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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T.ASHA

S.A.No.594 2009

and

M.P.No.1 of 2009

Natesa Udayar ...1st defendant/1st respondent/Appellant

Vs.

1.Sundaram (deceased) ...Plaintiff/Appellant/Respondent

2.Ayyadurai ...2nd defendant/2nd respondent/Respondent

(2nd respondent remained ex parte in the Courts below and hence notice is dispensed with)

3.S.Saradambal

4.Jothi

5.Tamilmani

6.Thangam

7.S.Sakthinatham

...Respondents

(R3 to R7 brought on record as legal representatives of the deceased 1st respondent vide order of Court dated 06.07.2015 made in M.P.Nos.1 to 3 of 2014 in S.A.No.594 of 2009 by PSNJ)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned Subordinate Judge, Perambalur in A.S.No.10 of 2008 dated 29.12.2008 reversing the Judgment and Decree of the learned District Munsif, Perambalur in O.S.No.840 of 1995 dated 27.11.2002.

For Appellant :Mr.A.K. Kumaraswamy
Senior Counsel
for Mr.Kaithamalaikumaran



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For Respondents :Ms.Jothivani
for R3 to R7

R1 - died

R2 - ex parte

JUDGMENT

The 1st defendant is the appellant before this Court challenging the Judgment and Decree in A.S.No.10 of 2008 on the file of the learned Subordinate Judge, Perambalur in and by which the learned Judge has reversed the Judgment and Decree of the learned District Munsif, Perambalur in O.S.No.840 of 1995. The parties for the ease of understanding are referred to in the same array as in the suit.

2.The plaintiff herein had filed a suit O.S.No.840 of 1995 for a declaration of his easementary right to take cattle through the suit property and for a consequential relief of permanent injunction from restraining the user of the suit property.

3.It is the case of the plaintiff that he, his elder brother Shanmugham and their father Panchanathi Asari owned property in S.No.171/2. The elder brother of the plaintiff was allotted his house in the North and the plaintiff was allotted the middle portion and the father was allotted the land in the South. The property was West of the North South lane and South of East West Street. West of the plaintiff's and Panchanathi Asari's houses are vacant sites belonging to them. This site was used by them for tethering cattles. Between the houses of the plaintiff and his father there was an 5 human feet wide East West Lane to reach the Western side belonging to the plaintiff. Panchanathi Asari to whose share this land belonged had permitted the plaintiff to use the same to reach his cattle shed.

4.After the death of Panchanathi Asari, the 2nd defendant who is the son of Panchanathi Asari through his second wife was allotted the said portion. Even after he had taken possession, the plaintiff had been using the lane in question. On 27.04.1995, the 2nd defendant sold the property to the 1st defendant who started obstructing the use of the suit property. The plaintiff had claimed a right to the pathway on the basis of the easement of grant, prescription and necessity.



5.The 1st defendant had filed the Written Statement inter alia contending that in the year 1955, there was a registered Partition Deed between the parties in which the plaintiff was allotted the middle portion, his brother Shanmugham in the Northern portion and his father in Southern portion. Originally, there existed a small pathway before the house of the plaintiff which under the Partition Deed was allotted to the plaintiff's father. The plaintiff was not given any pathway right over the same. Thereafter, the plaintiff and his father had demolished their respective thatched houses and by consent constructed a terraced and tiled building keeping a common wall. Thereby, the usage of the lane in between the house of the plaintiff and his father had come to an end.

6.It was also their case that on the Southern side of the plaintiff's father house, there was a lane over which the plaintiff had no right. Similarly, he has no right over the vacant site on the Western portion of his father's property which was allotted to his father.

7.The 1st defendant would submit that the plaintiff has an access to his backyard from his Street through his house and that he has not prescribed title to the suit property. The right to use the vacant space on the West was not granted to the plaintiff. Therefore, he sought for dismissal of the suit.

8.The learned District Munsif, Perambalur by Judgment and Decree dated 27.11.2002 was pleased to dismiss the suit. Challenging the same, the plaintiff had filed A.S.No.10 of 2008 on the file of the learned Subordinate Judge, Perambalur. The learned Subordinate Judge by her Judgment and Decree dated 29.12.2008 was pleased to allow the appeal and reversed the Judgment and Decree of the trial Court. Challenging the same, the 1st defendant is before this Court.

9.The Second Appeal has been admitted on the following Substantial Question of Law on 30.06.2009:

"Whether the Lower Appellate Court is justified in decreeing the suit when the plaintiff has proved the user of the suit pathway for 15 years alone?"

10.Mr.A.K. Kumaraswamy, learned Senior Counsel appearing for the 1st defendant would submit that the right is claimed only under the Partition Deed which has been marked as Ex.B1. The plaintiff who has come to Court seeking the relief of declaration and injunction had not produced a shred of evidence



except for a Sketch. He would submit that the plaintiff has not referred to the partition entered into between him, his brother and his father in his pleadings. He would submit that the trial Court had rightly dismissed the suit. He would draw the attention of this Court to the evidence of the plaintiff as P.W.1 wherein he has clearly and categorically admitted in his cross examination that the suit property / suit lane which is lying between their houses belongs to his father under Ex.B.1 - Partition Deed. He would further admit that both the plaintiff and his father had constructed a house retaining common wall to both the properties. He would also admit that Ex.B.1 - Partition Deed was executed and there was bad blood between him, his father and his brother. He would further submit that the evidence of P.W.2 who has been examined to support the case of the plaintiff cannot be relied upon since the witness had come to the suit Village only two years back and his evidence cannot be relied upon.

