

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2017
PRONOUNCED ON : 30.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.681 of 2001

1. G.Krishnamurthy (Deceased)
2. K.Ashok kumar
3. K.Balamurali
4. K.Surya kumar ...Appellants/Defendants
(Appellants 2 to 4 brought on record as LRs of the deceased sole appellant vide order of the Court dated 14.11.2017 made in CMP Nos. 18946 to 18948 of 2017)

Vs.

S.Shantha ...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 13.11.1997, passed in A.S.No.43 of 1997, on the file of the District Judge, Uthagamandalam, The Nilgiris, modifying the judgment and decree dated 18.7.1996, passed in O.S. No.219 of 88, on the file of the District Munsif, Uthagamandalam, The Nilgiris.

For Appellants : Mr.T.R.Sathyamohan
For Respondent : Mr.S.Jayaraman

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 13.11.1997, passed in A.S.No.43 of 1997, on the file of the District Judge, Uthagamandalam, The Nilgiris, modifying the judgment and decree dated 18.7.1996, passed in O.S. No.219 of 88, on the file of the District Munsif Court, Uthagamandalam, The Nilgiris.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction and mandatory injunction.

4. The case of the plaintiff, in brief, is that she is the owner of the plaint schedule property by virtue of the sale deed in her favour, bearing document no.1480 of 1978 situated in old S.No.4215/2B New R.S.No.4215/2B2 and the said property was purchased by the plaintiff, with specific boundaries and put in

possession and enjoyment of the same and the plaintiff has constructed a house in the suit property and paying necessary tax in respect of the same and the defendant is the adjacent owner of the suit property on the western side and he has no manner of right, title or interest in the land belonging to the plaintiff. While so, the defendant recently demolished his old building and trying to put up the construction without leaving any space from the boundary of the plaintiff nor getting sanction from the municipality and thereby attempted to encroach in the right of way on the south of the suit schedule property and the defendant also trying to put up a staircase on the right of way, measuring 10 feet in breadth and 41 feet length, leading from Ottley road and ending at the plaintiff's boundary and the defendant, subsequent to the filing of the suit, had also put up stair case and steps, encroaching on the suit pathway and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts. It is false to state that the plaintiff has purchased an extent of 00.03-4/16 of land vide document no.1480 of 1978. In fact the suit schedule property was a potato godown, originally belonging to one K.Joghee gowder and K.Kali gowder. On 04.4.64, the plaintiff had purchased the land from one Lourdu mary and Lourdu mary had purchased the same from K.Kali gowder and Lourdu mary was entitled to only an extent of 00.02-14/16 of land in R.S.No. 4215/2 of Ootacamund town and therefore, the claim of the plaintiff that she has purchased an extent of 00.03-4/16 acres is incorrect and the plaintiff's vendor had not purchased the right of way from her vendor and therefore, the plaintiff cannot claim any right of way, based on her purchase and the plaintiff, at no point of time, used or enjoyed the alleged right of way from Ottley road, where the defendant has constructed stair case within his boundary limit and it is false to state that the defendant, without any necessary plan had put up structure in the right of way and on the other hand, the plaintiff has got right of way on the eastern side of her property from time immemorial and hence, the plaintiff cannot prevent the defendant to enjoy the property to which he is legally entitled to and hence, the reliefs sought for by the plaintiff should not be granted.

6. In support of the plaintiff's case PW1 was examined and Exs.A1 to A11 were marked and on the side of the defendant, DWs 1 and 2 were examined and Exs. B1 to B7 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made and also on the basis of the personal inspection of the suit property done by the trial Court, it is found that the trial Court holding that the plaintiff is entitled to the relief of

permanent injunction and mandatory injunction, only in respect of the wooden planks and fence put up to an extent of 0.50 meters, on the south of the defendant's property and accordingly, granted the reliefs in favour of the plaintiff. Aggrieved over the same, the plaintiff preferred the first appeal and the first appellate Court, on an appreciation of the materials placed, modified the judgment and decree of the trial Court and accordingly, granted the relief of permanent injunction and mandatory injunction, infavour of the plaintiff, holding that the defendant had encroached and put up the staircase, sunshade and temporary fence, encroaching into the common way as noted by the Advocate Commissioner and detailed in his report and plan and accordingly, directed the defendant to remove the same and accordingly, disposed of the appeal in favour of the plaintiff. Aggrieved over the same, the present second appeal has come to be laid.

