

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09.10.2015

CORAM:

THE HON'BLE TMT.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.284 of 2009

and

M.P.No.of 1 2009

T.M.Habibullah

.. Appellant/Respondent/
Defendant

-vs-

P.M.Yousuf Sahib

..Respondent/Appellant/
Plaintiff

Appeal under section 100 of Civil Proceedure Code against the judgment and decree dated 29.11.2008 made in A.S.No.5 of 2008 on the file of the Sub Court, Kanchipuram, confirming the judgment and decree dated 17.08.2007 made in O.S.No.750 of 1999 on the file of the Additional District Munsif Court, Kanchipuram.

For Appellant : Mr.A. Kandasami
for

Mr.R.Singaravelan
For Respondent : Mr.K.Goviganesan

JUDGMENT

It is a dispute between the adjoining owners of their properties respectively. The appellant, who was the defendant in O.S.No.750 of 1999 is the owner of Door No.62 in S.No.3046 and the respondent, who was the plaintiff is the owner of the property in S.No.3048/2. The plaintiff had sought for declaration of title with respect to 2' Narasam in between two properties, for consequential injunction and also for mandatory injunction, directing the defendant to demolish 'B' schedule, which is 1' breadth 4 feet height wall to the length of 2 ½' which is newly put up inside the Narasam of 2' by filing O.S.No.No.750 of 1999 before the District Munsif, Kanchipuram.

3. The trial Court had dismissed the suit and on appeal, the first Appellate Court, Subordinate Judge, Kancheepuram in A.S.No.5 of 2008, by judgment dated 29.11.2008, though gave a finding that the plaintiff is entitled to the relief sought for, however, dismissed the appeal erroneously. Aggrieved by the same, the defendant has preferred the above Second Appeal.

4. The plaintiff has purchased the property under Ex.A1 on 09.09.1996, measuring about 24' East-West, 152' North-South on the Western side and 162' North-South on the Eastern side. The defendant had purchased the property under Ex.A2 on 24.06.1971 as a vacant site. The breadth of the vacant site is 32' East-West and 55' North-South. As regards the property purchased by the plaintiff, there is no dispute with respect to the measurement on the North-South, on the Eastern and Western side of the properties. There is also no dispute with respect to the individual titles of the plaintiff and the defendant. The dispute is only with respect to 2' Narasam lying in between the properties of the plaintiff and defendant.

5. An Advocate Commissioner was also appointed, who had filed a report specifically stating that though the plaintiff had purchased 24' East-West, the measurement of the house is only 22'. It is the consistent case of the plaintiff that his vendor had left 2' on the Eastern side of the construction for the purpose of conservation, namely, for ventilation, laying pipeline and for sewage purposes. The defendant and the plaintiff had purchased their respective properties from two brothers, who had originally owned the same. The construction was put up by the defendant in the year 1984 and he had also left 10' on the Western side. As the defendant trespassed into the passage and put up brick construction on 01.10.1999, the suit came to be filed.

6. Even as per Ex.A1, the plaintiff had purchased 24' East-West. The lower appellate Court has mis-directed itself by holding that the plaintiff had claimed easementary right, whereas, the plaintiff claims the right of passage on his own property. He had left the said passage of 2' only for the purpose of free flow of light and air. This was misconceived by the lower appellate Court that the plaintiff had claimed only easementary right by prescription. The plaintiff has based his claim on Ex.A1, which is also supported by the report of the Commissioner, which says that the plaintiff is the owner of 24' East-West. However, the construction was carried out in the year 1966 only for 22'. When the evidence is clear that the plaintiff has left 2' adjacent to the properties for the purpose of conservation, which has also been established by categorical evidence, the suit ought to have been decreed. Though, the lower appellate Court recorded a finding that the plaintiff is entitled to 2' on a misconceived notion, held that he is not entitled to the easementary right. When the plaintiff is entitled to the right of passage of 2' based on his title deed, the decree ought to have been granted in his favour. However, the lower appellate Court had erroneously dismissed the appeal. The defendant has filed the above Second Appeal, challenging the said decree, however, he has not established his claim. Hence, the appeal has to be dismissed.

7. At the time of admission, only notice was ordered and there is no question of law arising for consideration in the Second Appeal.

8. As stated earlier, the lower appellate Court had erroneously dismissed the appeal, having found that the plaintiff is entitled to 2' passage, which is incorrect. Instead, the lower appellate Court ought to have allowed the appeal in part. Therefore, the lower appellate Court is directed to re-draft the decree in accordance with its

finding, which is affirmed by this Court, decreeing the suit to the extent indicated above.

9. In view of the above findings, the Second Appeal is dismissed, confirming the judgment of the lower appellate Court with the above direction. No costs. Consequently, connected miscellaneous petition is closed.

Srn

Sd/-
Assistant Registrar

/True Copy/

Sub-Assistant Registrar

To

1. The Sub Court, Kanchipuram
(With direction to re-draft the decree in A.S.No.5/2008)
 2. The Additional District Munsif Court, Kanchipuram.
 3. The Record Keeper, V.R.Section,
High Court, Madras
- +1 C.C. To MRS.M.Srividhya, Advocate in SR.NO.55247

S.A.No.284 of 2009
and
M.P.No.of 1 2009

GJ(CO)
sd : 06/11/2015

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