

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 10.01.2017

Date of Verdict : 20.01.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 873 of 2010

M.P.No.1 of 2010

G. Kanniah Chetty (Died)

G. Sudarsan

....Plaintiff/Respondent/Appellant

Vs.

M/s. Sha Magajee Asaldas

Rep. by its Partner Mr.Mahendra Kumar

...Defendant/Appellant/Respondent

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 09.01.2009 passed in A.S.No.437 of 2005 by the learned V Additional Judge, City Civil Court at Chennai by partly reversing the decree and judgment dated 09.12.2004 passed in O.S.No.1289 of 1994 by the learned III Assistant Judge, City Civil Court at Chennai.

For Appellant : Mr.N.Nagu Sah

For Respondent : Mr.H.Kishore

JUDGMENT

The appellant is the landlord. The suit has been filed for permanent injunction against the tenant/respondent for misusing the passage rented exclusively for domestic purpose and from being used for commercial activities and for mandatory injunction to remove the lock put up by the defendant/tenant thereby preventing the landlord/plaintiff from using the passage.

2. The trial Court after considering the evidence let in by the respective parties decreed the suit as prayed for. Aggrieved by that, the defendant/tenant preferred appeal in A.S.No.437 of 2005 and in that appeal, the first appellate

Court considering the terms found in the Ex.A.2, partly allowed the appeal to the effect that the defendant/tenant is entitled to use the passage for his commercial activities also. Thus, aggrieved by the judgment of the first appellate Court, the plaintiff/landlord has preferred the second appeal.

3. At the time of admission, this Court has issued notice to the respondent to ascertain whether there is any substantial question of law existence to interfere with the judgment of the first appellate Court. On notice the respondent has entered appearance through counsel and put forth his point of argument.

4. The brief facts leading to the case are as under:- The suit property was owned by one Kanniah Chetty and he had leased out a major portion of the ground floor to one M/s. Sha Magajee Asaldas represented by its partner Kantilal. While the front portion of the ground floor was meant for commercial activities the rear portion was meant exclusively for residential purpose. Contra to this understanding, the defendant/tenant converted the rear portion as godown and started storing his goods and using the common passage causing disturbance to the residents of the first and second floor and also to the other shop owners on the southern side of the passage.

5. The defendant/tenant contested the suit on the ground that the property was rented for commercial purpose and there is no restriction in using the passage for commercial activities. Further, it was also contested by the defendant/tenant that being a partnership firm, the said Kathilal, who represented the firm retired and he has been replaced by one Mahendra Kumar. Without impleading the said Mahendra Kumar the appeal is filed.

6. The trial Court after considering the evidence let in by the parties held that the passage cannot be used for commercial purpose and the attitude of the defendant/tenant closing the gate of the passage is against the terms of the contract and therefore, decreed the suit as prayed for. However, the first appellate Court considering the terms found in Exs.A.1 and A2, held that the defendant/tenant is entitled to use the passage for his commercial activities and therefore, he cannot be restrained from making use of the passage, thereby the appellate Court while confirming the injunction restraining the defendant from locking the gates of the passage, set aside the relief of injunction granted against the defendant regarding the manner of using the said passage.

7. After hearing the learned counsel appearing for the appellant and considering the judgments of the Courts below the following substantial questions of law are formulated :-

1. Whether the appellate Court right in law in holding that the suit passage can be used for non residential purpose without giving any finding on the crucial issue whether the use of the passage for non residential purpose would create disturbance and nuisance to the appellant?
2. Whether the appellate Court right in law by interpreting the recitals of Ex.A.2 lease agreement that the suit passage can be used for non residential purpose when there was evidence on record that the suit passage was provided for the used of the defendant to have access to her rear side residential portion and that there was no non residential portion to be accessed through the suit passage.

8. The learned counsel for the appellant submitted that the appellate Court erred in interpreting the recital of Ex.A.2-lease agreement as if the suit passage can be used for non-residential purpose contra to the evidence on record and the appellate Court failed to appreciate the evidence on record that the common passage has to be used for the residents of first and second floor and the same cannot be put into use for commercial activities which caused disturbance and nuisance to the residents.