8. At the time of admission of the second appeal, the following substantial questions of law was formulated for consideration:

1. Whether in the absence or determination of the plaintiff's right over the actual extent or property, the question or encroachment upon the same can be decided?
2. Whether the plaintiff is entitled to allege claim encroachment without, admittedly, establishing her easementary right or otherwise over the suit property by providing that he has been in enjoyment of the property?
3. Whether the lower appellate Court right in ignoring the opinion formed by the learned trial Judge upon inspection of the suit property, which is a material piece of evidence and simply relying on the commissioner's report that states without any tangible evidence that the construction put up by appellant is an encroachment?

9. It is found that the plaintiff claims title to the property located in old R.S.No.4215/2B, new R.S. No. 4215/2B-2, measuring an extent of 0.03-4/16 acres of land. It is also found that the defendant's property is situated in the R.S.No.4215/2 on the western side of the plaintiff's property. From the materials placed, it is seen that the property of the plaintiff and the defendant originally belong to one K.Joghee gowder and K.Kali gowder and it is found that the defendant had purchased his property from K.Joghee gowder and the plaintiff's vendor Lourdu mary had purchased the property from K.Kali gowder and in turn, had sold the same to the plaintiff by way of Ex.A1

and it is thus seen that the plaintiff is claiming title to the property by way of Ex.A1 and the copy of the sale deed of Lourdu mary has been marked as Ex.B2.

10. Now, according to the plaintiff, on the southern portion of the property of the defendant, a common way has been left out for having access to the plaintiff's property as well as the defendant's property and it is further seen that according to the plaintiff, the said pathway measures 10 feet in width and leading upto her property and the said case of the plaintiff is disputed, in specific as regards the width of the pathway, by the defendant. Further according to the plaintiff, the defendant, while putting up the new construction in his property had encroached into the common pathway and put up the staircase and roof etc., and thereby, preventing the plaintiff from enjoying the common pathway for having access to her property and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

11. The defendant has disputed the extent of the common pathway as pleaded by the plaintiff and further according to him he had put up the construction of staircase and roof etc., only within his property limits and not on the pathway as alleged and it is his further case that the plaintiff had never used the common pathway as pleaded and hence the plaintiff is not entitled to obtain the relief sought for in the plaint.

12. Though the plaintiff has not established, as such, that the pathway measures 10 feet in width from Ootley road, it is seen that as determined by the first appellate Court, there is a common pathway on the south of the defendant's property and this could be evidenced from the documents produced in the matter and accordingly, it is noted that the defendant has filed caveat petitions, as regards the property involved in the matter and accordingly, from the caveat petitions marked as Exs.A10 and A11, it is noted that the defendant has mentioned that the portion in R.S. No.4215/2, on the south of his property, is left in common. That apart, as rightly found by the first appellate Court, the defendant examined as DW1, has also admitted in his evidence, that even in Ex.B1, his sale deed, while describing the boundaries, the southern boundary has been show as south portion of R.S.No.4215/2 in common and also the plan annexed with the documents exhibited in the case also point out to the above said common road and it is further seen that the said common road commences from Ootley road and reaches upto the plaintiff's property. Therefore, it is found that there is a common road/pathway leading from Ootley road to the plaintiff's property and this could also be seen from the photographs marked by both the plaintiff and the defendant as Exs. A4 to A9 and Exs.B4 to B7 respectively. That apart, the building plan submitted by the plaintiff's vendor and marked as Ex.B2, would also go to show that the southern portion was left in common to the south of the defendant's property and therefore, it is seen

