



S.A.(MD)No.286 of 2018

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.06.2025

CORAM

THE HON'BLE MR.JUSTICE **G.ARUL MURUGAN**

S.A.(MD)No.286 of 2018
and
C.M.P.(MD)No.8029 of 2018

Ravi

... Appellant/2nd Appellant/
3rd Defendant

Vs.

1.Pitchammal @ Mookkammal ... 1st Respondent / 1st Appellant /
2nd Defendant

2.Seenivasaragavan, ... 2nd Respondent / 1st Respondent/
Plaintiff

3.Mallika

4. Shanthi

... Respondents 3&4/

Respondents 2&3 / Defendants 4 &5

PRAYER : Second Appeal filed under Section 100 Cr.P.C., against the judgment and decree dated 16.04.2018 passed in A.S.No.11 of 2013 on the file of the Principal Subordinate Judge, Tirunelveli, confirming the judgment and decree dated 15.06.2011 passed in O.S.No.191 of 2008 on the file of the Principal District Munsif Court, Tirunelveli.



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For Appellant : M/s. K.Shwathini
for Mr.G.Prabhu Rajadurai

For Respondents : Mr.T.Selvan for R2

: No appearance for R1

: R3& R4 Dispensed with

JUDGMENT

This second appeal has been filed challenging the judgment and decree dated 16.04.2018 passed in A.S.No.11 of 2013 on the file of the Principal Subordinate Judge, Tirunelveli, confirming the judgment and decree dated 15.06.2011 passed in O.S.No.191 of 2008 on the file of the Principal District Munsif Court, Tirunelveli.

2. The legal heirs of the deceased first defendant, who have been impleaded as defendants 2 to 5 in the suit, are on appeal.

3. The parties are referred, as per the litigative status before the trial Court.



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4. It is the case of the plaintiff that his father, viz. Mr.Poovalingam, had purchased the suit 1 and 2 schedule properties through a registered sale deed, dated 11.03.1942, in Ex.A1. The father of the plaintiff died in the year 1979 and among the six legal heirs, a partition deed was executed on 23.03.2000 in Ex.A2, whereby, the suit schedule 1 and 2 properties were allotted in favour of the plaintiff. Pursuant to the partition, the plaintiff had demolished the old house and had built a house for his own use in Door No.27 and again, he constructed two commercial properties in Door Nos.27/1 and 27/2 in the year 2005.

5. It is the case of the plaintiff that earlier his father and thereafter, himself had been in peaceful possession and enjoyment of the properties in Schedule 1 and 2 for the past 60 years from the date of purchase in Ex.A1 and they have been using the C- Schedule property to whitewash and maintain the B – Schedule property for the past 60 years. It is their further case that they have got right through prescription to go through the third item of the property to maintain the 2nd schedule of the property. According to the plaintiff, the defendants have fixed pipelines to drain



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waters in the 3rd schedule towards 2nd schedule property and further they have installed hand pump and taps in the 2nd schedule property. As such, the plaintiff had come up with the suit, claiming declaration, permanent injunction and mandatory injunction.

6. The first defendant resisted the suit by filing a written statement contending that the 2nd item of the suit schedule property is a common property of both the plaintiff and the defendants. Since it is a common property, the plaintiff cannot claim an exclusive title or enjoyment over the 'B' schedule property. Since 'B' schedule property is a common property belonging to both the plaintiff and the defendants, the claim of any easementary right to use B schedule property through C schedule property does not arise. It is their further case that since the C schedule property absolutely belongs to them, they have every right to lay the pipeline or install hand pump and the relief of mandatory injunction to remove the pipeline cannot be sustained and sought for dismissal of the suit.

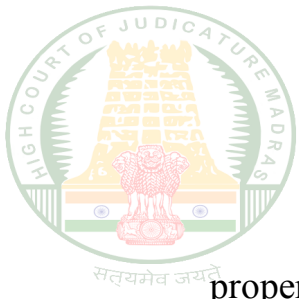


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7. During trial, the plaintiff examined himself as P.W.1, one Sankarakuttralam as P.W.2 and Mani Asari as P.W.3 and have marked Ex.A1 to Ex.A4. The third defendant examined himself as D.W.1 and examined two other witnesses as D.W.2 and D.W.3 and have marked Ex.B1. During trial, an Advocate Commissioner was appointed and the report of the Advocate Commissioner along with plan and surveyor plan were marked as Court Exhibits, viz., Ex.C1 to Ex.C3.

