IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF MARCH, 2024

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BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

R.S.A. NO. 634 OF 2011 (PAR)

BETWEEN:

SRI T VENKATRAMANA BHAT
AGED ABOUT 60 YEARS
S/O A MAHALINGA BHAT
R/O NEKKILADY IN ALANKAR VILLAGE,
PUTTUR TALUK, D.K.-575001. … APPELLANT

(BY SRI O. SHIVARAM BHAT, ADVOCATE)

AND:

SRI SUBRAMANYA BHAT
AGED ABOUT 52 YEARS
R/O NEKKILADY IN ALANKAR VILLAGE
PUTTUR TALUK, D.K.-575001. … RESPONDENT

(BY SRI A KESHAVA BHAT &
SRI K.SHRIKRISHNA, ADVOCATES)

THIS R.S.A. IS FILED UNDER SECTION 100, O-XLII, RULE-1 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED 24.01.2011 PASSED IN R.A.10/2009 ON THE FILE OF THE PRL. SENIOR CIVIL JUDGE, PUTTUR, D.K., DISMISSING THE APPEAL AND CONFIRMING THE JUDGMENT AND DECREE DATED 18.12.2008 PASSED IN O.S.99/2006 ON THE FILE OF THE PRL. CIVIL JUDE, (JR. DN.), PUTTUR, D.K. AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 04.03.2024 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

This appeal is filed challenging the judgment and decree dated 24.01.2011 passed in R.A.No.10/2009 by the Principal Senior Civil Judge, Puttur, D.K.

2. The factual matrix of the case of the plaintiff before the Trial Court that he has filed the suit in O.S.No.99/2006 for the relief of permanent prohibitory injunction restraining the defendant, his men, servants, legal representatives or anybody claiming through or under him from in any way encroaching upon the plaint 'C' schedule roadway or from reducing its width or from blocking the plaint 'C' schedule property measuring 12 to 15 feet wide motorable roadway branching from the panchayat road namely Alankar to Kakve at place called Karthutelu and passing across the Sy.No.118/1 of Alankar village, Puttur taluk, D.K. and connecting the house of the plaintiff.

3. It is contended in the plaint by the plaintiff that he is the absolute owner of agricultural kadim warga land bearing Sy.No.116/7 to the extent of 0.47 acres situated at Alankar village, Puttur taluk, D.K. amongst other lands which was acquired by virtue of partition deed dated 03.02.1988. The land described in 'B' schedule of the plaint along with other lands form direct frontage kumki to the kadim warga lands mentioned in the 'A' plaint schedule. It is further contended that both 'A' and 'B' schedule properties are in a compact block, enclosed by common physical boundaries like fencing and agalu. The plaintiff has raised vast agricultural improvements in both the plaint 'A' and 'B' schedule properties and he has also constructed a new residential house in Sy.No.116/7 in plaint 'A' schedule property after the partition. It is contended that the road has been more fully described as schedule 'C' in the plaint.

4. It is also contended that the defendant is the none other than the direct brother of the plaintiff, being a party to the partition deed. The defendant has got a separate motorable roadway in order to reach his house. However, recently with the

consent of the plaintiff, the defendant is also using the said road apart from the other road. It is contended that the plaint 'A' and 'B' schedule properties as well as the plots held by the defendant and that of one Shankaranarayana Bhat were jointly held by them, they being the co-sharers. Thereafter, as per the partition deed, the property was divided into separate shares, in that partition, the plaintiff got allotted with the 'A' and 'B' schedule properties along with other lands. It is contended that at the time of partition, there exists mamool and easementary rights of way, water, etc., which were continued even after partition. The plaintiff further submits that the 'C' schedule roadway was in existence even at the time of partition and even much prior to it, so as to reach the plot now held by the plaintiff. As such, the defendant has no right to encroach or block the said roadway. The plaintiff further contended that he has got no other road other than 'C' schedule road so as to reach his house from the public road mentioned above. If the width of the road is reduced, it will be impossible for the plaintiff to take heavy vehicles like lorry, agricultural produces, manure, hay and other materials, etc. It is also contended that the defendant, on 20.07.2006,

with the help of his henchmen erected some wooden sticks and planted some live-plants encroaching upon 'C' schedule road and the plaintiff rushed to the spot and objected the act of the defendant and could resist the defendant temporarily with great difficulty.

