

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1947 of 2002

And

C.M.P.No.16552 of 2002

Samuel ... Appellant/Appellant/Defendant

Vs.

Nuzhath Sami ... Respondent/Respondent/Plaintiff

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree passed by the learned V Additional Judge, City Civil Court, Chennai in A.S.No.218 of 2001 dated 01.03.2002 confirming the judgment and decree passed by the learned XVIII Assistant Judge, City Civil Court, Chennai in O.S.No.5791 of 1997 dated 10.07.2001.

For Appellant : Ms.Y.Kavitha
for M/s.P.V.S.Giridhar Associates
For Respondent : M/s.A.Vinupradha

J U D G M E N T

The un-successful second defendant who lost the case before both the Courts below has come forward with this second appeal.

2.The sum and substance of the plaint averments are as follows: The suit schedule properties originally belonged to one Zubaida Begum and she executed a sale deed dated 14.05.1964 in favour of one K.Rabia Bi along with the right to use the common passage of 4 feet wide to the North of the land and to use the road to be formed on the Eastern side of the land and to provide one door way on the side of the said road, whenever the purchaser constructs on the land. Subsequently, on the Eastern side of the suit property a 6 feet road was formed by the plaintiff's predecessor in the year 1965 and a door way was also put up on the Eastern side and she was using the common passage of an extent of 32 x 6 feet on the Eastern side for her ingress and egress.

3.The plaintiff further avers that the legal heirs of the said Rabia Bi sold the suit schedule properties to the plaintiff by way of a registered sale deed dated 03.04.1997 along with the right to use the said common passage on the Eastern side of the property and from the date of purchase, the plaintiff is in peaceful possession and enjoyment of the said property along with the common passage on the Eastern side of the property. After purchase, the plaintiff divided the suit schedule property into two houses, in which, the Eastern portion of the property has no other alternative access to the road, except through the common passage.

4.The plaintiff further avers that the defendants are residing on the East and South East side of the suit schedule properties and they are also having ingress and egress on the said common passage. While being so, on 26.05.1997 the defendants put up iron gate by raising pillars adjacent to the plaintiff's wall and locked it and thereby prevented the plaintiff from using the said common passage. When the plaintiff questioned the activities of the defendants, they threatened the plaintiff with dire consequences. Hence, she immediately lodged a police complaint with the K-1 Police Station and requested the law enforcing agency to take action against the defendant.

5.The plaintiff further avers that in front of the Police, the defendants compromised with the plaintiff. However, on 10.08.1997, the defendants locked the gate and prevented the plaintiff and her mother from using the common passage. Hence, once again the plaintiff lodged a Police complaint with the concerned Police Station.

Since the defendants are influential persons, they once again started threatening the plaintiff with dire consequences. Hence, left with no other option, the plaintiff has filed the suit for permanent injunction restraining the defendants and their men, agents, servants from in any manner interfering with the plaintiff's peaceful possession and enjoyment and occupation of the suit property including the common passage of an extent of 32 x 6 feet on the Eastern side of the schedule mentioned property with the help of police and for mandatory injunction directing the defendants to remove the iron gate put up by them in the common passage of the schedule mentioned property measuring to an extent of 32 x 6 feet in the Eastern side of the suit property with police protection.

6.The sum and substance of the written statement filed by the defendants is as follows: The defendants denied the averments contained in the plaint. However, they admitted that the plaintiff is the owner of the house in T.S.No.2/3, but

denied the right to use the common passage on the Eastern side of the property. The defendants further averred that a perusal of the sale deed dated 03.04.1997 itself would disclose that the plaintiff has no right in the common pathway.

The defendants further denied the usage of the common passage by the plaintiff and her predecessor.

7.The defendants further aver that no pathway was put up by the plaintiff or her predecessor on the Eastern side in the year 1965 or at any point of time. The pillars and the iron gate at the end of the passage have been there for a long time and the defendants are well within their rights in locking the same. No threats were issued to the plaintiff by the defendants as alleged and the defendants only politely informed the plaintiff that she does not have any manner or right over the said passage. The defendants have not entered into any compromise with the plaintiff.

8.The defendants further aver that the plaintiff and her husband have the habit of making false complaints to the Police. The Police after enquiry have found the same to be false and warned the plaintiff's husband not to resort to such false complaint. The plaintiff's henchmen and her husband have been indulging in rowdyism and has been threatening the respondents constantly. They have even gone to the extent of pouring acid over the plants in the passage. After dismissal of I.A.No.15248 of 1997, the plaintiff and her henchmen

have been letting out sewage water on to the passage deliberately to harass the defendants although their sewerage pipes run through their house on to the road on the Northern side of the property and do not run in any part of the said passage. The defendants have made complaints to the authorities of the Chennai City Municipal Corporation who are taking action on the same.

9.After hearing both sides, the lower Court decreed the suit. Aggrieved by the same, the second defendant filed appeal before the lower Appellate Court. The lower Appellate Court dismissed the appeal and confirmed the order passed by the lower Court, against which, the present second appeal is filed.

10.At the time of admission of the second appeal, this Court framed the following substantial questions of law:

"1)Whether not the Plaintiff bound to prove easement by prescription for a period of 20 years by cogent evidence?

2)Whether not the Lower Appellate Court erred in dismissing the Appeal even after finding that the Plaintiff had failed to establish title to the suit pathway?

3)Whether easement by necessity could be invoked even when it is admitted that there is an alternate access to the suit property?"