8. After analyzing the documents and evidences, the trial Court decreed the suit in respect of declaration and also partly decreed the suit insofar as the mandatory injunction to remove the hand pump and pipes, except the water outlet pipes and consequential permanent injunction were also granted. The trial Court also came to the conclusion that when both the documents in Ex.A1 and Ex.A2 do not refer to the items 1 and 2 as common property, the defence or claim made by the defendants that it is a common property cannot be sustained and they have not established their claim through evidence that they have any right over the B Schedule property. The trial Court has also come to the conclusion that once the declaration is granted in respect of item Nos.1 and 2 schedule



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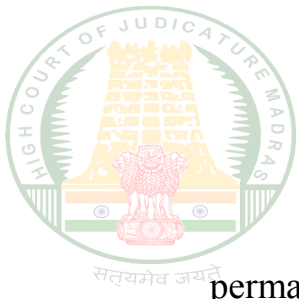
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properties, then the permanent injunction and the easementary right to maintain the property through C Schedule is incidental to the relief granted.

9. Aggrieved by the decree of the trial Court, the defendants preferred an Appeal. The First Appellate Court by judgment dated 16.04.2018 confirmed the judgment and decree of the trial Court, placing reliance on the cross examination of D.W.1 and also the documents in Ex.A1 and Ex.A2 and also Ex.B1. The First Appellate Court had also placed reliance mainly on the specific admission of D.W.1 that even prior to the purchase of the property, the 2nd Schedule of the property was inexistence. Assailing the concurrent findings of fact, the third defendant is before this Court on appeal.

10. The Second Appeal has not been admitted and this Court by order dated 24.10.2018 had only issued notice to the parties.

11. Ms.K.Shwathini, learned counsel appearing for the appellant submitted that even though the declaration, mandatory injunction and



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permanent injunction have been granted, the appellant is specifically aggrieved only by the easementary right granted in favour of the plaintiff insofar as allowing them to use 3rd suit schedule property, for two days in a year to whitewash the 2nd Schedule property. The learned counsel asserted that if a relief of declaration in respect of easementary right is to be granted, then it is for the plaintiff to specifically plead and prove that they have been in possession and enjoyment of the right through the property of the defendants, whereby, they acquired the right by prescription for the statutory period of 20 years. The Courts below have not considered the legal provision for grant of easementary right, as the plaintiff has not established or proved the usage as per the provision under Section 15 of the Indian Easements Act, 1882 and therefore, the decisions of both the Courts below are perverse and are liable to be set aside.

12. Mr.T.Selvan, learned counsel appearing for the second respondent argued that the property has been originally purchased by the plaintiff's father as early as in the year 1942, which was allotted to the plaintiff through the partition effected in 2000 and the plaintiff has



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specifically pleaded the fact that they have been using the C- Schedule property to whitewash the B Schedule property for the past 60 years, ie., from the date of purchase. When a party has been using a right over the other person's property, for a period of 20 years, then the parties are entitled to claim the right of easement by prescription and in the instant case, when the plaintiff has been using the right through C- Schedule property for the past 60 years, the Courts below have rightly appreciated the evidence and have granted decree for easementary right to have an access through the C Schedule property for a period of two days in a year for the sole purpose of whitewashing the B Schedule property.

13. The learned counsel further contended that all along it was the defence of the defendants that B schedule property is only a common property and only in such circumstances, they have claimed that the relief of easementary right through the C- Schedule property cannot be granted. But once the Court had granted declaration in respect of the B schedule property in favour of the plaintiff, then the relief of permanent injunction and the easementary right to whitewash the B Schedule property is incidental. The learned Counsel contended that both the Courts below



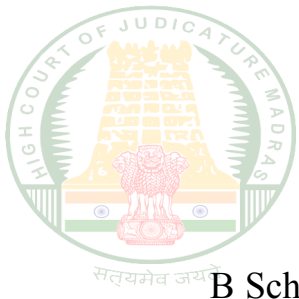
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have arrived at a finding of fact based on the pleadings and documents, needs no interference and sought for dismissal of the appeal.

14. Heard the respective counsels and perused the materials available on record. Admittedly, the suit A and B Schedule properties have been purchased by the plaintiff's father through a sale deed, dated 11.03.1942 in Ex.A1. The boundaries to the sale deed in Ex.A1 contains that on the southern side, it is bounded by the Manthiram Asari pathai, which shows that a way is in existence on the southern side of the property purchased by the plaintiff's father. It is also admitted that after the plaintiff's father died in the year 1979, there had been partition effected among the legal heirs of Poovalingam and in the partition deed, dated 23.03.2000 in Ex.A2, Schedule A and B suit property were allotted in favour of the plaintiff. Even in the partition deed in Ex.A2, the boundaries to the properties had been shown that is bounded with Balakrishnan's (first defendant) pathway.