5. In pursuance of suit summons, the defendant appeared and filed the written statement even denying the correctness of description of 'A' and 'B' schedule properties. But he contended that there is a separate alternative motorable road which leads to the house of the plaintiff. It is contended that 'C' schedule road is formed by the defendant for his purpose and he never closed or blocked 'C' schedule road at any point of time as contended by the plaintiff. The defendant denied all other allegations of erected some wooden sticks and planted some live-plants encroaching upon 'C' schedule road.

6. Based on the pleadings of the parties, the Trial Court framed the following Issues:

1. Whether plaintiff proves that he has been enjoying the plaint 'C' schedule road to reach his

house from Alankaru – Kakve Panchayat road since a very long time continuously, openly and uninterruptedly as of right against defendant and against all the concern?

2. Whether plaintiff proves that the defendant is interfering with plaintiff's peaceful enjoyment of 'C' schedule road?

3. Whether plaintiff is entitled for relief claimed?

4. What order or decree?

7. The Trial Court allowed the parties to lead their evidence. In order to substantiate the case of the plaintiff, the plaintiff examined himself as PW1 and also examined two witnesses as PW2 and PW3 and got marked the documents at Ex.P1 to P43. On the other hand, the defendant also examined himself as DW1 and also examined his brother as DW2 and got marked the document at Ex.D1. The Court Commissioner was also appointed and he has been examined as CW1 and got marked the report of the Court Commissioner as Ex.C1.

8. The Trial Court having considered both oral and documentary evidence placed on record as well as the Court Commissioner's report, dismissed the suit of the plaintiff in coming to the conclusion that the plaintiff has failed to show that 'C' schedule road is in existence since from very long time continuously, openly and uninterruptedly and the defendant has proved that it is formed after construction of his house and hence, the question of interference does not arise. The Trial Court also comes to the conclusion that the defendant has proved that the plaintiff has got an alternative road to reach his house and the plaintiff has no necessity to go through 'C' schedule roadway.

9. Being aggrieved by the judgment and decree of the Trial Court, the plaintiff preferred an appeal before the First Appellate Court. The First Appellate Court having considered the grounds urged in the appeal, formulated the points which read as follows:

1. Whether the Trial Court went wrong in holding that issue No.1 in the negative?

2. Whether the judgment and the decree passed by the Trial Court is perverse, capricious, illegal and calls for interference?

3. What order or what decree?

10. Having reassessed both oral and documentary evidence placed on record including the Commissioner's report, the First Appellate Court also dismissed the appeal and confirms the judgment and decree of the Trial Court. Hence, the present second appeal is filed before this Court.

11. The learned counsel for the appellant/plaintiff would vehemently contend that the Trial Court has not framed proper issues for its consideration and both the Courts misunderstood the recitals extracted in the partition deed wherein there is a reference with regard to the existence of mamool easementary right and user of the same survey number and the house is away from the few meters from the old house. Both the Courts failed to appreciate the evidence of PW3 who was the vendor of the entire property which was partitioned by the plaintiff and the defendant subsequently who clearly deposed before the Court

that there is an existence of only one road to the entire property before the partition. The said evidence of PW3, who was the vendor the of the plaintiff and defendant's properties, was not considered by both the Courts. The First Appellate Court ought to have drawn adverse inference against the defendant in view of the fact that he has not produced any document to show that there is an alternative road to the plaintiff's house. It is also contended that this Court while disposing of W.P.No.16231/2006 clearly observed that it is for the defendant to show that there is an alternative road which leads to the plaintiff's house. Since the defendant has not produced any document to show that there is an existence of alternative road, both the Courts have held that the defendant has failed to prove the existence of alternative road and as such ought to have decreed the suit of the plaintiff. The First Appellate Court failed to consider the finding of the Trial Court on Issue No.1 as wrong and not based on evidence on record. The admission of the defendant coupled with the evidence of PW3 and CW1 which clearly show that there is no alternative road except the plaint 'C' schedule road. The report of the Court Commissioner and his evidence was

completely misread by both the Courts. The finding of the Trial Court as well as First Appellate Court with regard to the existence of alternative road is contrary to the record and evidence.

12. This Court having considered the grounds urged in the appeal, formulated the substantial question of law which reads as follows:

> Whether the Courts below committed an illegality in misreading the Court Commissioner reports?

