

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.02.2017

PRONOUNCED ON : 23.03.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

**S. A.Nos.478 of 2011
and 972 of 2013
and
CMP.No. 2094 of 2017**

P.Balaraman ... Appellant in S.A.478/2011
& Respondent in S.A.972/2013

Vs.

Iswaryam Apartment
Owners Association,
Rep.by its Secretary ... Respondent in 478/2011 &
Appellant in S.A.972/2013

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 25.01.2010 made in A.S.No.42 of 2009 on the file of the Learned III Additional City Civil Judge, Chennai, partly reversing the judgment and decree dated 01.12.2008 made in O.S.No.4966 of 2004 on the file of the Learned VII Assistant City Civil Judge, Chennai.

For Appellant in S.A.478/2011
& Respondent in S.A.972/2013 : Mr.M.Rajavadivelu

For Respondent in 478/2011 &
Appellant in S.A.972/2013 : Mr.G.Ashokapathy
for M/s.Pass Associates

COMMON JUDGMENT**S.A.No.478 of 2011**

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 25.01.2010 made in A.S.No.42 of 2009 on the file of the III Additional City Civil Court, Chennai, partly reversing the judgment and decree dated 01.12.2008 made in O.S.No.4966 of 2004 on the file of the VII Assistant City Civil Court, Chennai.

S.A.No.972 of 2013

Challenge in this second appeal is made by the defendant against the judgment and decree dated 25.01.2010 made in A.S.No.42 of 2009 on the file of the III Additional City Civil Court, Chennai, partly reversing the judgment and decree dated 01.12.2008 made in O.S.No.4966 of 2004 on the file of the VII Assistant City Civil Court, Chennai.

3. The second appeals have been admitted and the following substantial question of law is formulated for consideration in the second appeals:-

" Whether the judgment and decree of the first appellate court are misdirected against the evidence on record and based upon the perverse findings and conclusions?"

4. The suit has been laid by the plaintiff, with reference to a passage situated to the South of the plaintiff's property and the North of the apartments belonging to the defendant's association, for declaration, permanent injunction and mandatory injunction.

5. A reading of the plaint would go to show that as regards the disputed passage, the plaintiff has claimed both title as well as easementary right. It has not been established by the plaintiff as to how he would be entitled to claim right over the disputed passage both on the grounds of title as well as on the ground of easementary right and this has not been properly explained by the plaintiff. However, as seen from the prayer sought for by the plaintiff in the suit, it is found that the plaintiff seems to have claimed the relief over the disputed passage based upon an agreement of compromise dated 27.11.1997 marked as Ex.A5. Therefore, it could be seen that as per the relief prayed for, the plaintiff has sought right over the disputed common

passage only based upon Ex.A5 agreement of compromise.

6. However, as adverted to supra, in the plaint, the plaintiff has laid a claim over the disputed passage both on the grounds of title and easement. It is found that on the basis of the case of the parties and the evidence adduced in the matter, originally the disputed passage as well as the adjoining properties thereto was owned by Kanniah and thereafter, the same had been divided by Kanniah and his sons by way of a partition deed dated 19.05.1956, which has been marked as Ex.B3. Therefore, it could be seen that originally the disputed passage as well as the adjoining properties had been dealt with in the partition amongst the owners thereof under Ex.B3 and it is the specific case of the defendant that the share allotted to Sundararama Reddiar, the predecessor in title of the defendant, including the disputed passage. On the other hand, according to the plaintiff, in the share allotted to Sankariah Reddiar, his predecessor in title, the disputed passage, had been included. As such, according to the plaintiff, Sankariah Reddiar, while conveying the property to Santhammal, the predecessor in interest of the plaintiff under Ex.B4, also conveyed the right over the passage in question, in dispute and when the plaintiff acquired the property from Santhammal under Ex.A1, the same had been conveyed by her in favour of the plaintiff. However, when according to the

