



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date: 15.09.2020

CORAM

THE HONOURABLE MR.JUSTICE **N.SESHASAYEE**

S.A(MD)No.39 of 2016

and

C.M.P(MD)No.1065 of 2016

WEB COPY

R.Subbaiah : Appellant/Appellant/Plaintiff

Vs.

1.Maheshwari

2.Rameshkumar

3.Subbaian

: Respondents/Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree passed in A.S.No.105 of 2013 on the file of the Principal Sub Court, Dindigul, dated 19.09.2014 confirming the judgment and decree passed in O.S.No.577 of 2009 on the file of the Additional District Munsif Court, Dindigul, dated 31.07.2013.

For Appellant : Mr.D.Venkatesh

For Respondents : Mr.R.Ramadurai

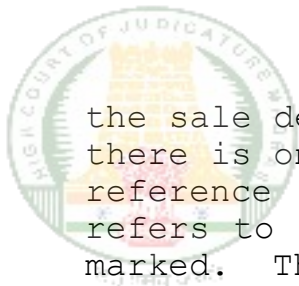
J U D G M E N T

The plaintiff who laid a suit for bare injunction that his right of access over certain pathway that cuts across Survey Nos.496/1B and Survey No.496/5B is not obstructed by the defendants, and having lost the suit before both the Courts below, has preferred this appeal. The parties would be referred to by their rank before the trial Court.

2.A certain Mallappa Gouder owned some properties, of which, a property measuring 4.32 acres(out of 6.76 acres) in Survey No.489/4B is one. Mallappa Gouder had four sons. They are Manjaya Gouder, Duraisamy Gouder, Subbian Gouder and Thangaraj Gouder. Be that as it may, on 05.12.1964 under Ex.A1, partition deed, Mallappa Gouder and his sons had divided the properties, in which, Manjaya Gourder was allotted the aforesaid, 4.32 acres in Survey No.489/4B with a Well in Survey No.496/5B with a right of way and another small property in Survey No.489/6. He has also filed a rough plan indicating the pathway, which he has to access for the purpose of accessing the Well. The plaintiff would further allege that this is the only pathway available to him to access the Well. This was objected to by the defendants.

3.Before the trial Court, both sides adduced oral and documentary evidence and a Commissioner too is stated to have been appointed. The trial Court has taken a view that in Exts.A2 and A3,

<https://hcservices.ecourts.gov.in/hcservices/>



the sale deeds under which the plaintiff has purchased the property, there is only a reference to a right of way and there is no specific reference to Survey Nos.489/4B or 496/5B or 496/1B. Secondly, it refers to a Commissioner's report and it never appears to have been marked. This was also accepted by the First Appellate Court.

WEB COPY

4.This Second Appeal is not admitted and this Court had the advantage of hearing both the counsel appearing for rival parties.

5.The law has to be stated candidly. Under Section 13 of the Indian Easements Act, where unity of title is disintegrated, that is to state, where a property held in the ownership of one person is either divided by partition, or by alienation, then, if for enjoying any portion of the divided property any right is required to be exercised over the other portion, then an easement of necessity springs into existence. However, if any deed of conveyance or partition expressly provides for a right of way, then, it amounts to express grant or a term of contract. A Mere existence of an alternative pathway may not by itself take away the easement of necessity available to a party in terms of Section 13 of the Easements Act or the grant given under a document of partition or conveyance.

6.Having stated thus, this Court does not have the advantage of a Commissioner's report before it, even though there is some reference to it before the trial Court. Since the matter requires certain consideration on the aspect of existence of a right of way on the basis of a Commissioner's report, this Court deems it appropriate to remand the matter back to the first Appellate Court. The first Appellate Court is now required to mark the Commissioner's report in evidence and grant both the sides necessary opportunities to adduce further evidence in the matter.

7.Accordingly, this Second Appeal is allowed and the judgment and decree passed in A.S.No.105 of 2013 on the file of the Principal Sub Court, Dindigul, dated 19.09.2014 confirming the judgment and decree passed in O.S.No.577 of 2009 on the file of the Additional District Munsif Court, Dindigul is set aside and the matter is remanded for fresh consideration in the terms stated above. Both sides are directed to appear before the Principal Sub Court, Dindigul on 15.10.2020. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



To

1.The Principal Subordinate Judge, Dindigul.

2.The Additional District Munsif, Dindigul.

3.The Section Officer,
V.R.Section, Madurai Bench of Madras High Court,
Madurai.

S.A(MD)No.39 of 2016
15.09.2020

SDS (01.10.2020) 3P-5C