

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21 .08.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.630 of 2017

and C.M.P.No.15591 of 2017

Judgment reserved on 03.08.2018	Judgment pronounced on 21.08.2018
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G.Krishnamurthy ... Appellant/1st Respondent/Defendant

Vs.

1.Santhakumari ...1st Respondent/Appellant/Plaintiff

2.The Managing Director,
Tamil Nadu Slum Clearance Board,
Kamarajar Salai,
Chepauk, Chennai. ... 2nd Respondent/2nd Respondent
/2nd Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 11.11.2016 made in A.S.No.310 of 2014 on the file of the XIX Additional City Civil Court, Chennai, reversing the judgment and decree dated 10.04.2014 made in O.S.No.10979 of 2010 on the file of the IV Assistant City Civil Court, Chennai.

For Appellants : Mr.Akhil Akbar Ali

For R1 : Mr.C.Prakasam
for Mr.K.Balaji

For R2 : Mr.S.Prabhu, Standing Counsel

J U D G M E N T

This Second Appeal has been filed against the judgment and decree dated 11.11.2016 made in A.S.No.310 of 2014 on the file of the XIX Additional City Civil Court, Chennai, reversing the judgment and decree dated 10.04.2014 made in O.S.No.10979 of 2010 on the file of the IV Assistant City Civil Court, Chennai.

2.The defendant is the appellant herein. He succeeded before the Trial Court, but lost before the I Appellate Court. The first respondent/plaintiff filed suit for permanent injunction restraining the appellant from interfering with her peaceful possession and enjoyment over the Schedule B mentioned premises and permanent injunction restraining the appellant from in any way dealing with or encumbering, alienating the Schedule B property.

3.According to the first respondent, appellant is her brother. Their mother Yesodhammal was allotted a property bearing plot No.153, Door No.25, Sadasivam Street, Purusaiwakkam, Chennai 600 007, measuring an extent of 1250 Sq.Ft, described in A Schedule property by the Tamilnadu Slum Clearance Board. After death of their mother, Yesodhammal, the first respondent and appellant gave a letter to the second respondent for partition of the property. The second respondent has partitioned the property into Plot No.153A, measuring 625 Sq.Ft and 153B measuring 525 Sq.Ft and left common pathway of 100 Sq.Ft from East to West. Plot No.153A was allotted to appellant and 153B was allotted to the first respondent. The sketch was annexed with regard to sub division and separate allotment orders were issued to the appellant and first respondent. The first respondent was using the common pathway from the date of allotment. She has put up RCC roofing and using upstairs for several years. When she wanted to put up doors on the ground floor of the pathway, the appellant prevented her from putting up any door or window. The appellant has constructed a gate at the entrance of common pathway and prevented the ingress and egress of the first respondent through the common pathway. The appellant with rowdy elements, came and threatened the first respondent with dire consequences. The first respondent gave a complaint to the police. The first respondent issued notice dated 16.09.2010 to the appellant. The appellant sent a reply dated 18.09.2010, containing false averments. On 20.09.2010, the appellant came with rowdy elements and threatened the first respondent. The first respondent lodged a complaint to the police on 21.09.2010 and filed the suit.

4.The appellant filed written statement and denied all the averments. According to the appellant, the first respondent was allotted Plot No.153A and Plot No.153B to him under World Bank Scheme. The pathway mentioned in Schedule B is not common pathway. It is allotted to him exclusively by the second respondent. He has put up RCC roofing as he is parking his two-wheeler in pathway. He has put up a gate at the entrance of Schedule B pathway with a view to safeguard from trespassers and the first respondent has no right over the pathway and RCC is not put up by her as alleged by her. The appellant denied that he threatened the first respondent with rowdy elements. On the other hand, he has given a complaint to the police against the first respondent. He has no intention of selling the property bearing Plot No.153A allotted to him.

5.Based on the above pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the first respondent examined herself as P.W.1 and marked 23 documents as Exs.A1 to A23. The appellant examined himself as D.W.1 and marked 14 documents as Exs.B1 to B14. The report of the Advocate Commissioner and sketch were marked as Exs.C1 and C2 and the objections filed by the appellant to the Commissioner's report was marked as Ex.C3. The learned Trial Judge considering the pleadings, oral and the documentary evidence, dismissed the suit with liberty to the first respondent to maintain her southern wall by having access of Schedule B property twice in a year by giving prior notice to the appellant and to keep the first floor structure as it is protruding above the passage.