plaintiff, he claims title over the disputed passage, as above mentioned, it does not stand to reason as to why he IS seeking the relief in respect of the disputed passage on the basis of the agreement of compromise marked as Ex.A5. That apart, if according to the plaintiff, he and his predecessor in interest had been enjoying the passage in dispute absolutely, there is no need for entering into an agreement of compromise with reference to the same with Narayanasamy under Ex.A5. It is, therefore, evident that the plaintiff himself is not sure as to on what basis, he is laying claim over the disputed passage. On the one hand, he would claim that he had been conveyed absolute right over the disputed passage and on the other hand, he would state that he has easementary right over the same. However, in the relief portion, he has sought the relief of declaration over the disputed passage only by virtue of the agreement of compromise marked as Ex.A5.

7. A perusal of the partition deed marked as Ex.B3 would go to show that the disputed passage, as such, had been allotted only to the share of Sundararama Reddiar, the predecessor in title of the defendant, as put forth by the defendant. Accordingly, it is found that the plaintiff is not able to lay any claim of title over the disputed

passage by virtue of his title deeds marked as Exs.B4 and A1. The plaintiff is unable to point out that the disputed passage, as such, had been conveyed to his predecessor in interest Santhammal under Ex.B4 and accordingly, Santhammal had also conveyed the same to him under Ex.A1. In such view of the matter, it could be seen that the claim of the plaintiff in respect of the disputed passage on the ground of title, as such, cannot be countenanced in any manner.

8. As regards the claim of the plaintiff over the disputed passage as an easementary right, even in the relief sought for, the plaintiff has only claimed that he is entitled to use the disputed passage as a common passage. In other words, the plaintiff has impliedly admitted the entitlement of the others i.e. the defendant to use the passage in dispute. However, it is for the plaintiff to establish that he is also entitled to use the passage in dispute along with the defendant by way of easementary right as it is found that the plaintiff cannot have any right over the disputed passage on the ground of title.

9. As seen earlier, the property allotted to Sundararama Reddiar included the disputed passage. Accordingly, it is found that when the property was passed on to Sundararama Reddiar and two others and

lastly to the defendant, it is found that the title had passed on to the defendant in respect of the disputed passage and accordingly, it is noted that the defendant's association had put up some shed etc., and also asbestos sheet in the disputed passage area. It is found that the same had been in possession and enjoyment of the defendant's association for having egress and ingress to the respective properties owned by their apartments owners.

10. In this matter, a commission was taken out and accordingly, it is found that the advocate commissioner, after inspection of the passage in dispute, had submitted his report and plan with photographs marked as Exs.C1 to 3. A perusal of the report and plan of the advocate commissioner would go to show that the disputed passage lies between the plaintiff's house and the defendant association's apartments. As seen from the commissioner's report and plan, it is found that the plaintiff has main entrance to his house only on the northern side and not via the disputed passage. Therefore, it could be seen that the plaintiff has access to his house property from the northern side and it could thus be seen that the plaintiff, as such, is not in need of the disputed passage for having access to his property. It is also found from the commissioner's report and plan

that the defendant has put up a gate in the disputed passage on the south of the plaintiff's property and it is further found that the defendant has also put up asbestos shed in the disputed passage and also constructed the sump and also put up a gate at the starting point of their compound wall on the eastern side. The commissioner has also noted that the apartments owned by the defendant's association has only one entrance through the disputed passage and on the other hand, as noted by the advocate commissioner, the plaintiff has access to his property mainly from the northern side. In such view of the matter, it does not stand to reason as to how the plaintiff would be entitled to use the disputed passage even on the ground of easement.

