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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 27.04.2017

Judgment Pronounced on : 16.11.2017

CORAM :

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.(MD)No.1127 of 2005

1.Rajammal

2.Palaniammal

.. Appellants/Respondents/Defendants

Vs.

Subbammal

..Respondent/Appellant/Plaintiff

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 07.12.2001 made in A.S.No.88 of 2001 on the file of the Principal District Court, Karur in reversing the well considered judgment and decree dated 31.07.2001 made in O.S.No.537 of 1996 on the file of the Principal District Munsif Court, Karur.

For Appellants

: Mr.Parthasarathy
for Mr.K.Rajkumar

For Respondent

: Mr.M.Saravanan

JUDGMENT

The defendants in O.S.No.537 of 1996 on the file of the Principal District Munsif, Karur has preferred this appeal. The suit is filed by the respondent/plaintiff, seeking a decree to declare a right of pathway over plaint 'B' schedule property that belongs to the appellant herein. The plaintiff was unsuccessful before the trial Court which led her to prefer A.S.No.88 of 2001 before the Principal District Court, Karur, and here she was successful and the suit was decreed. Parties would be referred to by their rank before the trial Court.

2.The material facts on which the plaintiff has rested the cause of action for the suit are:

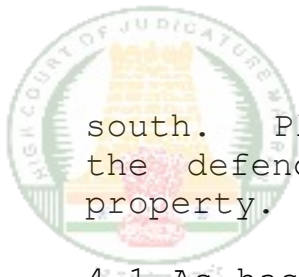
<https://hcservices.epnys.gov.in/hcservices/>
The suit properties and others originally belonged to one Pichandi Moopan. On this death, they were partitioned by his



widow and sons under a registered partition deed dated 11-04-1976.

- The controversy is described in terms of a rough plan (marked Ext.A-1). According to this, the property allotted to Krishnan lies to the north of a street. The defendant's property lie on the immediate west of Krishnan's property. Somewhere about the middle of the western wall of the A-schedule property, there is an opening into the adjacent property on the west which belonged to the defendants. There are steps at this opening. The plaintiff has been accessing her property from the street on the south only through defendant's property on the west. This is the only way the plaintiff has to reach her property and it is shown as B-schedule property in the suit.
- The plaintiff has been enjoying the same openly, continuously and to the knowledge of the defendant for well over the statutory period and therefore has perfected title to the suit property by way of adverse possession and prescription.
- The defendants have no manner of right over the B-schedule property. However, taking advantage of the fact that the property on the west is vacant, the defendants were attempting to put up a construction there. But during the pendency of the suit, the defendants have been successful in completing their construction and obstructed the pathway at the point where there were steps on the western wall of the plaintiff's property.
- B-schedule property is the absolute pathway of the plaintiff and she has acquired title to it by way of easement of necessity.
- Hence, suit is laid seeking decree (a) for declaring plaintiff's right of easement over B-schedule property; (b) for a decree of possession over B-schedule property; (c) for a decree of mandatory injunction to remove obstruction in the B-schedule property and (d) for a decree of prohibitory injunction seeking to restrain the defendants and their men from interfering with the plaintiff's peaceful possession and enjoyment of the 7 feet wide pathway in the suit B-schedule property.

3. Denying and disputing plaintiff's claim of right of pathway over B-schedule property, the defendants have pleaded in the written statement as follows: In the family partition of 1976, under which the plaintiff traces her title to the A-schedule property, a portion of way is granted to her through the property allotted to her husband's brother Palaniappan. Plaintiff is therefore has to use this portion to access the street on the



south. Plaintiff B-schedule property is the exclusive property of the defendants. Plaintiff has no manner of right over this property.

4.1 As has been indicated earlier, the suit was initially laid for bare injunction when the defendants had just commenced some construction activity in their property on to the west of plaintiff A-schedule property. Subsequently, the said construction was completed and so was the obstruction, and therefore the suit was suitably amended for declaring plaintiff's right of pathway and also for injunction to remove obstruction and for restoring the right of pathway, which appears to be wrongly placed in the prayer portion of plaintiff recovery of the property.

4.2 The trial Court has appointed a Commissioner, who had visited the disputed property both at the time when the suit was filed, and thereafter when the suit was amended after the apprehended obstruction was completed.