13. The counsel appearing for the appellant in his arguments would vehemently contend that both the Courts have committed an error in considering the admission with regard to the existence of road prior to the partition. The counsel for the appellant would vehemently contend that even plaintiff is ready to take the old road but both the Courts fails to take note of the Court Commissioner's report and committed an error in making an observation that there is an alternative road inspite of Court Commissioner has deposed that there is no any other alternative

road. The counsel also would vehemently contend that when Ex.P1-Parttiion Deed is produced wherein also it is clearly stated that the parties are having an easementary right to the access of their properties and the same is also not been considered by both the Courts. The counsel also would vehemently contend that the Court Commissioner's report which is marked before the Trial Court as Ex.C1 is very clear that there is no any alternative road and in the evidence of Court Commissioner also he says that there is no alternative road, inspite of it, both the Courts have committed an error in coming to the conclusion that there is an alternative road.

14. Per contra, the learned counsel appearing for the respondent would vehemently contend that the suit is filed only for the permanent injunction and the relief of declaration is not sought. The counsel also would vehemently contend that the properties are divided in the year 1988 in a partition and the defendant has constructed separate house. The counsel would vehemently contend that the plaintiff also constructed separate house and the same is in the year 1996 and the suit is filed in

the year 2006 that is after the period of 10 years, hence, the question of easementary right of prescription and easement of necessity does not arise.

15. The counsel for the respondent in support of his argument, relied upon the judgment reported in **AIR 2019 SC 3056** in the case of **S SUBRAMANIAN vs S RAMASAMY ETC. ETC.,** wherein the Apex Court discussed that in the second appeal permissible only on substantial question of law and not on question of facts or of law. The question of law cannot be the substantial question of law. The High Court not justified in setting aside the findings of facts recorded by Courts below unless and until it found to be manifestly perverse and/or contrary to evidence on record. The counsel also relied upon the judgment reported in **AIR 2019 SC 1777** in the case of **T RAMALINGESWARA RAO (DEAD) THROUGH LRS AND ANOTHER vs N MADHAVA RAO AND OTHERS** wherein also the Apex Court held that when the concurrent findings of Lower Courts that plaintiffs, son of co-sharer failed to prove to be in exclusive possession of suit property, interference by High Court

in second appeal with said findings and decreeing suit by granting decree of permanent injunction against defendants, unjustified. The counsel also relied upon the judgment reported in **AIR 2010 SC 2685** in the case of **BHARATHA MATHA AND ANOTHER vs R VIJAYA RENGANATHAN AND OTHERS** wherein also the Apex Court held that the concurrent finding by lower Courts that such presumption cannot be raised as defendant was married and her marriage was subsisting, interference by High Court with finding of fact, improper, more so when interference was made by considering evidence of defendant only. The counsel also relied upon the judgment of this Court passed in **Appellate Civil dated 16.02.1982** in the case of **D RAMANATHA GUPTA BY HIS POWER OF ATTORNEY HOLDER G R KRISHNA MURHTY vs S RAZAACK.** The counsel referring this judgment brought to notice of this Court for consideration of point No.1 which is discussed in paragraph 9 wherein this Court held that it is necessary that the required period of 20 years or over must end within 2 years next before the institution of suit wherein the claim to the easement is contested. This necessarily implies that the right of easement

by prescription under the Act cannot become absolute unless the right has been contested in a suit. This Court also discussed with regard to Section 15 of the Indian Easement Act.

16. In reply to the arguments of the learned counsel for the respondent, the learned counsel for the appellant would vehemently contend that even in the absence of suit for declaration, the Court can grant the relief of permanent injunction. In support of his contention, the learned counsel also relied upon the judgment reported in **1996(5) KAR L J 306** in the case of **PUTTEGOWDA ALIAS AJJEGOWDA vs RAMEGOWDA** wherein also the suit is filed for the relief of perpetual injunction and discussed Sections 34, 37 and 48 of the Specific Relief Act. This Court held that when the suit is not filed for the relief of declaration of title, suit not to be dismissed on that ground. Court may grant injunction as substantial relief even without prayer for relief of declaration. Declaration is implicit in grant of perpetual injunction, party seeking injunction to plead and prove his right, title and interest. The counsel referring this judgment would vehemently contend that in the

absence of any declaratory relief of easementary right, the Court can grant the relief of easementary right in a suit for permanent injunction and no need to seek for the relief of declaration.

