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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.02.2022

Coram:

THE HONOURABLE Mr.JUSTICE N.ANAND VENKATESH

Second Appeal No.255 of 2014

1.Ponnambalam (died)
2.Shanthi
3.Jaganathan
4.Sugavaneswaran
5.Sundar

...Appellants 2 to
5/LR's of the Plaintiff

[Sole appellant died Appellants 2 to 5 brought on
record as LR's of the deceased sole appellants
viz., Ponnambalam vide Court order dt.20.04.2021
made in CMP.5663/2021 in SA.255/20214]

.Vs.

1.Muthukumaresan
2.Krishnan
3.Ponnuvel
4.Yamuna

..Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned Ist Additional District Judge, Salem dated 27.08.2012 made in A.S.No.87 of 2002 confirming the judgment and decree of the Ist Additional District Munsif, Salem dated 29.04.2002 made in O.S.No.672 of 1995.

For Appellant :Mr.Subarajalu
for Mr.G.Jermiah

For Respondents :Mrs.R.Meenal
for R 1

R2 to R4 - ex parte



JUDGMENT

The plaintiff is the appellant in the present Second Appeal.

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2.The case of the plaintiff is that originally the properties of the plaintiff and the defendant was owned by one Arumuga Mudaliar and the said Arumuga Mudaliar divided the property by laying 4 ½ feet north-south lane in the middle of the property and the property situated in the western side was retained him. Insofar as the property that stood in the eastern side is concerned, it was divided into five portions and given to his sons and relatives. While undertaking this process, he had also make provision for drainage and lane for their usage.

3.The further case of the plaintiff is that the said Arumuga Mudaliar executed Sale Deeds for the five portions that were given on the eastern side of the property. According to the plaintiff, one of the portion that was sold to Sornammal, was the second portion in the northern side and she is the predecessor in title for the 1st defendant. The first portion on the northern side was sold to one Arthanari, who is the grand father of the plaintiff.

4.The specific case of the plaintiff is that at the time of purchase of the property on 04.06.1964 by the 1st defendant's mother from the above said Sornammal, there is a clear mention about the lane cum drainage which was exclusively shown as "D C B M N O P Q" in the rough plan that was annexed with the plaint. According to the plaintiff, they were in possession and enjoyment of the said portion.

5.The further case of the plaintiff is that the 1st defendant filed a suit in O.S.No.2345 of 1978 seeking for the relief of declaration and enjoyment to declare that the property mentioned in the "C B N M" portion absolutely belongs to him. According to the plaintiff, when the 1st defendant filed the suit, he suppressed the existence of "D C B M N O P Q". The suit was also filed on the basis of easement by grant. This suit was decreed and it was confirmed up to second appeal before this Court in S.A.No.1520 of 1982.

6.The grievance of the plaintiff is that the defendants had put up a construction in the suit property and thereby have prevented the plaintiff from enjoying the property in "D C B M N O P Q" alone which the plaintiff is claiming right as an easement of necessity. Consequently, the plaintiff filed the



suit seeking for the relief of declaration to declare that he is entitled for the right of easement of prescription and easement of necessity and quasi-easement over the suit property. The plaintiff also claimed for the relief of permanent injunction and for mandatory injunction to remove the structure that has been put up over the passage and restore the suit lane to its original state.

7.Both the Courts below on appreciation of the oral and documentary evidence and after considering the facts and circumstances of the case, found that the plaintiff is not entitled for the relief sought for in the suit and concurrently held against the plaintiff. Aggrieved by the same, the plaintiff has filed the present Second Appeal before this Court.

8.Heard Mr.Subbarayalu, learned counsel for the appellants and carefully perused the findings rendered by both the Courts below.

9.The learned counsel for the appellant primarily focused his arguments on the issue of res judicata that was put against the plaintiff by both the Courts below by virtue of the earlier judgment and decree passed in O.S.No.2345 of 1978. The learned Counsel submitted that the earlier suit was based on the right was claimed by the 1st defendant as a easement of grant and the present suit has been filed by the plaintiff seeking for the right as a easement of necessity and hence, the earlier judgment will not have any bearing in the present suit. The learned counsel submitted that the easement of necessity is an independent statutory right that has been given to the plaintiff under the Indian Easements Act, 1882 and that cannot be denied by pointing out to the earlier suit filed by the 1st defendant. The learned counsel further submitted that the earlier suit was governed under Section 15 of the Indian Easements Act, 1882 and the present suit is governed under Section 13 of the Indian Easements Act, 1882 and hence, the consideration and determination of right is completely different in both the suits. Hence, the findings in the earlier suit will not have a bearing while deciding the present suit. The learned counsel also submitted that the lower Appellate Court failed to consider the report of the Advocate Commissioner, which was brought in as an additional evidence at the time of the pendency of the appeal.

10.This Court has carefully considered the submissions made on either side.



11.Both the Courts below after marshalling the evidence that was available on record, have come to a very categorical conclusion that the existence of the disputed area "D C B M N O P Q" has not even been proved by the plaintiff. This factual finding has been reiterated by the Appellate Court also. The plaintiff, who claims a right by way of easement of necessity over the disputed portion, is duty bound to prove his case on the existence of such a disputed area and the burden of proof is upon him under Section 101 of the Indian Evidence Act, 1872. When that burden has not been discharged by the plaintiff, there is no necessity for this Court to go into the various other contentions raised by the learned counsel for the appellant with regard to the applicability of the principle of res judicata qua the findings given in the earlier suit. This Court while exercising its jurisdiction under Section 100 of the Code of Civil Procedure is not expected to reappraise the evidence. A factual finding has been given by both the Courts below to the effect that the plaintiff has even failed to prove the existence of the disputed area and this finding has not been shown to be perverse and it is based on the materials available on record. Hence, there is no ground to interfere with the judgments of both the Courts below. In any case, no substantial question of law is involved in the Second Appeal.

12.In the result, this Second Appeal is dismissed. Considering the facts and circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar(CCC)

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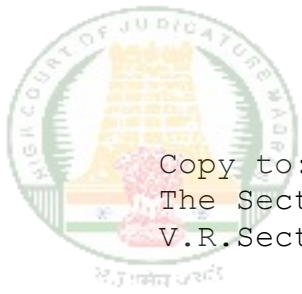
Sub Assistant Registrar

KP

To

1. Ist Additional District Judge,
Salem.

2. Ist Additional District Munsif,
Salem.



Copy to:
The Section Officer
V.R.Section, High Court, Madras.

+lcc to M/s.R.Meenal, Advocate SR.No.10461

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AJS(CO)
CB(11/03/2022)