9. Per contra, the learned counsel for the respondent submitted that while the landlord had permitted to use the grinding stone and tap, which are located in the ground floor, there is no other restriction for the tenant to use the passage. While so, as per Ex.A.2, the tenant is entitled to use the passage in the manner he likes and there cannot be any restriction in the manner he uses the passage. Further more, having leased out the property for commercial activities, the appellant/landlord cannot restrict the manner of usage of the passage by way of suit. Since already a rent control proceedings is pending between the parties, the present suit is not maintainable.

10. From the evidence, it is obvious that the suit premises was originally owned by the appellant's father and the present appellant has inherited it through testamentary succession from his father. A major portion of the ground floor has been leased out to the respondent herein. As per the plan annexed to the plaint, it is evident that the entire

backyard of the suit property has been leased out to the respondent along with portion north of the passage. It is an admitted fact that the northern side of the passage is used for commercial purpose, wherein, the respondent is running his business along with the entire backyard. The portion of the property leased out to the respondent is marked as ABCDEFGA in the suit plan. It is the contention of the plaintiff that the passage is used by the residents living in the upstairs of the building and other shops owners and the passage should be used only for the residential purpose. The defendant/tenant, contra to the terms, is using the passage to carry the gunny bags through the passage by causing disturbance and nuisances to the plaintiff.

11. The trial Court while considering the facts and evidence, has accepted the plea of the plaintiff and allowed the suit. Whereas the first appellate Court giving weightage to Ex.A.2 has modified the trial Court judgment to the effect that the defendant/tenant is entitled to use the passage for his commercial activities.

12. A close perusal of Ex.A.2 shows that it is a letter containing terms in the form of agreement from the respondent to the father of the present appellant. Ex.A.2 indicates that it is an agreement for a period of three years and advance of Rs.300/- has been paid to the landlord, however, it was not a registered deed. So the terms of the contract cannot be looked into for any other purpose except for collateral purpose. However, the first appellate Court has gone into the terms and conditions found in this document.

13. Even otherwise the terms and conditions as found in Ex.A.2 does not give any right or liberty to the tenant to use the passage for his commercial activities. Admittedly the building is used both for commercial and residential and the passage is used in common by several tenants including residential tenants. So the usage of the passage cannot be at the cost and hindrances to other co-user. The terms found in Ex.A.2 do not confirm any exclusive rights to the respondent to use the passage. In fact the recital of Ex.A.2 exempted the shop and room on the southern side adjoining the staircase and also give the right to make use of the amenities located in the ground floor like grinding stone and tap. It is not the case of the defendant/tenant that to access to backyard he has to necessarily use the passage. The defendant/tenant has his own exclusive access to reach the suit premises including the backyard which is marked as BCDEF. Therefore if at all he wants to use the passage it shall always be with a limitation. He cannot disturb the co-occupiers of the premises more fully when there are residents using the staircase to reach their portion.

14. Therefore, this Court finds that the judgment of the first appellate Court modifying the trial Court Judgement is erroneous. The terms and conditions found in Ex.A.2 have been wrongly interpreted by the appellate Court. More over, the appreciation of Ex.A.2 itself is illegal and not sustainable since it is an un-registered document leasing out the property for the period of three years. Therefore, recital of an un-registered document, which requires registration under law, cannot be considered for evidence. For the said reason, the appeal is allowed. The appellate Court judgment is set side and the trial Court judgment is confirmed with costs. Consequently connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CCC)

//True Copy//

Sub-Assistant Registrar

To

1. The V Additional Judge, City Civil Court, Chennai
 2. The III Assistant Judge, City Civil Court, Chennai.
 3. The Section officer, V.R. Section, High Court, Madras
- +1 CC to M/s. H. Kishore, advocate sr 3890

सत्यमेव जयते

Judgment in
S.A.No. 873 of 2010
& M.P.No.1 of 2010

CNR (CO)
sp/20/2

WEB COPY