17. Having heard the learned counsel appearing for the respective parties and also in keeping the substantial question of law framed by this Court and also the grounds urged in the appeal, this Court has to examine whether both the Courts have committed an illegality in misreading the Court Commissioners reports. Having perused the material available on record, it is not in dispute that the plaintiff and the defendant are the direct brothers. It is also not in dispute that all of them were residing together prior to the partition. It is also not in dispute that the properties are purchased in the year 1982 and partition was effected in the year 1988. It is also important to note that to show that there was a partition in the family, document at Ex.P1 is marked. No doubt, the Trial Court has made an observation that in the sale deed of the year earlier 1982, there is no reference of existence of road. It is also important to note that it is emerged during the evidence that there is a reference in the

partition deed which is marked as Ex.P1 particularly in page 4 of the partition deed a reference is made with regard to existence of borewell and using the same by the family members and even for taking the water also to make use of the road which is in existence and not to raise any objections and the same is also not disputed that there is a mamool easementary right between the parties. It is also not in dispute that the suit schedule properties are allotted to the respective parties in the said partition deed.

18. Apart from that the Court Commissioner was appointed before the Trial Court. It is the claim of the respondent that there is an existence of alternative road and in order to prove the said fact, no document is placed before the Trial Court and only he has marked one document at Ex.D1 that is eye sketch. The Court Commissioner who was appointed before the Trial Court deposed that he found the iron gate and at the distance of 35 feet, the road divides and right side road is 10 feet width and the same reaches to the house of defendant and also found a new type of gate and said gate was opened and the

said gate width is 12 feet and the said gate was fresh in nature and also found that new pole was erected and the same was also coloured with red-oxide. From that gate, the house of the plaintiff was at the distance of 125 meters and the said road was wet road consisting of mud and also found the movement of the vehicle and one more road deviates which reaches the house of the plaintiff and other road reaches the house of the defendant. The road which leads to the house of the plaintiff compressing of wet mud and also they put sand and the road which leads to the house of the defendant was used. He also found new plants were planted that is pineapple plants and also flower plants and small wooden sticks are also put and also it evidences the fact of encroaching of the said road. The said 'C' schedule road passes through 'A' and 'B' schedule properties and the same was informed to him by the plaintiff. The gate was locked and when the same was questioned, the defendant given the reply that from whom they took the permission and he refused to open the gate and they came back from other road which leads to the house of the defendant.

19. The Court Commissioner was examined before the Trial Court as CW1 and he categorically deposed that there are two gates and found new gate and he also categorically says that except 'C' schedule road to reach the house of the plaintiff, there are no other road and also he deposed that one of the gate was locked. This witness has not been cross-examined by the defendant and says no cross-examination. Hence, the evidence of the Court Commissioner was not disputed and Court Commissioner's report is also very clear with regard to deviation of two roads which one leads to the house of the plaintiff and another one leads to the house of the defendant and the same is located within 'A' and 'B' schedule properties.

20. It is also important to note that the First Appellate Court also Court Commissioner was appointed in R.A.No.10/2009 wherein also the Court Commissioner has given report stating that he went to the spot and inspected the property and he found gate G1 and gate G2 and Gate G2 was locked and there were 12 feet width wooden poles are used and the respondent came and opened the said gate and hence, they proceeded

further and also found house of the appellant. And at the distance of 130 feet from the said gate, he found the house of the appellant and also found the house of the respondent in the opposite direction. The Court Commissioner has prepared the sketch and marked that from point marked as B to D reaches the house of the plaintiff and point marked as B to C reaches the house of the defendant. The road B to D marked is the 'C' schedule road and the same is also informed to the Court Commissioner and the defendant has not denied the same and also found causing obstruction by thorn fencing in 'C' schedule property measuring only 11 to 16 feet and near the house of the appellant, the width of the road is 15 feet and also sign of vehicle was moved in the said road near the house of the appellant. In view of the said obstruction, it is difficult to reach the house of the plaintiff. He also stated that on both the sides planted pineapple plants wherein the width of the road is 10 to 12 feet. The said road is old road and kachcha road. The counsel who appears for the respondent/defendant would vehemently contend that the appellant has got the alternative road but on the inspection, the same was not found. No doubt,

this Court Commissioner's report was objected by filing the objections.

21. I have already pointed out with regard to causing of obstruction and no other alternative road. The Court Commissioner who has been appointed before the Trial Court has categorically reiterated the same but the Trial Court committed an error in coming to the conclusion that there is an alternative road even without any evidence placed by the defendant. It is also important to note that the First Appellate Court also committed an error even inspite of Court Commissioner was appointed before the First Appellate Court and the Court Commissioner has given the sketch wherein it is discloses that there are two gates that is Gate 1 and Gate 2 and through Gate 2, which is marked, there is a road from A to B and in the place of B, 2 roads deviated, one is reaches the house of the appellant that is B to D and other road B to C reaches the house of the respondent and except that road, there are no other road. Hence, the Trial Court and the First Appellate Court also fail to consider the Court Commissioner's report.

