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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2021	PRONOUNCED ON: 19.03.2021
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CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.NO.309 OF 2010

1.Thangaraj

2.Theerthagiri

3.Saravanan

4.Sakthivel

5.Goindasamy

6.Dhanabakiyam

.. Appellants/Defendants

..Vs..

Palani

.. Respondent/Plaintiff

PRAYER:

Second Appeal is filed under Section 100 of C.P.C, against the decree and judgment in A.S.No.45/2008 on the file of the Sub Court, Harur and dated 29.12.2009 in reversing the judgement and decree in O.S.No.220/2003 on the file of the District Munsif Court, Harur and dated 21.02.2008.

For Appellants : Mr.V.Raghavachari
For Respondent : Mr.N.Subbarayalu
for M/S.S.Kanniah

J U D G M E N T

This second appeal has been preferred against the judgment and decree passed in A.S.No.45/2008 on the file of the Sub Court, Harur and dated 29.12.2009 in reversing the judgement and decree in O.S.No.220/2003 on the file of the District Munsif Court, Harur and dated 21.02.2008.

2. The Appellants in the second appeal are the defendants.



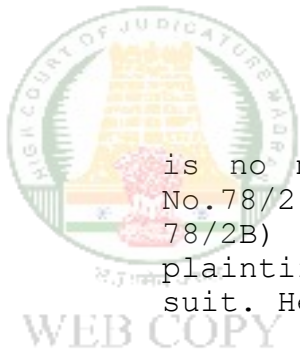
3. The short fact of the plaintiff case is as under:

The plaintiff and the defendants are the members of the joint family and they were enjoying the suit properties and other properties jointly. On 07.09.1975 they entered into a partition between themselves. As per the partition deed the respective parties took the possession of their respective shares and were enjoying of the same. The plaintiff was allotted with the properties in Survey Number.78/2B (item No.1) and eastern half in survey No.77/7. The plaintiff used to take water from the well in S.F.No.77/7 through the first defendants lands in S.F.No.78/2A and irrigated his suit lands in S.F.No.78/2B and he was also enjoying a pathway which measures 3ft x 190 ft and it was his easementary right. He has no other pathway to reach his lands in S.F.No.78/2B. There is also a cart way of 14 ft x 190 ft, which runs across the S.F.No.78/2A. These pathways are used by both the plaintiff and the defendants to reach their respective lands. Apart from that there is an another pathway which runs in the middle of S.F.No.78/2A. Both the plaintiff and the defendant have been using all these pathways for more than 30 years without any problem. And all of a sudden on 10.10.2003, the defendants with an intention to cause hardship to the plaintiffs, obstructed the pathways and denied the easementary rights enjoyed by the plaintiffs. Hence the suit has been filed by the plaintiffs for declaration and injunction.

4. The written statement of the defendant in brief is as under:

The suit of the plaintiff is not maintainable and he does not have any easement of necessity as alleged. The allegation of the plaintiff that he was enjoying the pathway and he has channel right in the suit property is false. The plaintiff has got a well in Survey No.78/2B and with the water from that well alone he irrigates his lands in survey No.78/2B. The defendant has laid a separate pipe line through well in porombokke land and he takes water from that well and also from a well in survey No.78/2A to irrigate his lands. Both the plaintiff and the defendant were irrigating their lands by using the water from the well situated in their respective portions. The plaintiff is using the well in survey No.77/7 for irrigating the portion of the land in survey No.77/7 over which he is in enjoyment.

4.1. The plaintiff can reach the riverbed which has on the southern side of survey No.78/2, by passing through his own land and further he can have an access to his land from the panchayat road running on the northern side. In the partition deed there



is no mention about the pathway, despite the lands in survey No.78/2 was divided into two portions (as survey Nos. 78/2A and 78/2B) and allotted to the shares of the defendant and the plaintiff respectively. There is no cause of action for the suit. Hence the suit has to be dismissed.

5. On the side of the plaintiff two witnesses have been examined as PW1 and PW2 and Ex.A1 to A6 were marked. On the side of the defendant one witness has been examined as D.W.1 and Ex.B1 to B3 were marked. The report of the Commissioner has been marked as Ex.C1 and C2.

