



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.11.2016

Coram:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

S.A(MD)No.505 of 2015 & M.P(MD)No.1 of 2015

1.M.Kaleel Rahuman  
2.J.Jeseela

... Appelants/Appelants/  
Defendants Nos 1&2

vs.

1.Sakeena Beevi  
2.The Collachel Municipality,  
Rep.by its Commissioner,  
Collachel Village,  
Kalkulam Taluk,  
Kanyakumari District.

...1st Respondent/1st Respondent/  
Plaintiff  
...2nd Respondent/2nd Respondent  
Defendant No.3

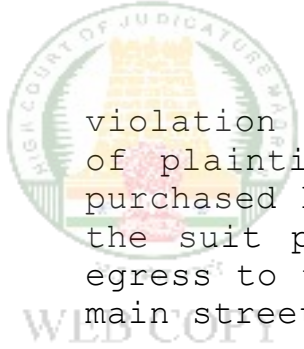
**PRAYER:** Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 07.07.2011 made in A.S.No.126 of 2010 on the file of the Subordinate Judge, Padmanabhapuram, confirming the Judgment and Decree dated 15.09.2009 made in O.S.No.6 of 2004 on the file of the Additional District Munsif Court, Eraniel.

|                 |                          |
|-----------------|--------------------------|
| For Appellants  | :Mr.T.Lajapathi Roy      |
| For Respondents | :Mr.C.Dhanaseelan for R1 |
|                 | : Mr.P.Srinivas for R2   |

#### JUDGMENT

The defendants 1 and 2 in the suit in O.S.No.6 of 2004 on the file of the Additional District Munsif Court, Eraniel, are the appellants in this second appeal.

2. The first respondent in this appeal as plaintiff filed a suit in O.S.No.6 of 2004 for declaring the plaintiff 'A' Schedule property as a common pathway and that the plaintiff has a right to use the same freely without any obstruction. The suit is also for mandatory injunction directing the removal of all the windows in the first and other floors opened by the defendant abutting plaintiff 'A' Schedule property, and to remove the pipeline and sunshade projections and all other constructions which are in



violation of Building Rules within three feet. It is the case of plaintiff that her predecessor in interest got the property purchased by her in 2002 in a partition dated 22.04.1980 and that the suit property was provided as a pathway for the ingress and egress to the property allotted to the plaintiff's vendor from the main street on the south.

3. The suit was contested by the appellants/defendants 1 and 2 by stating that the construction put up by the defendant is not in violation of building Rules and that the construction of the whole house is within their patta land. According to the defendants 1 and 2, the suit 'B' Schedule property is available to its full length and breadth and the suit is filed without any cause of action. The suit is also contested on other grounds.

4. The trial Court after considering the pleadings and evidence both oral and documentary, decreed the suit by granting a decree for mandatory injunction, directing the first defendant to remove the sunshade or window, which are protruding into the suit property and cause obstruction to the plaintiff's free egress and ingress. The trial Court has also granted permanent injunction restraining the defendants 1 and 2 from putting up any other construction so as to interfere with the rights of the plaintiff in suit 'A' Schedule property. It is pertinent to mention that the first defendant preferred a counter claim and the same was also dismissed by the trial Court.

5. As against the judgment and decree of the trial Court in O.S.No.6 of 2004, the defendants 1 and 2 filed an appeal in A.S.No.126 of 2010 on the file of the sub-Court, Padmanabhapuram. The lower appellate Court on appreciation of the evidence confirmed the judgment of the trial Court and dismissed the appeal.

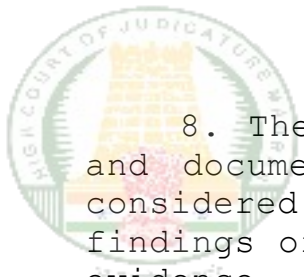
6. Aggrieved by the concurrent judgment and decree of the Courts below, the defendants 1 and 2 have filed the above second appeal.

7. The appellants have raised the following Substantial questions of law in the memorandum of grounds:

"1) Whether the Judgment and Decree of the Courts below is vitiated for non consideration of the oral and documentary evidence in proper perspective?

