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SA.No.1459 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.04.2024

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.1459 of 2010

1. Rajamanickam (Died)

2. R.Rajendran

3. R.Subramanian

(Appellants 2 & 3 brought on record as LR's of the deceased
sole appellant vide order dated 05.10.2023 made in
CMP.No.20711/2023)

... Appellants

- Vs -

1. Kaliaperumal

2. Rajangam

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 04.03.2010 made in A.S.No.73/1991 on the file of the Subordinate Judge, Ariyalur confirming the judgment and decree dated 23.06.1987 made in O.S.No.119 of 1983 on the file of the District Munsif, Ariyalur.

For Appellants : Mr.M.Sriram

For Respondents : Mr.P.Dinesh Kumar



SA.No.1459 of 2010

WEB COPY

J U D G M E N T

The 2nd defendant is the appellant herein. The plaintiff has been figured as the 1st respondent, and the first defendant has been arrayed as 2nd respondent in this Second Appeal.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.

3. The brief facts which give rise to the instant Second Appeal is that, the plaintiff is the absolute owner of the suit property referred as A B C D in the rough plan. It is the submission of the plaintiff that on the northern side, the first defendant's property situates and on the southern side, the 2nd defendant's property situates. The plaintiff has further stated that the 2nd defendant has attempting to encroach upon the plaintiff's property by claiming right of passage in the plaintiff's property. Hence, the plaintiff has come forward with a suit for declaration and for permanent injunction.

4. The said suit was resisted by the first defendant by disputing the plaintiff's claim. However, the 2nd defendant is the contesting defendant in



SA.No.1459 of 2010

the Second Appeal. According to the statement of the 2nd defendant, he disputed the description of property and he also denied that that his northern boundary is his east-west wall. It is the submission of this defendant that on the northern side to their wall, they have got passage to reach the western side property. It was also the contention of the first defendant that there was no fencing on A B C D portions. It is the submission of this defendant that Olungai measuring 10 feet in breadth runs east-west through out and the same is in existence for more than 18 years and before that, the same was in existence on the northern side for more than 30 years. Therefore, this defendant submits that if the decree is granted, then the defendant will become land locked and he will not be in a position to reach his land. Therefore, he prayed to dismiss the suit.

5. Before the Trial Court, the plaintiff examined himself as PW1 and marked as many as 22 documents as Exs.A1 to A22. On behalf of the defendants, 3 witnesses were examined as DW1 to DW3 and marked one document as Ex.B1. As a Court document, Exs.C1 to C4 have been marked.

6. The Trial Court, after having considered the oral and documentary evidence, has found that there are no proof to show that the existence of



SA.No.1459 of 2010

Olungai on the southern side of the suit property, therefore, ultimately decreed the suit as prayed for. The 1st defendant, who has also suffered a decree has not preferred any appeal. However, the 2nd defendant has instituted the First Appeal before the First Appellate Court. But, the First Appellate Court, on re-appreciation of evidence, has concurred with the finding of the Trial Court and dismissed the First Appeal. Not satisfying with the order of the First Appellate Court, the 2nd defendant is before this Court by way of the instant Second Appeal.

7. At the time of admission on 29.11.2010, this Court has formulated the following substantial question of law:-

“1. Whether the Lower Appellate Court is justified in dismissing the appeal when all the oral and documentary evidences and the Commissioner's plan clearly established the existence of the said passage?”

2. Whether the Courts below are justified in not considering the principles laid down in easement of necessity under Section 13 of The Indian Easements Act, 1882?

3. Whether the Court below are justified in negating the claim of the appellant when the said passage is in long and continuous enjoyment as an easementary right for more than the statutory period prescribed under the Act?



SA.No.1459 of 2010

4. *Whether the Courts below are justified in not considering the doctrine of lost grant and the appellant had acquired the right of easement by prescription?"*

8. The learned counsel for the appellants/2nd defendant would vehemently contend that, this defendant disputed the plaintiff's title over the property and even according to the admission made by the plaintiff, he was not very much confident about the description mentioned in Ex.A2-Sale Deed, which is the main document for the plaintiff. It was also the submission of the learned counsel for the appellant that by examining DW2 and DW3, he has established the existence of passage on the northern side of his property. It was also the contention of the learned counsel that the plaintiff has not at all established his right before the Court. Hence, he prayed to allow this appeal, thereby dismissing the suit.

9. Per contra, the learned counsel appearing for the plaintiff/first respondent would vehemently submit that the plaintiff had established his right by producing Ex.A2-Sale Deed and also through the admission of the defendant. It was also the contention of the learned counsel for the plaintiff/first respondent that even according to the defendants, there was a



SA.No.1459 of 2010

panchayat during 1984 and only in that panchayat, the passage was laid on the northern side of the 2nd defendant's property, whereas the suit has been filed during 1983. It was also the contention of the learned counsel for the plaintiff/first respondent that according to the sale deed of the first defendant, whose property situates on the northern side of the plaintiff's property, has clearly referred the southern boundary as the plaintiff's property. Therefore, only based upon the evidence available before the Court, the Trial Court as well as the First Appellate Court have arrived at a finding in favour of the plaintiff. Therefore, there is no perversity in the judgment of the First Appellate Court. Hence, the learned counsel would submit that unless there is a perversity in the order, while exercising jurisdiction under Section 100 of CPC, this Court cannot interfere with the order of the Courts below.

10. I have given my anxious consideration to either side submissions.

11. The submissions of the learned counsel for the appellants is in respect of his easementary right. According to the learned counsel, he has got property on the western side. Therefore, if the decree is granted, then the plaintiff would treat the common passage as his property. If that being the



SA.No.1459 of 2010

case, his entire remaining land will be landlocked. Therefore, from the submissions of the learned counsel for the appellant, what is essential to be considered is, whether is there any common passage between the plaintiff's property and respondent's property.

12. In this regard, the learned counsel for the first respondent would submit that, even according to the case of the defendant, the passage on the southern side of the plaintiff's property was left only during 1964, that too in furtherance to the panchayat. In this regard, if we look at the written statement, even this defendant has admitted that there was a passage for more than 18 years. But to support such pleading qua the existence of passage, there are no Revenue records submitted before the Court. The Trial Court has found that according to the plaintiff's document, he is the owner of the entire suit property. Such finding has been reached on appreciation of fact. As a matter of fact, the 2nd defendant did not submit any document except genealogy tree, to support his contention.

13. Therefore, only based upon the evidences available before the Trial Court, both the Courts below have arrived at a finding of fact that there was no passage between the plaintiff's and defendant's property and also found



SA.No.1459 of 2010

that the plaintiff is entitled for a decree of declaration and permanent injunction. From the submissions made by the learned counsel for the appellants, this Court could not find any perversity and also could not find any justifiable ground.

14. In view of the above discussions, this Court answers the substantial question of law in favour of the respondents.

15. In the result, this Second Appeal is dismissed. There shall be no order as to costs.

17.04.2024

kmi

Index : yes/no

Speaking/Non Speaking Order

Neutral Citation Case: Yes/No

To

1. The District Munsif Court,
Ariyalur.

2. The Subordinate Judge,
Ariyalur.

C.KUMARAPPAN, J



WEB COPY



SA.No.1459 of 2010

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S.A.No.1459 of 2010

17.04.2024