

Reserved on : 01.03.2019
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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.409 of 2008 &

M.P.No.1 of 2008

Mr.Manohar LalAppellant/1st Defendant

Vs

1. Mr.A.Kannan1st Respondent/Plaintiff

2. The Commissioner,
Corporation of Chennai.

3. The Member Secretary,
Chennai Metropolitan
Development Authority. 2nd and 3rd Respondents/
2nd and 3rd Defendants

Prayer:- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 16.07.2007 in A.S.No.560 of 2006 on the file of the III Additional City Civil Court, Chennai confirming the judgment and decree dated 27.08.2003 in O.S.No.7863 of 1995 on the file of the XI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.N.Jayabalan

For Respondents: Mr.K.P.Chandrasekaran - R1
Mr.R.Arunmozhi
Standing Counsel - R2

JUDGMENT

Aggrieved over the concurrent finding of the trial Court and the first appellate Court granting permanent injunction and mandatory injunction, the present Second Appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. Brief facts of the plaintiff case is as follows :

The plaintiff is the owner of the property bearing door No.152, Chellappa Mudali Street, facing Strahans Road, Madras - 12. Ever since the date of purchase, he is in possession and enjoyment of the property. The access to the plaintiff's property from Strahans Road is through a passage on the eastern side of his property. The defendant has purchased a portion of the property in R.S.No.2836 bearing Door No.148 shown as ABCD in the plan attached to the plaint. The defendant has put up construction in the property purchased by him in Door No.148 flux with the property belonging to the plaintiff without leaving any space in between the properties and the plaintiff reliably understands that the first defendant has not obtained any sanction or permission from the second and third defendants.

The plaintiff in order to have a cordial relationship with the defendant believed his assurance that he will not put up any ventilators or doors on the western side wall. However, the first defendant had put up 3 grills and 3 ventilators and six ventilators and two windows and one opening in the first floor on the western side wall. Besides, the defendant had also encroached 6 inches in the plaintiff's property. The construction has been put up by the first defendant without leaving any space between two properties on all sides as provided by municipal regulations. The defendant has no right to make any openings doors, windows, grills and ventilators on the western wall belonging to the plaintiff.

4. It is the further contention of the plaintiff that the defendant has no right to use 10 ft. passage from Strahans Road on the eastern side. The defendant is using the passage keeping carts, trucks loaded with materials, cycles, lorries, bullock carts, tricycles etc. on the passage thereby preventing free ingress and egress to the plaintiff. Hence, the suit for mandatory injunction to remove the unauthorized construction put up by him in Door No.148 and also to close the doors and grills and also to remove the construction put up by the first defendant and direct the second and third defendants to remove the unauthorized construction put up by the first defendant and permanent injunction restraining the first defendant from parking and keeping bullock cart, fish body trucks, lorries etc. loaded with materials and preventing free access to the plaintiff's property from the main road through the passage used by the plaintiff to reach his property and from enjoying his property.

5. The first defendant denying the entire allegation of the plaintiff, it is the case of the first defendant that he has not made any encroachment as alleged by the plaintiff. He has not made any construction or alteration and he had carried out only repair works after purchasing the property from the vendor. The plaintiff has twisted and suppressed the facts. He has also denied that the defendant has no right in the passage as alleged by the plaintiff. The suit has been filed to get over the decree in O.S.No.9637 of 1974 and 3818 of 1975, wherein it has been held that the passage is necessary for use of others for parking the vehicles. By this suit, the plaintiff is again trying to deny the right of the defendant to use the passage for allowing vehicles to come there for loading and unloading the materials. The passage is existing from the time immemorial. Hence, prayed for dismissal of the suit.

6. The trial Court has framed the following issues:

1. Whether the plaintiff is entitled for mandatory injunction relief as prayed for?
2. Whether the plaintiff is entitled for permanent injunction relief as prayed for?
3. Any other relief?