that only for enabling the plaintiff and the defendant for having access to their respective properties, the south portion has been left in common and in such view of the matter, the contention of the defendant that no common road/pathway has been left on the southern portion, as such, cannot be countenanced in any manner. No doubt, the common road/pathway may not be in existence measuring 10 feet as claimed by the plaintiff. However, it is found, there exist a common road/pathway on the southern portion of the defendant's property and it is seen that the said portion had been left in common only for enabling the parties concerned to have access to their respective properties and it is also seen that the common road/pathway left in the southern side leads upto the plaintiff's property. Unable to conceal the above facts, the defendant examined as DW1 has also admitted that the common road/pathway is not measuring 10 feet in width and on the other hand, it is only measuring 6 ft in width and it is further admitted by him that no construction should be put on the common pathway and it is seen that underneath the common pathway, drainage and the water pipeline etc., of the parties are embedded and in such view of the matter, it is accordingly seen that while conveying the properties to the plaintiff as well as the defendant, their vendors respectively had chosen to leave the south portion in common for enabling the parties to gain access to their respective properties and therefore, none of them is entitled to put up construction in the common pathway, so as to prevent the other party from having access to his or her property. Even as per the admission of the defendant, the common pathway measures 6 feet, however, there is no proof, as such, placed on the part of the defendant, to hold that it only measures 6 feet and not 10 feet. Equally it has to be held that the common pathway measures 10 feet, as claimed by the plaintiff, is not substantiated.

13. The first appellate Court has rightly discarded the evidence of DW2, on finding that he is an interested witness and also he is not acquainted with the actual extent of the property to which the respective parties are entitled to and therefore, no interference is called for as regards the above determination of the first appellate Court, for discarding the evidence of DW2.

14. In this case, it is noted that the trial Court, suo motu has chosen to inspect the properties of the respective parties and accordingly, made a personal inspection of the property in dispute and accordingly, proceeded to determine the issues involved in the matter. However, it is seen that as rightly contended, the trial court has inspected the properties of the parties concerned after a lapse of nearly 8 years and that apart, it is also seen that the trial Court, at the time of inspection, had not taken the assistance of any Taluk surveyor etc., for correctly determining the extent of the properties to which the parties are actually entitled to and on the other

hand, it has simply noted the physical features as available on the date of inspection and accordingly, making note of the same, proceeded to dispose of the suit only on the basis of the inspection conducted by it. It is not made clear as to whether the trial Court had provided an opportunity to the parties concerned to place any objections to the notes of inspection prepared and relied by it. On inspection of the properties of the parties concerned, on record it is seen that such an opportunity has not been provided to the parties concerned, to place objections to the notes of inspection prepared by the trial Court, on the basis of inspection conducted by it. Be that as it may, it is seen that the trial Court, has not taken the assistance of any surveyor for determining the extent of property to which the parties are actually entitled to, had also inspected the properties nearly 8 years after the institution of the suit and therefore, as rightly argued, thereby, the trial Court would not have been in a position to determine the identity and the extent of the properties to which the respective parties would be entitled to. It is seen that as such, without inviting the objections of the parties concerned to the notes of inspection, the trial Court, in my considered opinion, had erred in determining the merits of the case only based on the notes of inspection prepared by it. At the time of inspection of the properties concerned, it is seen that as rightly put forth, the Advocate Commissioner appointed in this matter, had taken the assistance of the Taluk surveyor and accordingly, inspected the properties of the respective parties concerned and noted that the defendant has encroached into the common road/pathway and put up the structure, stair case etc., thereby, obstructing the access of the plaintiff to reach her property from Ootley road and it is seen that the trial Court as such, has erred in not considering the Commissioner's report and plan and on the other hand, had only taken into consideration, only the notes of inspection prepared by it for disposing of the suit one way or the other. Accordingly, it is seen that the first appellate Court on noting the above said glaring defects in the approach of the first appellate Court, for the determination of issues, when it is seen that as admitted by the defendant himself and when the materials also disclose that there is admittedly a common road/pathway, been left out for the purpose of accessing to their respective properties, it is seen that the Commissioner's report and plan seen in toto, clearly point out that the defendant has put up a permanent structure namely the staircase, sunshade and fence (temporary), as detailed in the report and plan on the land, which has been used as a common road/pathway by the parties concerned, thereby, obstructing the right of way of the plaintiff. It is seen that the first appellate Court had rightly discarded the notes of inspection prepared by the trial Court, taking into consideration, the report and plan of the Advocate Commissioner and accordingly, held that the defendant, despite the protests made by the plaintiff, had proceeded to put up permanent structure namely the staircase measuring 85 square feet,

sunshade measuring 95 square feet and fence measuring 23 square feet, in the common road/pathway and accordingly finding that the defendant has encroached into the common road/pathway, granting the reliefs of permanent injunction and mandatory injunction in respect of the above said portion in favour of the plaintiff and accordingly, disposed of the suit. In this connection, it is noted that the Advocate Commissioner while inspecting the properties of the parties concerned, accordingly with the assistance of the qualified surveyor and other persons, measured and identified the properties to which the parties are actually entitled to, as per the plan found in the FMB and accordingly, measured the properties of the parties concerned and found that the defendant had encroached into the common road/pathway and put up the above said permanent structure etc., on the same and in such view of the matter, it is found that the first appellate Court has not committed any error or mistake in accepting the Commissioner's report and plan in toto and also rightly discarded the notes of inspection prepared by the trial Court and in such view of the matter, it is seen that no interference is called for the determination of the issues involved in this matter as adjudicated by the first appellate Court.