6. After trial, the trial Court has dismissed the suit. The plaintiff filed the first appeal before the Sub Court, Hurur. The first appellate Court set aside the judgment and decree of the trial Court and decreed the suit as prayed for. Aggrieved over the same, the defendant has filed this second appeal. The second appeal has been admitted on the following substantial question of law:

"Whether the First Appellate Court is correct in decreeing the suit for easement when admittedly the partners were co-owners and were divided under Ex.A1, Partnership Deed?"

7. The fact that the plaintiff and the first defendant are brothers, was not denied. The suit properties were enjoyed jointly by the plaintiff and the 1st defendant. The respondent/plaintiff and the appellant/1st defendant have partitioned the properties among themselves by virtue of a Partition Deed dated 17.07.1975, (Ex.-A1) and that was also not denied.

8. The claim of the respondent/plaintiff was that in the partition entered into himself and his brother, the appellant/1st defendant, the western half of the land in S.F.No.78/2A was allotted to the share of the defendant and the eastern half in S.F.No.78/2B was allotted to the share of the plaintiff. And the shares of the plaintiff and the defendant in the said S.F.No.78/2 has been sub-divided into S.F.Nos.78/2A and 78/2B. It is alleged by the respondent/plaintiff that the lands in S.F.No.77/7 (which is on the western side of S.F.No.78/2A) was also divided into two half and the eastern portion was allotted to the plaintiff and the northern portion was allotted to the appellant/1st defendant.



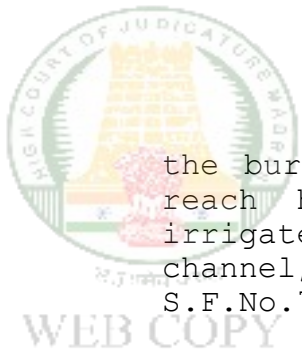
9. The respondent/plaintiff claims that there is a well in S.F.No.77/7 and from which, he was taking water through the channel running on the defendants land in S.F.No.78/2A, in order to irrigate his lands in S.F.No.78/2B. The alleged channel was shown in item No.1 of the plaint in the suit scheduled property. The respondent/plaintiff has further claimed that there is a pathway running across the land of the defendant in S.F.No.78/2A and through which he used to go to his lands in S.F.Nos.77/7 and 78/2A. The alleged pathway was shown in item Nos.2 and 3 of the suit scheduled properties. Apart from these, the respondent/plaintiff also claims pathway right in S.F.No.77/3 which lies on the northern side of the S.F.No.77/7 and this has been shown as item No.4 in the suit scheduled properties.

10. The main contention of the appellant is that in the Partition Deed dated 17.07.1975 (Ex.A1), the alleged pathway and the channel rights were not shown and the parties to the partition Deed have simply shared their properties. It is further submitted that the respondent never used any pathway as alleged in suit item Nos.2 to 4 or channel rights as alleged in suit item No.1.

11. The learned first appellate Judge placed his reliance mainly on Ex.A6, which is said to be a muchalika entered into between the plaintiff and the defendant on 13.12.1990. Ex.A3 is the sale Deed dated 12.12.1990 and it was executed by the appellant/1st defendant and his sons in favour of the respondent/plaintiff. By virtue of the above said sale Deed, the appellant/1st defendant has sold his half share in S.F.No.77/1 and some other properties. Despite Ex.A3 sale Deed was executed in respect of the properties in S.F.No.77/7 there is no mention about the right of enjoyment over the channel which is alleged to be running across S.F.No.78/2A for the purpose of taking water from the well in the S.F.No.77/7 and to irrigate the plaintiff's lands in S.F.No.78/2B.

12. The learned Trial Court has observed that the sale Deed has been executed on 12.12.1990 and the muchalika, was executed on the next day itself on 13.12.1990 (Ex.A6). Though the appellant/1st defendant admitted his signature in Ex.A6, he denied the contents in the said muchalika, Ex.A6.

13. According to the appellant/1st defendant the signature on Ex.A6 was fraudulently obtained and there is no pathway or channel right enjoyed by the respondent/plaintiff as alleged by him. When the plaintiff alleges an easement of necessity then



the burden is on him to prove that he has got no other way to reach his properties or there is no other possibility to irrigate or to reach his lands except through the alleged channel, said to have been running across the appellants land in S.F.No.78/2A.