11.The learned Senior Counsel would draw my attention to the Ex.B.1 - Partition Deed and to the schedules thereunder and a perusal of the same would clearly indicate that there was no right of way given to the plaintiff on the Western side of the plaintiff's father's property. The learned Senior Counsel would submit that the Appellate Court has totally failed to appreciate that the plaintiff who has claimed an easement of grant, necessity and prescription raised contradictory claims. The claim of an easement of grant has not been proved on a further perusal of Ex.B.1 - Partition Deed, it is clearly seen that the plaintiff does not have any right to any portion on the West of his father's property. Further, the plaintiff has not been able to prove the continuous usage of the suit pathway for over 20 years. Even the witness examined on the side of the plaintiff would only state that the use is for a period of 15 years even that has not been proved by the plaintiff. Therefore, the easement of prescription does not arise. Lastly, the easement of necessity also does not arise. The plaintiff's property is abutting the road on the South therefore there is a demarcated access to the plaintiff's property. Even without any iota of evidence in support of the plaintiff, the Appellate Court had erroneously reversed the Judgment and Decree of the trial Court.

12.Per contra, Ms.Jothivani, learned counsel appearing for the plaintiff would contend that the plaintiff has been using this suit pathway even after the partition in the year 1955 and it is only after the 1st defendant had purchased the property from the 2nd defendant that the problem had started. She would submit that the plaintiff's father and after him, the



2nd defendant has not objected to the plaintiff using the same. Therefore, she would plead that the plaintiff had prescribed a right to the suit lane. She would draw the attention of this Court to the evidence of D.W.2 who has himself admitted to this fact and which has been taken note of by the Lower Appellate Court. She would therefore submit that the Judgment of the Appellate Court need not be disturbed.

13. Heard the learned counsels on either side and perused the records.

14. The case of the plaintiff is that the suit lane was being used with the consent of her father and thereafter, the 2nd defendant, his half brother. However, a perusal of Ex.B.1 which was the Partition Deed entered into in the year 1955 clearly shows that the suit lane has not been so described and that apart, that portion has fallen to the share of the plaintiff's father from whom the 2nd defendant had inherited the property. The plaintiff has not let in any evidence to show the continuous usage of the lane for over 20 years for having prescribed a right of easement over the suit lane.

15. That apart, it is the admitted case of the parties that the properties had undergone a change with the thatched house giving way to the terraced/tiled house in the properties of both the plaintiff as well as the property of his father, which now belongs to the 1st defendant. Even when the properties had undergone a change there was no written Agreement between the parties permitting the use of the suit lane by the plaintiff. Admittedly, the plaintiff's property is situate abutting the road and therefore, there is an access already available to the plaintiff. The trial Court has considered the evidence of DW2, the half brother of the plaintiff and the vendor of the 1st defendant, who has stated in no uncertain terms that the plaintiff was not using the suit pathway for taking his cattle and on the contrary, has deposed that he has been taking them only through his house and this procedure has been continuing by him over 15 years. The plaintiff has only one witness on his side, PW2. Even this witness's evidence cannot be considered since he has come to the suit Village only two years ago. He is not competent to speak about the use of the suit property by the plaintiff. The Appellate Court has totally overlooked the fact and except for the oral evidence of the plaintiff, he has not been able to independently prove the usage of the suit property by him. The only document that has been produced on the side of the plaintiff is a Sketch. The Appellate Court has also overlooked the admission of the



plaintiff that the suit property has been allotted to his father under Ex.B.1 -Partition Deed. In fact, the Plaint is totally silent about the Partition Deed entered into between the plaintiff, his father and his brother. The Appellate Court has proceeded to reverse the Judgment of the trial Court primarily looking at the Commissioner's Plan which show the existence of the vacant site on the Western side of the 1st defendant's property. The Lower Appellate Court has not taken into consideration the Partition Deed which is the document under which the parties claimed their rights to their respective shares.

In view of the above, the Substantial Question of Law is answered in favour of the 1st defendant and the Second Appeal is allowed. The Judgment and Decree of the learned Subordinate Judge, Perambalur in A.S.No.10 of 2008 is set aside and the Judgment and Decree of the learned District Munsif, Perambalur, in O.S.No.840 of 1995 is confirmed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(JJ Act)

// True Copy //

Sub Assistant Registrar

mps
To

- 1.The Subordinate Judge,
Perambalur.
- 2.District Munsif,
Perambalur.
- 3.The Section Officer,
V.R.Section, High Court, Madras.

+lcc to Mr.S.Kaithamalai Kumaran, Advocate SR.No.35039
+lcc to M/s.S.S.Jhothimani, Advocate SR.No.34414

S.A.No.594 2009
and
M.P.No.1 of 2009

PP(CO)
CB(22/11/2021)