22. I have already pointed out that when the Court Commissioner was examined before the Trial Court as CW1 and he categorically deposed that there is no any alternative road except 'C' schedule road, even the defendant has not cross-examined the Court Commissioner and says no cross-examination inspite of it, the Trial Court comes to other conclusion that there is an alternative road and also the Trial Court comes to the conclusion that the plaintiff has failed to show that 'C' schedule roadway is in existence from very long time and he has been using it continuously, openly and uninterruptedly.

23. The Trial Court fails to take note of the recitals made in Ex.P1-Partition Deed wherein it is specifically mentioned that using of the road even for taking the water from the borewell. When the easementary right is conferred in the document of Ex.P1 itself, the Trial Court ought not to have comes to a such conclusion that the defendant has proved that he has formed the road after the construction of his house and no interference from the defendant inspite of the Court Commissioner categorically

stated that recently they put up the gate which clearly discloses the recent sign of gate and also planting of pineapple plants. The Trial Court erroneously proceeded to held that the plaintiff is not in usage of 'C' schedule roadway but erroneously comes to the conclusion that the defendant has proved that the plaintiff has got alternative road to reach his house.

24. The commissioner was even appointed before the First Appellate Court also wherein he has categorically stated with regard to causing of obstruction and no other way to reach the house of the plaintiff. The Court Commissioner also clearly demarcated the same in the sketch produced along with the report wherein also pointed out Gate 1 and 2 and also the house of the respondent is marked as X and the house of the appellant is marked as Y and the house of Shankaranarayana Bhat is marked as Z and also clearly mentioned A, B, C and D is the road and E and F is other pathway which leads to the house of defendant. When all these materials available before the Court, the First Appellate Court fails to take note of the evidence of the commissioner, report and sketch. Hence, it is clear that both the

Courts have misread the reports of the commissioner and committed an error in appreciating both oral and documentary evidence placed on record including the commissioners' reports.

25. The counsel appearing for the respondent relied upon the judgment in the case of **S SUBRAMANIAN** referred supra. No doubt, in the said judgment, the Apex Court discussed that in the second appeal permissible only on substantial question of law and not on question of facts or of law. The question of law cannot be the substantial question of law. The High Court not justified in setting aside the findings of facts recorded by Courts below unless and until it found to be manifestly perverse and/or contrary to evidence on record. This judgment is helpful to the appellant since this Court has held that the Trial Court and the First Appellate Court manifestly passed the perverse order contrary to the evidence on record and also to the Court Commissioner's report and hence, the judgment is also not helpful to the respondent. The other judgment relied upon by the respondent counsel is in the case of **T RAMALINGESWARA RAO** referred supra wherein also the

Apex Court held that when the concurrent findings of Lower Courts that plaintiffs, son of co-sharer failed to prove to be in exclusive possession of suit property, interference by High Court in second appeal with said findings and decreeing suit by granting decree of permanent injunction against defendants, unjustified. No dispute with regard to the principles laid down in the said judgment and this Court when comes to the conclusion that the concurrent finding is not in accordance with law in terms of the evidence available on record and also in terms of the Court Commissioner's report, this judgment also will not comes to the aid of the respondent. The counsel also relied upon the other judgment in the case of **BHARATHA MATHA** referred supra wherein also the Apex Court held that the concurrent finding by lower Courts that such presumption cannot be raised as defendant was married and her marriage was subsisting, interference by High Court with finding of fact, improper, more so when interference was made by considering evidence of defendant only. Hence, I do not find any force in the contention of the respondent counsel that concurrent finding cannot be reversed and finding of the Trial Court as well as the First

Appellate Court is perverse hence, this judgment is not applicable to the case on hand.

26. The other question is with regard to granting of relief of easementary in nature in a suit for perpetual injunction without seeking the relief of declaration is maintainable or not. The learned counsel for the respondent contends that the Court cannot pass such an order. In support of his contention, he relied upon the judgment of this Court in the case of **D RAMANATHA GUPTA** referred supra wherein and no doubt, while answering point No.1, the Trial Court discussed the issue with regard to the consideration of easementary right and right of enjoyment for more than 20 years and also held that in a suit for injunction based on a prescriptive easement right, the plaintiff should seek for a declaration from the Court that he has so acquired the prescriptive right of easement. In the present suit, however, the plaintiff has not sought for declaration that he has acquired prescriptive right of easement with regard to the inflow of air and light through the windows and ventilator. Without more, therefore, the suit is liable to be dismissed.

