

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:06.04.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.252/2017 in O.S.No.295 of 2006

V.Durai

...Appellant / 1st Defendant

Vs.

1.V.Kannaiyan

...1st Respondent / Plaintiff

2.The Assistant Engineer,
T.N.E.B. perungudi village & post,
Tambaram Taluk,
Chennai-96.

...2nd Respondent / 2nd Defendant

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree in A.S.No.33/2013 dated 14.12.2016 on the file of Subordinate Court, Tambaram, confirming the judgment and decree in O.S.No.295/2006 dated 12.03.2013 on the file of Principal District Munsif Court, Alandur.

For Appellant : Mr.G.Appavu

JUDGMENT

The 1st defendant, who lost before the Courts below is the appellant herein.

2 The 1st respondent / plaintiff, filed O.S.No.295/2006 on the file of the court of Principal District Munsif at Alandur, against the appellant as well as against the 2nd respondent herein, praying for judgment and decree for mandatory injunction, directing the defendants to remove the underground cable from the land admeasuring 5 feet in breadth (North-South) and 106.6 feet in length (East-West) comprised in Survey No.58 Post office street, Okkiam Thoraipakkam Village, Pallikkaranaï Firka, Tambaram Taluk, Kancheepuram District and also for permanent injunction restraining the 1st defendant and his men, agents or servants from trespassing into the suit property or in any manner interfering with the plaintiff's peaceful possession and enjoyment of the suit property and though the said suit, after contest, came to be decreed on 12.03.2013 and challenging the legality of the same, the 1st

defendant filed an appeal in A.S.No.33/2013 on the file of the Subordinate Judge, Tambaram, and vide impugned judgment and decree dated 14.12.2016, the Lower Appellate Court has dismissed the appeal and thereby confirmed the judgment and decree passed by the Trial Court and aggrieved by the same, 1st defendant has filed this Second Appeal.

3 The facts, briefly narrated, necessary for the disposal of the Second Appeal are as follows:-

(a) It is the case of the 1st respondent/plaintiff that he is the absolute owner of the suit property and he owned 1/4th share in the suit property by virtue of a partition with his other sharers, and subsequently had acquired 3/4th share from the other sharers by virtue of Release Deed dated 3.02.2005 (Ex.A1) and further claims to be in exclusive possession as the sole owner ever since the date of purchase and also put up a superstructure.

[b] The 1st respondent / plaintiff would further aver that the appellant / 1st defendant owned the house on the eastern side of the suit property and laid an underground cable on 01.10.2005 through the suit property and thereby got electricity connection and it was energised by the 2nd respondent/ 2nd defendant. It is a specific case of the 1st respondent / plaintiff that the 2nd respondent/2nd defendant without his consent, invasion of the right over the suit property has done so and in this regard has issued a legal notice on 13.02.2006 (Ex-A2) and it was returned "unserved" under Ex.A3. Therefore the 1st respondent/plaintiff came forward to file the suit.

[c] The 1st defendant has filed the written statement denying the averments made in the plaint and would contend that he is the absolute owner of the property admeasuring to the extend of 1204 sq.ft comprised in S.No.58 situate at Okkiam Thoraipakkam Village and he purchased the same from the plaintiff and five others under a registered Sale Deed dated 04.02.2005 (Ex.B5) along with the common right over the passage and as such he is entitled to use the said common pathway for his benefit also and in order to get electricity connection, had approached the 2nd respondent/ 2nd defendant and after due compliance of all the procedural formalities and underground cable has been given to him which was also energized and as such, the claim made by the plaintiff /1st defendant is wholly untenable and prays for dismissal of the suit.

[d] The Trial Court, on a consideration of pleadings, has framed the following issues:-

- Whether the suit property is a common passage?
- Whether the plaintiff is entitled for common passage?
- Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?
- To what other relief, the parties are entitled to?