15. In the light of the above discussions, when it is clearly found that the defendant has put up the permanent structure on the common road/pathway and when the plaintiff is granted the right of way in the common portion earmarked for the same as per the materials placed and when it is found that the first appellate Court had given acceptable and plausible reasons for accepting the Commissioner's report and plan and ignoring the notes of inspection of the trial Court, it is seen that the first appellate Court had not committed any error as such, both factually as well as legally, in determining that the defendant had actually encroached into the common road/pathway and put up the staircase and sunshade and fence etc., and accordingly, it is seen that the first appellate Court had granted the appropriate reliefs in favour of the plaintiff as regards the removal of the offending structures put up on the common road/pathway. Accordingly, the substantial questions of law formulated in this second appeal are answered.

16. In conclusion the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any is closed.

Sd/-
Assistant Registrar (CS-VII)

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Sub Assistant Registrar

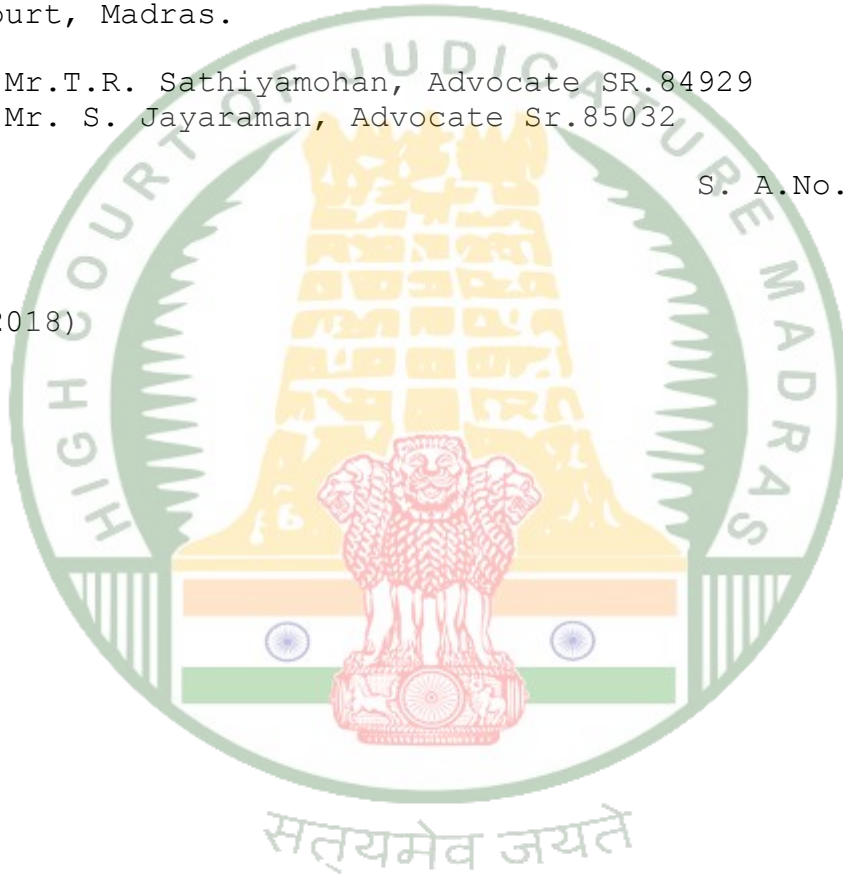
To

1. The District Judge, Uthagamandalam,
The Nilgiris.
2. The District Munsif Judge,
Uthagamandalam, The Nilgiris.
3. The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to Mr.T.R. Sathiyamohan, Advocate SR.84929
+ 1 cc to Mr. S. Jayaraman, Advocate Sr.85032

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