15. Admittedly, after the properties were allotted to the share of the plaintiff, the plaintiff has demolished old structure available in the A and



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B Schedule and thereafter, had constructed a house with Door No.27 and also constructed two other structures for commercial purposes with Door Nos.27/1 and 27/2 in the year 2005. From the above documents, it is evident that the plaintiff's father and thereafter, the plaintiff are the owners and in enjoyment of the Schedule 1 and 2 of the properties for the past 60 years from the date of purchase by the plaintiff's father in Ex.A1 dated 11.03.1942. It is the specific case of the plaintiff that there was an old house available in the Schedule A and B and they have been using the pathway in C - Schedule to whitewash B Schedule property. The plaintiff has specifically pleaded that they have been using the property in the C – Schedule for the past 60 years to whitewash the properties in B Schedule. It was only the claim of the defendants that the B Schedule property is not an absolute property belonging to the plaintiff and it is a common property and both the plaintiff and the defendants have right over the B - Schedule property. It was their further claim that the B - Schedule property was only a common wall and therefore, they were entitled to instal the pipelines and hand pump, which they have done so and when it is a common wall, the question of declaration for exclusive ownership or any easementary right through the C – Schedule property to



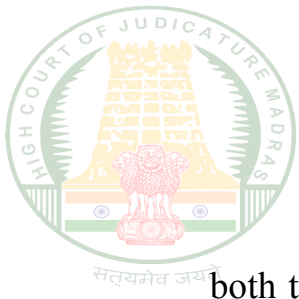
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maintain B – Schedule property does not arise.

16. The plaintiff examined himself as P.W.1 and had specifically given evidence that B – Schedule is the absolute property of the plaintiff and the plaintiff's father and the plaintiff had been using the C- Schedule for the past 60 years for the purpose of whitewashing B- Schedule property. The defendants even in the cross-examination had only sought to justify the claim that the B-Schedule property is only a common property and they have not resisted or suggested any specific examination in respect of non-usage of the C- Schedule property for the past periods.

17. Further, the third defendant had examined himself as D.W.1, who had admitted that the 2nd Schedule property had been in existence even prior to the purchase of the C- Schedule property by his father. When it is a specific assertion on the part of the defendants that even prior to the purchase by the defendants, the plaintiff's father and the plaintiff were having the property in the A and B Schedule, then the claim that the B- Schedule property is a common property belonging to

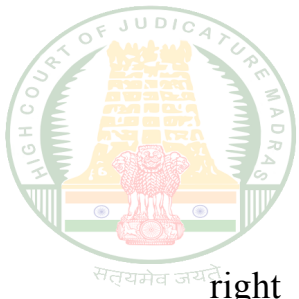


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both the plaintiff and the defendants is without any legal basis. Further, as rightly found by the Courts below through the documents in Ex.A1 and Ex.A2, which are the sale deed and the partition deed executed in favour of the plaintiff's father and the plaintiff would amply demonstrate that it is an exclusive property of the plaintiff and the B- Schedule has not been shown as common property or any rights were given to any third party. By documents, it has been established that the plaintiff is the absolute owner of the B Schedule property and the Courts below have rightly declared the title of the A and B Schedule property to the plaintiff.

18.To claim an easementary right by prescription, as per Section 15 of the Indian Easements Act, 1882, the party can claim a right of way or any other easement if it has been peacefully and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for a period of twenty years. In the case on hand, the plaintiff has specifically pleaded that they have been in usage of the C – schedule property to whitewash the building in the B-Schedule property and the plaintiff has also given specific evidence asserting the

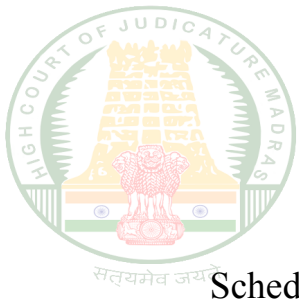


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right for a period of 60 years. In fact, the defendants had not even chosen to suggest that the plaintiff had not used the property in the C-Schedule property to whitewash the property in B- Schedule property for the past 60 years or even after their purchase or after re-construction was made. All along it was the claim of the defendants that the B- Schedule property is only a common property, which is a common Wall, that has been negated and established by the plaintiff that it is an exclusive property.

19. When the appellant has not resisted the Appeal insofar as granting of declaration, permanent injunction and mandatory injunction in respect of B- Schedule property and also the pipelines installed in the C- Schedule property, the only argument raised in the appeal that the easementary right granted in the C- Schedule property to have access for whitewashing B- Schedule property for a period of two days in a year is without any basis and cannot be sustained. Both the Courts below have appreciated the pleadings and evidences let in and having found that the plaintiff is the absolute owner of the A and B Schedule property and also the C- Schedule property has been used to carry out whitewashing B



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Schedule property. The findings of the fact arrived at by the Courts below are based on available evidences.

20. In view of the findings of the fact arrived at by both the Courts below, this Court does not find any illegality or perversity in the decision arrived at. There is no question of law, much less than the substantial question of law that arises in the appeal for the consideration in this Appeal.

21. In fine, the Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
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- 1.The Principal Subordinate Judge,
Tirunelveli.
- 2.The Principal District Munsif,
Tirunelveli.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ARUL MURUGAN,J.

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