5. During trial, relying on the evidence before it, the trial Court dismissed the suit and grounded its decision on the following reasons:

- That in Ext.A-2 partition deed, for the portion allotted to plaintiff's husband, right of way has been provided on the west, through the portion allotted to her brother-in-law Palaniappan.
- Inasmuch as the plaintiff claims easementary right of prescription, she failed to establish precisely from since when she claims adverse user over the property of the defendant.
- Commissioner in Exts.C-3 and C-4 report has found that he finds signs of user as pathway only on the east and not through the property of the defendant on the west.

6. Challenging the above judgment and decree, plaintiff preferred first appeal to the District Court, which as such earlier stated, had reversed the decree of the trial Court and granted a decree in favour of the plaintiff. Its reasons are:

- That the Commissioner who visited the property before the amendment of the plaint has noted (a) windows on the western wall of the plaintiff's house and opening into the pathway B-schedule property. He has stated that plaintiff has been using the said pathway as her main access point, and that on the east there is only a backyard to her house.

- That D.W.1 has admitted that their plot of land on the west was a vacant piece of land originally, that on construction



she has put up their eastern wall 3 feet away from the western wall of the plaintiff's house, thus leaving a corridor portion.

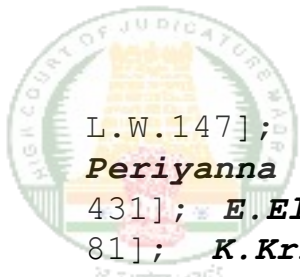
- In Ext.A-2, even though right of way has been provided to the plaintiff's husband through the property of his brother Palaniappan, still there is no indication that right of way has indeed been exercised.
- That the defendants have not produced their document of title to show that suit B-schedule property belonged to them.

7. In the second appeal, at the time of admission, following substantial questions of law were raised :

1) *Whether the Lower Appellate Court is right in granting the relief of declaration on the ground of Easement of necessity when admittedly there is an alternative pathway available in terms of Section 13 of Indian Easement Act?*

2) *Whether the Lower Appellate Court is right in shifting the burden of proving plaintiffs case on the defendant contrary to the documentary evidence Ex.A-2 in terms of provisions of the Indian Evidence Act?*

8. The learned counsel for the appellants/defendant has focused essentially on Ext.A-2 partition deed where a specific right of way has been granted to the plaintiff on the east. Secondly, the plaintiff has not come forward with a clear case: She claims right of easement by prescription and also claims title to B schedule property. This is evident from her prayer (c) which is styled as a consequential relief of declaration sought in relief (b) for possession. Both claim of title and right of easement cannot coexist and hence the plaintiffs must be non-suited. Thirdly, it might be that DW1 in her evidence would have stated that plaintiff's house might have been constructed some 40 years back, but that has to be construed essentially as an approximate estimation of a villager, a rustic witness, unexposed to the intricacies of cross examination, and it should not be a basis for holding that the plaintiff has been using the pathway for the entire statutory period adverse to the interest of the defendants. In a suit for declaration of right of pathway, the burden is entirely on the plaintiff to satisfy the Court that she has acquired the said right in the manner Sec.15 of the Easements Act insists. The first appellate Court has missed a point here and has shifted the burden on the defendants. Reliance was placed on the



L.W.147]; **Bachhai Nahar Vs. Nilima Mandal & Anr.** [2009-2-L.W.485]; **Periyanna Gounder (died) and another V. Komarasami** [2000 1 MLJ 431]; **E.Elumalai Chetty v. Naina Mudali and others** [1986 2 MLJ 81]; **K.Krishnamoorthy vs. Nagammal & others** [2015-1-L.W.570]; **Bhavani vs. Sivakozhundu and Others** [2017 1 MLJ 367].

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9. Per contra, the learned counsel for the respondent/plaintiff argued that it is inconceivable that plaintiff was using the portion on the east as her pathway since the same is only the backyard which the Commissioner himself has noted. Secondly, if B schedule was not used as a pathway, why at all there should be (a) door on the western wall opening into the B-schedule property, (b) why there are steps at that door, and (c) how windows are let to be opened on the western wall of the plaintiff, questioned the counsel. Ultimately, a finding on the existence of the pathway and its user are questions of fact which may not be re-agitated in a second appeal.

