased ) By Lrs. However, as rightly put forth by the defendants' counsel, a perusal of the judgment of the first appellate court would go to show that after analysing the contentions of both parties in a detailed manner, it could be seen that it had considered the material evidence pertaining to the issues involved, and on that basis found that the plaintiffs are not entitled to claim the reliefs sought for. Moreover, it is also found that the first appellate court has formulated the main point for determination in the matter and accordingly, after detailing the contentions of both parties, held that the plaintiffs have not established the entitlement of their right over the suit property. Therefore, even though, the judgment and decree of the first appellate court is found to be short and cryptic,

on that ground alone it cannot be held that it has not followed the principles adumbrated under Order 41, Rule 31 CPC. That apart, as per Section 99 of the Code of Civil Procedure, it could be seen that :

"99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder \*(or non-joinder) of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

\*(provided that nothing in this section shall apply to non-joinder of a necessary party)

19. Therefore, it could be seen that when the plaintiffs have not been shown to be seriously prejudice by the approach of the first appellate court in proceeding and disposing of the matter as above mentioned and the same not affecting the merits of the case, it could be seen that the judgment and decree of the first appellate court cannot be reversed or modified.

20. Inasmuch as the plaintiffs counsel forcibly contended that the judgment of the first appellate court has to be reversed and modified, on the query put up by this Court as to whether the evidence adduced by the plaintiff are sufficient to uphold his claim and on the plaintiffs counsel answering in the affirmative, this court also permitted the plaintiffs counsel to argue the case on merits, both on questions of fact as well as the questions of law, as contemplated under Section 103 of CPC. In this connection, the decision reported in 1993 Supp (3) Supreme Court Cases 497 (Bhagwan Sharma v. Bani Ghosh (Smt)) is placed by the plaintiffs. Accordingly, the counsel for the plaintiffs made exclusive submissions in the matter both on questions of law and on facts for sustaining the plaintiffs" case.

21. However, in the light of the above discussions, it could be seen that the plaintiffs have failed to establish that they had prescribed easementary right over the suit property by prescription by adducing acceptable and reliable evidence as prescribed under law and it is also found that even assuming for the sake of arguments that the plaintiffs have any easement right over the suit property, as such, the same got extinguished on account of the acts of the plaintiffs in burdening the servient heritage materially by putting the trees, house structure etc., and accordingly, the defendants had been constrained to interfere with the lawful enjoyment of the so called easementary right of the plaintiffs.

22. The evidence of PW2 and 3 as such would not be helpful to hold that the plaintiffs have prescribed easementary right over by prescription and it is found, as rightly argued by the defendants" counsel, the PWs2 and 3 are not shown to be the residents of the locality concerned and also found to be closely associated with the plaintiffs. In such view of the position, no safe credence could be attached with the evidence of PWs2 & 3 to hold that the plaintiffs have been

using and enjoying the suit property as a pathway in derogation of the rights of the defendants for more than the statutory period.

23. In conclusion, I hold that both on facts and on law, the plaintiffs have failed to establish their case. In addition to that, I find that no substantial question of law is involved in this second appeal. Accordingly, the second appeal fails and the same is dismissed. No costs. Consequently, CMP. No.18970 of 2016 and M.P. No.1 of 2011 are closed.