2) Whether the Judgment and Decree of the First Appellate Court is void of points for determination as contemplated under Order 41 Rule 31 of Code of Civil Procedure is sustainable in law?

3) Whether the Courts below had correctly appreciated the facts and law?"



8. The first question of law relates to appreciation of oral and documentary evidence by the Courts below and it cannot be considered as a question of law, unless it is pointed out that the findings of the Courts below are perverse and not supported by any evidence.

9. In the present case, the lower appellate Court has considered the entire evidence on record and gave reasons for its conclusions. In such circumstances, I do not find any merit in the questions of law. Secondly, though the lower appellate Court in paragraph '27' has framed the points for determination as follows:

"27) This Court has to decide that whether any encroachment was made by the appellant/first defendant in a common pathway and whether the plaintiff is entitled to get the relief of mandatory injunction for the removal of unauthorised construction if any made in the common pathway which was scheduled as 'A' schedule in the plaint."

10. The lower appellate Court has discussed the points framed by the appellate Court with reference to the documents filed on both sides. The lower appellate Court applied its mind independently by considering the documents and has given reasons for reaching its conclusions.

11. Having regard to the fact that every point canvassed and urged by the appellant has been considered by the lower appellate Court, absolutely there is no merit in the statement of the learned Counsel for the appellant, relying upon Order 41, Rule 31 of Code of Civil Procedure.

12. The third question of law is not a question of law, but once again regarding appreciation of evidence. Hence, it can never be considered as a question of law. Having regard to the fact that no other question of law has been raised by the learned Counsel for the appellant, I have no hesitation to dismiss this appeal. Hence, the Second Appeal be dismissed. No costs. Consequently, the connected miscellaneous petition is also dismissed.

13. During the course of arguments, the learned Counsel for the appellant pointed out that the decree is only for mandatory injunction to remove that portion of sunshade and window which would obstruct the pathway in 'A' Schedule property and that it is only when the first defendant fails to remove that portion of the window and sunshade, the plaintiff is entitled to execute the decree for mandatory injunction through Court. As per the Commissioner's report and plan, the window if it is open, there will be a projection into the suit 'A' Schedule property upto 1.25 feet. Hence, the learned Counsel for the appellant suggested that in case of removal of window, the appellants may be permitted to use the window with opening inside his house.



14. The learned Counsel for the respondents also would assert that the extent of projection by the window is 1.25 feet even though it is wrongly reflected in the Commissioner's report as 1.25 links.

15. Having regard to the specific decree that is passed by the trial Court and affirmed by the lower appellate Court, the contention of the appellant that he may be allowed to retain the window with the opening of the window within his house is reasonable. When this suggestion was put to the learned Counsel for the first respondent/plaintiff, he could not concede under the pretext that his client has other reasons not to come for any compromise. If the defendants either close their window or replace the existing window by a sliding window without any projection into the suit property, there cannot be any valid objection from the first respondent/plaintiff. The decree of the trial Court as confirmed by the appellate Court can be satisfied if the defendants replace the existing window by providing either a sliding window or by having the opening of their window inside their house without any obstruction to the suit pathway.

16. However, out of caution this Court does not want to take up the role of an Executing Court at this juncture. Hence, it is open to the appellants to satisfy the Executing Court, so that the Executing Court on the appreciation of facts and *bona fides* in the case will be in a position to consider the suggestion at the appropriate stage. The above observation can be taken note of by the Executing Court while deciding the issue.

Sd/-

Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

1.The Subordinate Judge,  
Padmanabhapuram.

2.The Additional District Munsif Court,  
Eraniel.

Copy to

The Section Officer/Record Keeper,  
VR Section, Madurai Bench of Madras High Court, Madurai

+1 cc to MR.P.SRINIVAS, Advocate Sr.No.72596

+1 cc to MR.T.LAJAPATHI ROY, Advocate SR.No.72796

+1 cc to MR.C.DHANSEELAN, Advocate SR.No.71760