27. On the other hand, the counsel for the appellant also relied upon the judgment in the case of **PUTTEGOWDA ALIAS AJJEGOWDA** referred supra wherein also the suit is filed for the relief of perpetual injunction and discussed Sections 34, 37 and 48 of the Specific Relief Act. This Court held that when the suit is not filed for the relief of declaration of title, suit not to be dismissed on that ground. Court may grant injunction as substantial relief even without prayer for relief of declaration. Declaration is implicit in grant of perpetual injunction, party seeking injunction to plead and prove his right, title and interest.

28. The earlier judgment relied by the respondent is of the year 1982 and the judgment relied upon by the appellant is of the year 1996 wherein this Court invoked Sections 34, 37 and 48 of the Specific Relief Act while granting the relief of perpetual injunction and held that when the suit is not filed for the relief of declaration of title, suit not to be dismissed on that ground. Court may grant injunction as substantial relief even without prayer for relief of declaration. Declaration is implicit in grant of perpetual injunction, party seeking injunction to plead and prove

his right, title and interest. This Court has observed that difference of language used in the Chapter VI and Chapter VII of the Specific Relief Act clearly reveals the intention of legislature. Had the legislature so intended that no suit for decree for injunction or possession should be entertainable unless plaintiff claims a formal decree for declaration of title the legislature would have so provided. The suit for permanent injunction cannot be dismissed simply on the ground that relief for decree for declaration of title has not specifically been claimed or mentioned in plaint if the plaint shows that plaintiff's claim for injunction is based on his title or right asserted in the body of the plaint in other words plaint makes it clear that the suit has been filed for establishing title of plaintiff and on that basis is seeking the decree for permanent injunction against defendant/appellant.

29. Having considered the principles laid down in the judgments, in the case on hand also the Court has to take note of the material available on record. It is emerged in the evidence that the appellant and respondent are direct brothers and before

the partition of the year 1988, all of them were residing together and even after partition also, all of them have resided together till they constructed their house. The fact that the property also purchased in the year 1982 and all of them were using the said property by easement and easement of necessity and of prescription since there is no any alternative road. Hence, this Court comes to the conclusion that there is no alternative road. It is also clear that on perusal of Section 13 of the Easements Act, *per se* reveals that right of easement of necessity has been confined to cases of transfer and bequest of immovable property by one person to another or to cases where property is jointly owned and there is a partition made thereafter.

30. In the case on hand, admittedly, the property was purchased in the year 1982 by the family and jointly owned and enjoyed and same was partitioned in the year 1988 and subsequently all of them were using the very same road. When such being the case, no doubt, the house was constructed in the year 1996 and in 2006, the suit was filed and though not completed 20 years and the usage of the road and the property

for the enjoyment is from 1982 onwards by the family jointly when they were all together in joint family. When such being the case, the very contention of the respondent counsel that 20 years of prescription period is not over and said contention cannot be accepted. Apart from that when partition was taken place in the year 1988, there is a recital with regard to mamool exercising of easementary right, share of water, hence, the very document itself is very clear with regard to enjoyment of the property by all the joint family members. Hence, the contention of the respondent counsel cannot be accepted. The Court has to take note of the pleading found in the plaint and pleading is also with regarding to the exercising of easementary right. Even in the absence of declaratory relief, when the suit is filed for the relief of perpetual injunction that too restraining the defendant from causing obstruction, exercise of easementary right conferred upon the appellant in terms of the partition deed as well as by the usage by the family members. In the absence of even declaratory relief also, the Court can grant the relief of perpetual injunction with regard to the exercising of easmentary right over the suit schedule property. Hence, I do not find any

force in the contention of the respondent counsel. In view of the discussions made above and also finding given with regard to the substantial question of law, the appeal requires to be allowed and the impugned orders are liable to be set aside.

31. In view of the discussions made above, I pass the following:

ORDER

The second appeal is allowed.

The impugned judgment and decree dated 18.12.2008 passed in O.S.No.99/2006 by the Trial Court and the judgment and decree dated 24.01.2011 passed in R.A.No.10/2009 by the First Appellate Court are set aside and consequently, the suit of the appellant/plaintiff is decreed as prayed for.

In view of disposal of the main appeal, I.A. if any, does not survive for consideration and the same stands disposed of.

Sd/-
JUDGE

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