[e] During the course of trial, the plaintiff examined himself as PW.1 and Exs.A1 to A3 were marked. On behalf of the defendants, DW.1 was examined and Ex.B1 to B5 were marked. The second defendant / Electricity Board was called absent and remained exparte.

[f] The Trial court, on consideration of pleadings and on appreciation of oral and documentary evidences, had decreed the suit as prayed for, vide judgment and decree dated 12.03.2013 and the 1st defendant made a challenge, by filing an appeal in AS No.33/2013 on the file of the Court of Subordinate Judge at Tambaram.

[g] The Lower Appellate Court, on perusal of the Memorandum of Grounds and other materials, had formulated the following point for consideration:
Whether this appeal has to be allowed or not?

[h] The Lower Appellate Court found that on a perusal of Ex.B1 - rough sketch filed in the earlier suit for partition in OS.No.1097 of 1978 on the file of the Court of District Munsif, Poonnamallee, in which, the 1st respondent/ plaintiff is one of the parties and the pathway has been marked as "GHINOJ" and it runs within the property of the suit and therefore, recorded the finding that the said common pathway belong to the parties to the said suit. The Lower Appellate Court has also perused the Sale Deed under which the plaintiff had purchased the property marked as Ex.B3 and found that in the schedule of property, the Southern boundary is shown as common pathway and the western boundary is a plot belonging to the third person and also taken note of the evidence of the 1st defendant/ DW1, wherein he has averred that though the plaintiff as well as one Mr.Jeevarathnam has prevented him from using the pathway, he did not choose to take any action in the form of complaint before the Police Station or file a case before the Court. The Lower Appellate Court, on a consideration of the oral and documentary evidences, has recorded the findings that there is no common pathway on the Western side of the 1st defendant property and he has the pathway on the Southern side of the suit property and as

such, he has no right over the same and as a consequence, he has no right to take out the cable laid under it for energising his house. The Lower Appellate Court, on the basis of the reasons assigned, has dismissed the appeal vide impugned judgment and decree dated 14.12.2016 and aggrieved by the same, 1st defendant filed this Second Appeal.

[i] In the Memorandum of Grounds of the Second Appeal, the following Substantial Questions of Law are raised for consideration:-

- i. Whether the Courts below had concurrently failed to uphold the Statute will prevail than the agreements between individual parties and thus the Tamilnadu Electricity Distribution Code 2004 Cl.29(6) will supercede release deed?
- ii. Whether the Transfer of Property Act recognise the sale of easementary right over the common passage, if so what is the remedy for purchaser depriving use of passage?
- iii. Is not the respondent / plaintiff is bound by the principle of Estoppel?

4 Mr.G.Appavu, the learned counsel appearing for Appellant / 1st defendant would contend that in the light of Clause No.29(6) of the Tamil Nadu Electricity Distribution Code 2004, the Appellant/1st defendant is having a statutory right to take the cable under the common passage for the purpose of energizing his house and since the provision of electricity is the basic amenity, he is having a fundamental right to do so and would further contend that the Courts below, without properly appreciating the oral and documentary evidence, had reached erroneous conclusion that the pathway under which the electricity cable has been taken, is not a common pathway and therefore prays for interference.

5 This Court has paid its best attention to the submission made by the learned counsel appearing for appellants /1st defendant and also perused the impugned judgments passed by the Courts below.

6 The Lower Appellate Court is the final Court of facts and law and it has independently analyzed the materials placed before it and found that under Exhibit B3, in and by which the plaintiff claims right, title and possession in respect of the common pathway, there is no common pathway on the Western side of the Appellant's property and he has pathway only on the southern side of the said suit property. The Lower Appellate Court also taken note of the fact that though it is the specific case of the appellant that his right to use the common pathway has been infringed, he did not choose to lodge a complaint and also not filed appropriate suit with regard to the same and therefore recorded the finding that the Appellant / 1st

defendant has no right to lay the underground cable beneath the passage without the consent of the Plaintiff.