11. The plaintiff has failed to establish that he has title to the disputed passage and the plaintiff has made inconsistent pleas claiming right over the disputed passage both on the ground of title and easement and on that sole ground, the suit is liable to be dismissed as contended by the defendant. Be that as it may, to enable the plaintiff to claim right over the disputed passage on the ground of easement of necessity, it is for the plaintiff to establish that he has right to his house property only through the disputed passage and not through any other way to reach his property. But when it is found

clearly by the advocate commissioner that the main access to the plaintiff's property is only from the northern side of his house, it could be seen that the plaintiff, as such, would also not be entitled to claim any easementary right in respect of the suit disputed passage. As rightly contended by the defendant's counsel, the plaintiff has failed to establish that other than the disputed passage, he has no other right of way for having access to his property. So, the plaintiff is found to be not entitled to lay any claim over the disputed passage on the ground of easement of necessity. The plaintiff has failed to establish that he and his predecessor in interest had been using the disputed passage for more than the prescribed period. In such view of the matter, it is found that the plaintiff is not entitled to lay any claim over the disputed passage on the ground of easement by prescription. The plaintiff has not established that he has been granted easement in respect of the disputed passage by way of grant in his title deed. Therefore, that plea also goes. In such view of the matter, it could be seen that the plaintiff has miserably failed to establish that he has any easementary right over the suit passage.

12. The plaintiff, on knowing very well that he has no title over the disputed passage as well as no easementary right over the

disputed passage, it could be seen that he has laid a claim over the disputed passage only on the basis of the agreement of compromise marked as Ex.A5. It has to be, therefore, seen whether the plaintiff would be entitled to lay any claim or right over the disputed passage under the agreement of compromise Ex.A5. The only contention, on which, the plaintiff seeks to bind the defendant under Ex.A5 is that the said agreement of compromise had been entered into by Narayanasamy with the plaintiff and further, according to the plaintiff, the defendant and his predecessor in interest had traced title only from Narayanasamy. Therefore, according to the plaintiff, Ex.A5 is binding on the defendant. However, it has not been established by the plaintiff that Ex.A5 has any legal force to bind the defendant. According to the plaintiff, in respect of the suit laid by the plaintiff against Narayanasamy in O.S.No.11259 of 1996, the agreement of compromise Ex.A5 has come into existence. However, it is found that the agreement of compromise marked as Ex.A5 has not received the seal of approval of the Court and it is found that the suit laid by the plaintiff in O.S.No.11259 of 1996 has come to be dismissed as withdrawn. If really, the agreement of compromise Ex.A5 had any legal force, as such, as rightly contended by the defendant's counsel, the same would have been placed before the Court in the above said

suit and accordingly, the parties viz., the plaintiff and Narayanasamy would have endeavored to obtain a decree on a compromise based upon Ex.A5 in the above mentioned suit. However, it is found that the suit laid by the plaintiff in O.S.No.11259 of 1996 has come to be dismissed as withdrawn and in such view of the matter, when the agreement of compromise Ex.A5 neither partakes the character of any decree nor it had been registered as required under law, it does not stand to reason as to how the plaintiff could lay any legal claim over the disputed passage based upon Ex.A5. Be that as it may, it is found that, at best, Ex.A5 would bind only the parties thereto, but according to the plaintiff, Ex.A5 would also bind the defendant's association. However, when the defendant and his predecessor in interest had obtained the property from Narayanasamy under various sale deeds, and when it could be seen that there is no reference as such about Ex.A5 and in such view of the matter, the contention of the plaintiff that Ex.A5 would bind the defendant as such cannot be countenanced. Accordingly, it is found that Ex.A5 has no legal force and that apart, the plaintiff has also miserably failed to establish that he is entitled to lay any right over the disputed passage legally based upon Ex.A5.

13. The first appellate court, though, has negated the relief

sought for by the plaintiff as regards the permanent injunction and mandatory injunction, however, granted the relief of declaration in favour of the plaintiff in respect of the disputed passage. But the first appellate court has failed to note that the plaintiff has taken inconsistent pleas as regards the claim of the right over the disputed passage. Further, the first appellate court has also after noting that the plaintiff is having main entrance to his property on the northern side has erred in holding that the plaintiff is entitled to use the disputed passage also situated on the southern side. For granting such a relief in favour of the plaintiff, the first appellate court should have determined as to on what ground, the plaintiff is entitled to use the disputed passage. Without discussing the same, it is found that the first appellate court as well as the trial court has granted the relief of declaration in favour of the plaintiff in respect of the disputed passage.