11.The learned counsel appearing for the appellant/ second defendant would submit that it is for the respondent/ plaintiff to prove that she has been enjoying the easementary right over and above the statutory period. In the present case, the plaintiff did not establish any right to the passage as alleged by her. From time im-memorial, the suit schedule property was never used as common passage and the defendant is in exclusive possession of the property. Though there was a window and door on the Eastern side of the suit schedule property, that window and door was locked for a long time and it was not open and the plaintiff never used the door and the windows. Since the plaintiff did not establish her case with regard to easementary rights to use the passage. In the absence of any material to substantiate the case of the plaintiff, the relief granted by the Courts below are unsustainable in law. Accordingly, she prayed for allowing the appeal.

12.The learned counsel appearing for the respondent/ plaintiff would submit that admittedly the property was purchased by the plaintiff from the legal heirs of one Rabia Bi. A perusal of Ex.A1 - photos would disclose the usage of suit pathway and the same is mentioned in the sale deed. Even the said passage is mentioned in the parent sale deed which is marked as Ex.A7 and the same was conveyed to the plaintiff. Apart from the above, after recognizing the plaintiff's possession and easementary rights, the revenue authorities granted joint patta in respect of the suit passage. The same was marked as Ex.A10.

13.In view of the above, the plaintiff prescribed the easementary right over the suit passage and enjoyed the same for more than 40 years as against the statutory requirement of 20 years and only in order to harass the plaintiff, the defendants have put up iron gate and prevented the users including the plaintiff in the common passage. Accordingly, the learned counsel prayed for dismissal of the appeal.

14.Heard the learned counsel appearing for the appellant as well as the respondent and perused the materials available on record.

15. Admittedly, the plaintiff purchased the property through a registered sale deed dated 03.04.1997 and she is in occupation of the property adjoining the suit premises. The lower Court has extracted the relevant portion of the sale deeds marked as Ex.B1 and Ex.A6 which discloses that the plaintiff is entitled to use the common passage. A perusal of Ex.A7 also reveals that the vendor of the plaintiff has categorically granted and conveyed the common passage to the plaintiff. The plaintiff is entitled to use the common passage of 4 feet wide to the North of the land and to use the road to be formed on the Eastern side of the land and to provide one door way on the side of the said road whenever the purchaser constructs on the land. The vendor also enjoyed the very same usage of the common passage.

16. Apart from the above, the revenue authorities also recognized that the suit property is a common passage. Accordingly, the revenue authorities granted joint patta in the name of the plaintiff and others and the same is marked as Ex.A10. The un-disputed documents were marked by the plaintiff in order to prove her easementary rights. Accordingly, the plaintiff prescribed the easementary rights through the above documents more than the statutory period as required under law.

17. In view of the above, I do not find any error in the order passed by both the Courts below. Accordingly, the substantial questions of law are answered against the appellant and the second appeal is dismissed.

18. In the result, the second appeal is dismissed. The judgment and decree passed by the learned V Additional Judge, City Civil Court in A.S.No.218 of 2001 dated 01.03.2002 confirming the judgment and decree passed by the learned XVIII Assistant Judge, City Civil Court in O.S.No.5791 of 1997 dated 10.07.2001, is confirmed. No costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-

Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

To

1. The V Additional Judge, City Civil Court, Chennai.

2.The XVIII Assistant Judge, City Civil Court, Chennai.

3.The Section Officer,
VR Section, High Court,
Madras.

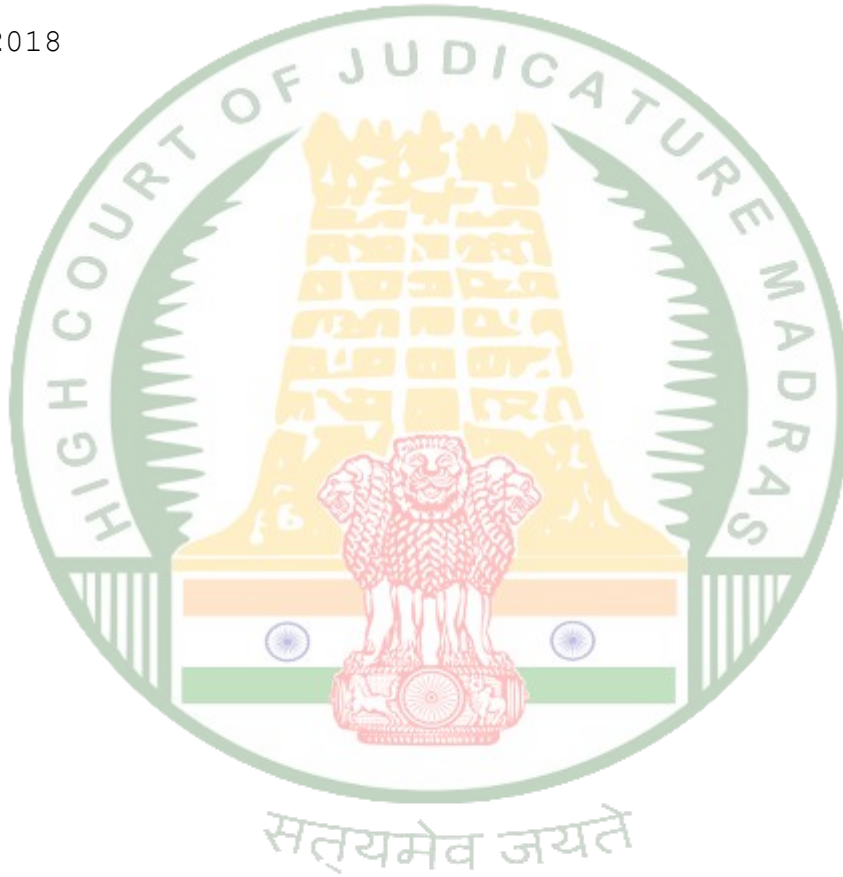
+1cc to M/s.Giridhar & Sai, Advocate sr.no.11494

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