7 Unfortunately, the 2nd defendant - The Tamilnadu Electricity Board remained exparte before the trial court and did not enter appearance before the Lower Appellate Court also.

8 The finding on fact recorded by the Courts below with regard to the common pathway, in the considered opinion of the Court, is based on proper appreciation of the relevant materials placed and this Court, exercise of jurisdiction under section 100 of the Code of Civil Procedure, cannot interfere with the same.

9 It the Appellant /1st defendant is so advised and if it is open to him under law, he is always at liberty to work out his remedy by filing a comprehensive suit before the Competent Forum.

10 In the considered opinion of the Court, there are no substantial questions of law arise for consideration in the second appeal and therefore, the Second Appeal is dismissed at the admission stage itself, confirming the judgement and decree dated 14.12.2016 made in A.S.No.33 of 2013 on the file of the Court of the Subordinate Judge, Tambaram. However, there shall be no order at costs. Consequently, the connected Miscellaneous Petition is also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

सत्यमेव जयते

rka/sk

WEB COPY

To

1.The Subordinate Court
Tambaram.

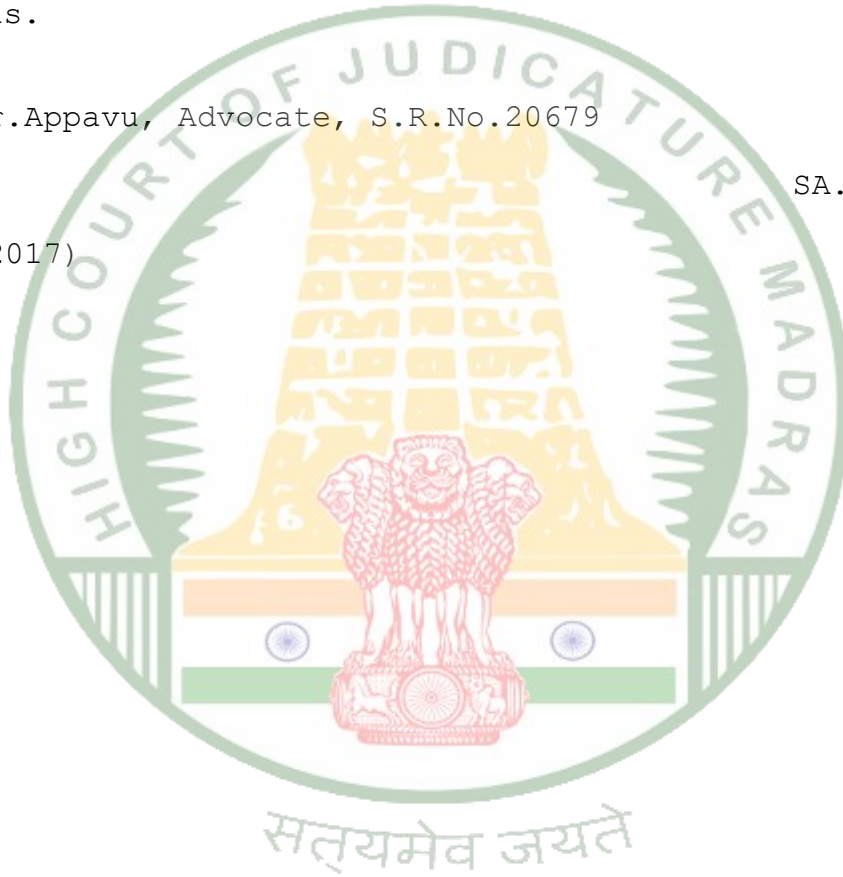
2.The Principal District Court
Alandur.

Copy To:-
The Section Officer
VR Section, High Court
Madras.

+1cc to Mr.Appavu, Advocate, S.R.No.20679

SA.No.252/2017

SSI (CO)
RS (25/04/2017)



WEB COPY