10. To start with, there appears considerable uncertainty in what the plaintiff claims. As rightly argued by the counsel for the appellants, she had asked for decree for possession of the B-schedule property and this cannot coexist with a claim of prescriptive right of easement of pathway. If the body of the plaint sans the prayer is keenly read, it strictly does not give an indication that the plaintiff has been keen to claim title to B-schedule property. However, plaintiff's son who was examined as P.W.1, claims possession of the B-schedule property in his chief examination and attempts to sustain it when he deposes in his cross examination that his grandfather had some property on the west. There is nothing fundamentally wrong for a plaintiff to put forth alternate and inconsistent pleadings. However, he has to make an election, but here there is a failure. He attempts to make it that the B-schedule property is located within the property of the plaintiff, but there is no foundation for it in the pleadings. The first appellate court does not appear to have scrutinized the evidence closely enough and ascertain the plane from which the plaintiff contests.

11. Alternatively, even if plaintiff's case of prescriptive right of easement is considered, admittedly in Ext.A-2 partition deed, her husband has been given a right of way through the property of Palaniappan, the allottee of the C-schedule property in the partition deed. It may be that the plaintiff might not have used this and preferred to access his property from the west, but, if a right of way already exists on the west, there would be no need for providing for a right of way through the east. That the eastern portion happened to be the backyard of the whole property might be due to how the parties to the partition deed might have chosen to use it, but it cannot be understood that the same is incapable of being used as a pathway.



12.1 Next is the point if the plaintiff has acquired prescriptive right of pathway over B-schedule property within the meaning of Sec.15 of the Easements Act. It cannot be said that it is an exclusive finding on fact, as contended by the counsel for the respondent, but must be understood as a mixed question of law and fact.

12.2 In terms of Sec.15, it is not just sufficient that a pathway existed, or the plaintiff has used a certain strip of land of the defendant as a pathway, but it must be open, hostile and adverse to the interest of the defendant. *Nec vi, nec clam, nec precario* are not a rhetoric in vacuum, or but a state of mind not just of the one who asserts a prescriptive right of easement, but also that of the one who defends it. It is therefore, not sufficient that a certain user over a alleged servient tenement is open, but it must also be accompanied by proof of other requirements in hostile, adverse, uninterrupted user for the entire statutory period of 20 years up to two years next before the filing of the suit. When this assertion of prescriptive right of easement of pathway is disputed, the burden is on the plaintiff to prove her user is *nec vi, nec clam and nec precario* as against the defendant in using the B-schedule property as a pathway.

12.3 In considering it, even if it is her contention is taken on the face value, the mere user of B-schedule property as a pathway may not be adequate for the plaintiff to prove prescriptive right pathway. Going by the testimony of D.W.1, her plot to the west of A-schedule property was a vacant site. It is not unusual in this country for a land owner to permit another to pass through their vacant plot. The point is, has the plaintiff used the B-schedule property as a pathway adverse to the interest of the defendant, and has it been done openly in order the defendant is put to notice about it. Here there is no evidentiary material to sustain it.

12.4 The first appellate Court has acted on the testimony of D.W.1 that her eastern wall is some three feet to the west of western wall of the plaintiff. Subject to such Building Rules as might be applicable, it is not for the court or for the parties to advice as to how another should construct his building. If the defendants wanted to have her eastern wall where it is now, that is the choice they make. How does it enure to the advantage of the plaintiff, or for that matter, can the plaintiff at all take advantage of the same? This Court finds it difficult to subscribe to the approach of the the first appellate court here.

<https://hcservices.courts.gov.in/hcservices>
13. On a combined reading of all the materials on record, this Court finds that the plaintiff must be non-suited. Accordingly, the second appeal is allowed, the judgement of the first appellate



court in A.S.No.88 of 2001 is set aside and the decree of the trial court in O.S.No.537 of 1996 is restored. No costs.

Sd/-

Assistant Registrar(T&P)

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Sub Assistant Registrar

To:

1.The Principal District Judge,
Karur.

2.The Principal District Munsif Court
Karur.

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The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+ 1 cc TO Mr.K.Rajkumar , Advocate in SR No. 87628

+ 1 cc TO Mr.N.C.Ashok kumar , Advocate in SR No. 87511

ds

AE/SKN RSK/SAR1/14.02.2018/7P/7C

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