6.Against the order of dismissal dated 10.04.2014, the first respondent filed appeal A.S.No.310 of 2014 on the file of XIX Additional City Civil Court, Chennai. In the first appeal, the second respondent herein was impleaded as second respondent by the order dated 29.07.2015 made in C.M.P.No.14 of 2015. The second respondent filed counter and stated that Plot No.153 was allotted to Yasodhammal, mother of the appellant and first respondent. After her death, at the request of both the appellant and first respondent, second respondent divided the Plot No.153 as per proceedings S.M.K.No.228/E5/2001, dated 10.10.2003 as Plot No.153A, measuring 0.69 Square meters and allotted the same to the appellant and Plot No.153B, measuring 0.49 Square meters was allotted to the first respondent with common passage measuring 125 Sq.ft. The second respondent also in the counter has stated that the dispute is between brother and sister, who are the private parties.

7.The learned I Appellate Judge framed necessary points for consideration and independently considering the materials on record, the judgment of the Trial Court and counter filed by the second respondent, allowed the first appeal, decreeing the suit as prayed for.

8.Against the said judgment and decree dated 11.11.2016 made in A.S.No.310 of 2014, the appellant/defendnat has come out with the present Second Appeal.

9.At the time of admission, following Substantial Questions of Law were framed:

"(a).Whether the lower Appellate Court is right in not dismissing the suit for want of any declaratory relief in respect of the right of the plaintiff over the suit Schedule Bproperty which is seriously denied and disputed by the defendant much before the suit?

(b).Whether the lower Appellate Court is right in placing reliance on the representation made by the Slum Clearance Board impleaded as party respondent at the appellate stage which is contrary to the public document issued by the same Board which is much earlier in point of time?"

10.The learned counsel for the appellant contended that the learned Trial Judge erred in granting two days a year to the first respondent to enter into common pathway for repairing the southern wall. The first respondent did not seek such a relief. The learned I Appellate Judge without properly appreciating the facts, erroneously allowed the appeal, decreeing the suit. A serious miscarriage has been committed by the I Appellate Court by granting injunction in favour of the first respondent when she failed to establish her right to enjoy the pathway common with the appellant. The first respondent has not produced any documents to show that she is entitled to use the pathway in common with the appellant. The appellant has produced allotment letter with sketch annexed which clearly shows that pathway is for his exclusive use. The learned counsel for the appellant contended that second respondent was impleaded only in the first appeal and appellant did not have any opportunity to cross examine to disprove the contention of the second respondent in counter filed by them in the first appeal. The appellant has denied the right of first respondent over Schedule B pathway and also contended that suit for permanent injunction without declaration is not maintainable.

11.Per contra, the learned counsel for the first respondent contended that Schedule B pathway is common pathway for both the appellant and first respondent. The first respondent was allotted a lesser extent by second respondent with common pathway described in the Schedule B. The first respondent was using common pathway for several years and appellant did not object such use by the first respondent. The first respondent for convenient use of her ground floor portion has put up door and windows on her southern wall with opening to common pathway. The first respondent has right to do so, so that she can have easy ingress and egress by using the common pathway. The appellant is disturbing the right of the first respondent to use common pathway only with a view to harass her and in view of the same, the suit filed by the first respondent for injunction, without seeking relief of declaration is maintainable. The first respondent has produced both the oral and documentary evidence to substantiate the case that Schedule B is common pathway.

12.The learned counsel for the second respondent contended that originally, Plot No.153 was allotted to Yasodhammal, mother of the appellant and first respondent. After her death, at the request of both the appellant and first respondent, the property was sub-divided as Plot Nos.153A and 153B. After obtaining consent from Corporation of Chennai, Plot No.153A measuring 625 Sq.ft was allotted to appellant and Plot No.153B measuring 525 Sq.ft was allotted to the first respondent. The pathway measuring 125 Sq.ft on southern side is common pathway for both the appellant and first respondent. The sale deed is yet to be executed. At the time of execution of sale deed, pathway will be mentioned as common pathway for both the appellant and first respondent.

13.Heard the learned counsel for the appellant as well as respondents 1 and 2 and perused the materials available on record.