14. It is seen from the evidence of the plaintiff that the well in S.F.No.77/7 is a Porrambokku well and a panchayat road has been running on the northern side of S.F.Nos.78/2A and 78/2B. Even during his oral evidence, the plaintiff has admitted that he can reach his lands in S.F.No.78/2B through the East-West Panchayat Road running on the northern side of his properties. It is also admitted by the plaintiff that there is a well in S.F.No.78/2B and the well is being used by him to irrigate the lands in S.F.No.78/2B.

15. The facts are true i.e. the plaintiff cannot claim as a matter of right, another pathway intercepting the lands of the appellant/1st defendant in S.F.No.78/2A. In fact, on the southern side of S.F.Nos.78/2A and 78/2B, there is a river Porrambokku. The plaintiff has admitted in his evidence that he can freely come from the panchayat road on the northern side and walk through his land and reach the river Porrambokku on the southern side.

16. The appellant /1st defendant has claimed that the plaintiff was using the water in the well in S.F.No.77/7 for the purpose of irrigating his share of lands in S.F.No.77/7. The panchayat road on the northern side is seen to be running near the plaintiffs land in S.F.No.77/3. The appellant has stated that the alleged pathway in the S.F.No.77/3 continues in the lands of the plaintiff only and he has got no easement of necessity in the lands of the appellant/1st defendant in S.F.No.78/2A. The surveyor who inspected the said property did not mention about the panchayat road which is lying on the northern side of S.F.No.78/2A and 78/2B and the river Porrambokku, which is lying on the southern side of S.F.No.78/2A and 78/2B. In the Commissioner's plan also the northern side Panchayat road is shown. Even without the pathway claimed in suit item No.4 the respondent/plaintiff seems to have got access to his properties through the riverbed on the southern side and through the Panchayat road on the Northern side.

17. The physical features of the suit property which was confirmed through the oral evidence of the plaintiff himself would show that the plaintiff does not have any easement of



necessity for a pathway or a channel on the lands of the defendant in S.F.No.78/2A. The learned trial Judge has correctly appreciated the documentary and oral evidence and arrived at a correct conclusion that the respondent/plaintiff did not prove his entitlement for easement of necessity. But the learned first appellate Judge ignored the admissions in the evidence of the plaintiff and carried away with Ex.A6 muchalika alone.

18. Despite the defendant has executed and registered the sale Deed on 12.12.1990, it does not state anything about the easementary right. But only Ex.A6, mucholika which is alleged to have been executed on the very next day states about the same. The claim of the respondent/plaintiff in respect of item Nos.1 to 4 is not a right by agreement. But as per the contention of the plaintiff in his plaint, it is an easement of necessity. When the physical features of the suit property and the evidence of PW.1 shows that there is a well in S.F.No.78/2B itself and in which the plaintiff has fixed a pump set, there is no necessity for him to take water from the Porrambokku well in S.F.No.77/7. When the panchayat road is running on the northern side of S.F.No.78/2B, the plaintiff cannot claim any easement of necessity on the defendants land. Because he can have access to his lands through the said road. Only because of these reasons, the pathway right or the channel right (which is now claimed by the plaintiff as easements of necessity) did not find place in Ex.A1, partition Deed entered himself and his brother i.e. the appellant/1st defendant. The learned first appellate Judge without evaluating the whole evidence available on record placed its reliance only on Ex.A6 and decreed the suit. Since the plaintiff did not prove the easementary right by necessity, it is correct for the trial Court to dismiss the suit. So the judgment of the first appellate Court which set aside the trial Court judgment is liable to be set-aside.

In the result the second appeal is allowed. The judgment and decree of the first appellate court is set aside and the judgment and decree of the trial court is hereby confirmed. No costs. The connected miscellaneous Petitions if any are also closed.

Sd/-

Deputy Registrar(TNMCC)

//True Copy//

Sub Assistant Registrar

jrs



To

1. The Subordinate Judge, Harur.
2. The District Munsif, Harur

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Copy To

The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.17924
+1cc to M/S.S.Kanniah, Advocate, S.R.No.17866

S.A.No.309 of 2010

AD(CO)

CS/21/10/2021