

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved On :21.12.2016****Pronounced On : 03.01.2017****CORAM****THE HON'BLE DR. JUSTICE G.JAYACHANDRAN****Second Appeal No.384 of 1998
and
C.M.P.No.1055 of 2011**

1.L.Sivalingam
2.H.Gangan
3.H.Moorthy

.. Appellants

/vs/

N.Sivalingam

.. Respondent

Prayer: Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 16.06.1997 made in A.S.No.40 of 1995 on the file of the District Court, Uthagamandalam confirming the judgment and decree dated 10.11.95 made in O.S.No.476 of 90 on the file of the District Munsif Court, Uthagamandalam.

For Appellants :Mr.A.Jinasenan

For Respondent :Mr.S.Mani

J U D G M E N T

The plaintiffs are the appellants before this Court. Suit for permanent and mandatory injunction filed by the plaintiffs was dismissed by the trial Court and the same was confirmed by the first Appellate Court. Aggrieved by this, the appellants have preferred the second appeal raising the

following Substantial Questions of Law:-

"1. In the light of the recitals in the document in favour of the appellants and the respondent which clearly direct the parties to set apart 6 feet each, whether the judgments of the Courts below dismissing the claim of the appellants are sustainable in law?

2. In view of the report of the Commissioner which has not been disputed by the parties and which shows that the respondent is in possession of 57 cents of land as against his entitlement of only 46 cents, whether the judgments of the Courts below rejecting the claims of the appellants are sustainable in law?

3. Whether the finding of the appellate Court that the boundary recitals found in Ex.A7 cannot be looked into on the ground that the parties to the suit are not parties to the said document is sustainable in law?"

2. For the sake of convenience, the parties are described as per their rank and status shown the original suit.

3. According to the plaintiffs, 5.70 acres of land in S.No.A160/B1 at Ootacamund Town was purchased by Giriappa Gowder from one Jakiriya Seth on 07.11.1939. From Giriappa Gowder one Javarammal purchased 50 cents of land with specific boundary on 09.03.1940 and 6 feet let

out for common pathway to the mother of the defendant. After demise of Javarammal, the defendant, who is the son of Javarammal, is in possession and enjoyment of the said land. While so, on 30.12.1948, Giriappa Gowder sold 2 acres of land in S.No.A160/B1 with specific boundaries to one Lingae Gowder, who is the father of the plaintiffs and 6 feet of land was let out for pathway up to the land of the vendor. The said pathway let out by the defendant's predecessor in title and the plaintiffs' predecessor in title along with a portion of the land let out by the vendor for pathway, were used by all the neighbouring land owners though it was a private pathway. While so, the defendant has encroached upon the pathway and therefore, notice was issued to the defendant on 31.10.1990 and the suit was filed on 21.11.1990. In spite of the interim injunction granted in I.A.No.883 of 1990 on 22.11.1990, the defendant continued to put up construction encroaching upon the pathway. Therefore, the suit prayer was amended for mandatory injunction for removal of superstructure put up by the defendant. Thus, the suit was filed by the legal heirs of Lingae Gowder for restraining the defendant from encroaching upon the common private pathway and for mandatory injunction to remove the superstructure put up on the encroached land.

4. The said suit was resisted by the defendant with the following averments:-

The plaintiffs have not disclosed title over the property, which claims to have been purchased from Giriappa Gowder. The pleadings are not

clear and no cause of action seems to have been occurred to the plaintiffs. The mother of the defendant purchased 50 cents of land from Giriappa Gowder and another 6 cents of land was in the possession of the defendant, as per the document No.982 of 1940. As per the parent title deed, both the defendant as well as the plaintiffs are supposed to leave 6 feet land for pathway along with their respective boundary (or) both have failed to do. While so, the plaintiffs with an intention to grab the land of the defendant's earmarked pathway, have filed the suit with an ulterior motive. In fact, the plaintiffs themselves have encroached upon 15 feet pathway let out by the vendor. The allegation made by the plaintiffs that the defendant, after passing of interim injunction on 27.11.1990, has put up construction in the suit land, is false and the building found in the suit property was constructed long before filing of the suit. The plaintiffs having encroached upon the land earmarked pathway have tried to grab the land of the defendant by way of injunction.

5. The trial Court has framed the following issues, after considering the rival pleadings:-

"1. Whether the plaintiffs are entitled for permanent injunction as prayed?

2. Whether the plaintiffs are entitled for mandatory injunction as prayed?

3. What other relief the plaintiffs are entitled to?"

6. The trial Court, after considering the oral and documentary

evidence adduced on either side, has held that the plaintiffs have no right to claim 6 feet pathway in the defendant's land and the plea of the plaintiffs to remove the superstructure put up by the defendant in their land is not sustainable. Aggrieved by that judgment, the plaintiffs preferred appeal in A.S.No.40 of 1995 on the file of the District Court, Uthagamandalam and the first Appellate Court has dismissed the appeal confirming the judgment of the trial Court, since the plaintiffs could not establish their right over the suit property to maintain it as a pathway.

7. Pending the appeal, the respondents filed an application to appoint an Advocate Commissioner to properly find out, whether the alleged 6 cents of land is available in S.No.160/B1?. This Court, after considering the nature of the case, has appointed an Advocate Commissioner to note down the physical feature and to identify, whether 6 cents of land is located elsewhere in the same S.No.160/B1 corresponding R.S.No.4805/1 of Ootacamund Town and in order to identify the said 6 cents of land, this Court has directed the Advocate Commissioner to measure the land of the appellants/plaintiffs and the respondent/defendant with their respective boundaries, if any and the passage running from the road till the end of the land in the same Survey number.

8. This Court has received Advocate Commissioner's report dated 27.11.2012 on 30.11.2012. The Advocate Commissioner appointed by this Court has measured the land, in the light of their respective sale deeds and

has found that on survey and measurement of the land made by the Surveyor, the appellants/plaintiffs are physically having 2.13 acres of land over and above the actual purchase of 2 acres of land, vide sale deed dated 30.12.1948. Similarly, the respondent/defendant is physically having 0.58 cents of land over and above the actual purchase of 0.50 cents of land, as per the sale deed dated 09.03.1940. In respect of the other direction, to locate the alleged 0.06 acres land, whether it is available in the said survey number or elsewhere and the Advocate Commissioner has come to the conclusion that the land measuring to an extent of 0.06 acres situated in old S.No.A160/B1 corresponding R.S.No.4805/1 of Ootacamund Town, is not contiguous to 0.50 acres purchased by Javarammal from one Mohammed Hussain Sahib vide, Ex.B1. The Advocate Commissioner has concluded that he and the surveyor were not able to identify and locate the land measuring to the extent of 0.06 acres elsewhere in the old S.No.A160/B1 corresponding R.S.No.4805/1 of Ootacamund Town.

9. From the evidence let in by the parties as well as the report of the Advocate Commissioner appointed by this Court, dated 27.11.2012, this Court finds that the suit is without proper description of the property and the plaintiffs have not established any right whatsoever to seek injunction against the defendant in respect of the suit property. It is evident that both the parties without letting out 3 feet for the pathway are holding the land over and above their respective title deeds. Therefore, this Court finds no

merit in the plea of the appellants/plaintiffs and the appeal is liable to be dismissed.

10. In the result, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

03.01.2017

Index:yes/no

Internet:yes/no

To

The District Judge, Uthagamandalam.

The District Munsif, Uthagamandalam.

Dr.G.Jayachandran, J.

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Judgment made in
S.A.No.384 of 1998

03.01.2017

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