Substantial Question of law (a):

14(a).The contention of the appellant is that he is disputing the claim of the first respondent over the Schedule B pathway. According to the appellant, the Schedule B pathway is exclusive pathway and first respondent has no right over the said pathway. In view of the denial of first respondent's right to use the pathway, the first respondent ought to have filed suit for declaration and then sought for consequential injunction. The said contention is without merits in the facts

of the case. The second respondent by the proceedings dated 10.10.2003, marked as Ex.A6, sub-divided Plot No.153 into Plot Nos.153A and 153B, at the joint request of appellant and first respondent vide letter dated 06.12.2000, marked as Ex.A5. In the said letter, the appellant and first respondent have stated that as they are in possession of separate portion in Plot No.153 and sought for sub-division and allotment of the portions under their occupation. In Ex.A5, they have stated that they are enclosing a sketch and requested second respondent to sub-divide and allot separate portion to them. In the said letter, appellant has not stated that he is in exclusive possession of pathway and first respondent has no right over the pathway. The second respondent also did not mention in the proceedings dated 10.10.2003, marked as Ex.A6, allotting 0.69 Square meters to the appellant that he has exclusive right over the pathway described in Schedule B. Plot No.153 was sub-divided in the year 2003 and according to the first respondent, the appellant prevented her from using the pathway in the year 2010, when she wanted to put up door and windows on the southern side of her wall for easy ingress and egress.

14(b).It is well settled that when title of the plaintiff is not in dispute and he is in possession, a suit for injunction simplicitor is maintainable without relief of declaration of title. Only when the title of the plaintiff is seriously disputed, then the plaintiff has to file a suit for declaration and injunction. When the denial or dispute with regard to title is not bonafide, the plaintiff cannot be driven to the necessity to file suit for declaration, incurring heavy expenses. The Hon'ble Apex Court has also held that when title of the party can be decided without necessity of considering complicated facts, the Court can decide the question of title also in a suit for injunction. In the present case, the denial of right of first respondent over the pathway described in Schedule B by the appellant is not bonafide and second respondent has not granted exclusive right to the appellant over the pathway described in Schedule B, the suit for injunction simplicitor filed by the first respondent is maintainable. For the above reason, the Substantial Question of Law (a) is answered against the appellant.

Substantial Questions of law (b):

15(a).The appellant in his written statement did not admit that Plot No.153 was originally allotted to Yasodhammal. On the other hand, he has taken a stand that Plot Nos.153A and 153B were allotted to appellant and respondent respectively under World Bank Scheme. Contrary to the said stand, the appellant in

his evidence has admitted that Plot No.153 was allotted to Yasodhammal and after her death, at the request of appellant and first respondent, it was sub-divided into two plots and Plot No.153A was allotted to him. In view of such evidence, it is clear that plot allotted to Yasodhammal was sub-divided and allotted to both the appellant and first respondent. The appellant has not stated the correct facts in his written statement. It is pertinent to note that appellant has stated that house was not constructed by the first respondent, but it was constructed by their mother Yasodhammal. Even during their mother's life time, the appellant had put up superstructure behind the house of their mother.

15(b).From the proceedings of the second respondent, it is seen that 0.69 Square meters was allotted to the appellant and only 0.49 Square meters was allotted to the first respondent. Both the appellant and first respondent have not obtained sale deeds from second respondent. In both the proceedings, the second respondent has not mentioned about the pathway described in Schedule B. Only in the sketch, pathway is shown. The second respondent under the proceedings whereby 0.69 Square meters was allotted to the appellant, has not stated that pathway is for appellant's exclusive usage. In the counter filed by the second respondent in the first appeal, the second respondent has categorically stated that pathway is common to both the appellant and first respondent. The learned counsel for the second respondent, during his arguments, has stated that at the time of execution of sale deed, pathway would be shown as common pathway.

15(c).Considering the materials on record and stand taken by the second respondent that pathway is common pathway for both the appellant and respondent and pathway will be shown as common pathway in the sale deeds, the stand taken by the second respondent in the counter filed by them in the first appeal is not contrary to the proceedings, whereby Plot Nos.153A and 153B were allotted to appellant and first respondent. As already pointed out in the said proceedings, there is no mentioning about the allotment of pathway exclusively either to the appellant or first respondent.

15(d).For the above reasons, I hold that second respondent has not taken any contrary stand. Accordingly the Substantial Questions of Law (b) is answered against the appellant.

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

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

- 1.The XIX Additional Judge,
City Civil Court, Chennai.
- 2.The IV Assistant Judge,
City Civil Court, Chennai.
- 3.The Managing Director,
Tamil Nadu Slum Clearance Board,
Kamarajar Salai,
Chepauk, Chennai.
- 4.The Section Officer,
Vernacular Records,
High Court, Madras-104.

+1cc to Mr.K.Balaji, Advocate Sr.57710
+1cc to Mr.S.Prabhu, Advocate Sr.58105
+1cc to Mr.Akhil Akbar Ali Associates Sr.58052

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