14. In the light of the above discussions, it is found that the courts below have failed to consider that the plaintiff has neither established his title over the disputed passage nor establish any easementary right over the disputed passage. On the other hand, it is found that Ex.A5, relied upon by the plaintiff does not have any seal of approval from a competent court nor has been established to be a

document having legal force and also, the plaintiff has also failed to establish that the same would bind the defendant. It could be seen that the plaintiff, as such would not be entitled to any right over the disputed passage based upon Ex.A5.

15. The counsel for the appellant placed reliance on the decisions reported in ***(1997) 1 Supreme Court Cases 99 (Bengal Water Proof Limited Vs. Bombay Waterproof Manufacturing Company and another), (2007) 1 MLJ 266 (Periyar Nagar Christian Association (Regd.), rep.by its President, Mr.Frank Moses, Vs. Periyar Nagar CSI Church, Diocese of Madras, rep.by its Presbyter -in-Charge and others), 2005 (1) CTC 368 (Bhanu Kumar Jain Vs. Archana Kumar & Anr) and 2005 (2) CTC 92 (T.S.Sridharan and another Vs. M.F.Simon and another).*** The counsel for the respondent placed reliance on the decisions reported in ***CDJ 2009 MHC 4961 (Janab S.S.Kaja Alavudeed through his Power Agent Janab K.A.Yusuf V.Sithi Jamil & Others), CDJ 2004 MHC 253 (Arunachalam Pillai & Another V.Sorimuthu Pillai), CDJ 2009 MHC 5478 (Gopalakrishnan V. C.Asokan), CDJ 2001 MHC 1021 (G.Kesavan V.Ranga Reddy and another), CDJ 2002 MHC 829 (Ponnaiyan Alias Ponnusamy Gounder V. Karuppakkal***

Alias Ponnayal), CDJ 1997 MHC 779 (Nanjammal and others V. Marappa Gounder and another), CDJ 2002 APHC 1800 (Hyderabad Cricket Association Secunderabad V. Cambridge Cricket Club), CDJ 1996 MHC 725 (Puthiavinayagam Pillai V. Sivasankaran Pillai), and CDJ 2015 MHC 979 (K. Krishnamoorthy V. Nagammal & Others). The principles of law outlined in the above decisions are taken into consideration and followed, as applicable to the facts and circumstances of the case on hand.

16. In the light of the above discussions, it is found that the first appellate court has on a misdirection of the evidence on record and based upon perverse findings and conclusions had granted the relief of declaration in favour of the plaintiff in respect of the suit passage. The findings and conclusions of the first appellate court in partly granting the relief of declaration in favour of the plaintiff are found to be perverse and misdirected the evidence on record and partly negating the reliefs sought for by the plaintiff as regards permanent injunction and mandatory injunction are found to be based upon proper findings and conclusions and proper appreciation of the evidence on record. Accordingly, the substantial question of law

formulated for consideration in the second appeals is answered.

In conclusion, the judgment and decree dated 25.01.2010 made in A.S.No.42 of 2009 on the file of the III Additional City Civil Court, Chennai granting the relief of declaration in favour of the plaintiff are set aside and in other aspects, the same are confirmed. Resultantly, the suit is laid by the plaintiff is dismissed in entirety. Accordingly, the second appeal No. 478 of 2011 is dismissed and the second appeal No.972 of 2013 is allowed. No costs. Consequently, connected CMP.No.2094 of 2016 in S.A.No.972 of 2013 is dismissed.

23.03.2017

Index : Yes/No

Internet : Yes/No

To

1. The III Additional City Civil Court,
Chennai.
- 2.The VII Assistant City Civil Court,
Chennai.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment in
S. A.Nos.478 of 2011
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