7. On the side of the plaintiff P.W.1 was examined and Ex.A.1 to A30 were marked. On the side of the defendant, first defendant was examined as D.W.1 and no document was filed on his side. The defendants 2 and 3 remained exparte. The learned trial Court decreed the suit as prayed for. The first appellate Court also confirmed the decree and judgment of the trial Court as against the concurrent finding of the Courts below, the present Second Appeal has been filed.

8. The learned counsel appearing for the appellant submitted that absolutely there is no merits in the plaintiff's case. In fact, the defendant had just tried to open the windows in the western wall. At this stage, this suit has been filed. The western wall is not the property of the plaintiff. There is a 10 ft. common passage very much available and the defendant is also entitled to use the common passage as per the plaintiff's own documents. The plan attached to the plaint itself prove the contention of the defendant. It is the further

contention of the learned counsel that the defendant made unauthorized construction in Door No.148 is absolutely false. In fact, the defendant had purchased the built up building under sale deed Ex.A.28 marked by the plaintiff. Ex.A.28 and Ex.B.29 clearly prove that the defendant has right of ownership and use the passage. It is leading from North to South from Strahans Road. In the plaint also, there is no particulars with regard to the nature of the alleged encroachment made by the defendant.

9. The photographs marked by the plaintiff itself clearly indicate that except opening of windows in the western side of the wall, no encroachment whatsoever made in the common passage.

The plaintiff has proceeded the suit only on the ground that the common passage absolutely belong to him, which is not correct. Therefore, it is the further contention of the learned counsel that the construction alleged by the plaintiff is found to be false. Infact, the defendant had made alteration in the building which was also regularized at a later part. At any event, there is a wide gap between the defendant's property and the plaintiff's property. Mere opening of the windows in defendant's property will not diminish air and light of the plaintiff's property. Hence, submitted that the Courts below have not considered the documents in a proper manner and erroneously held that the plaintiff has proved his case. In support of his submissions, the learned counsel also relied upon the judgment in Jallaludeen Vs. R.S.Chinnaiyan Chettiar and others reported in 1999 (3) Law Weekly 447.

10. The learned counsel for the respondent submitted that the entrance to the suit property measuring 2400 sq.ft. north to south is from Strahans Road. The plaintiff property has access from Strahans Road, 10 x 75 ft common passage at one point beyond 75 ft. and the common passage turns to east with 10 ft breadth for the access to the persons having properties having entrance facing north side. The appellant is having properties having entrance facing north side like that the appellant is having his entrance at the northern side. The wall of the defendant situate in the eastern side of the first respondent's property in between wall of the appellant and the respondent which is common for the appellant and the first respondent bearing Door No152. It is the further contention of the plaintiff that beyond the above area, the plaintiff is absolutely entitled to use the common passage as his own property. Further it, is the contention that at the time of the construction there was no planning permission obtained by the defendant. He himself admitted in his evidence that he had paid fine to the Corporation. It is the further contention that the defendant has encroached 9 inches of the plaintiff's property.

The plaintiff has filed many documents. The Court below has rightly considered the case of the plaintiff and granted injunction and submitted that there is no substantial question of law involved in this appeal.

11. The appellant has raised the following substantial questions of law.

1. Whether decree for removal of encroachment can be ordered without ascertaining the extent and location of encroachment in a property?

2. Whether the plaintiff is entitled to a decree for mandatory injunction to remove the superstructure constructed and situate within the four boundaries of defendant's property, even if the construction without any sanction?

3. Whether relief claimed is a Civil Right under Section 9 of C.P.C.?

4. Whether the plaintiff is entitled to dual remedy in respect of cause of action?

5. Whether Civil Court has jurisdiction to pass an injunction decree against the statutory authority?

6. Whether the suit is maintainable against statutory authorities?

12. For deciding this appeal, only the following substantial questions of law is relevant for disposal of this appeal. Therefore, same are framed.

1. Whether decree for removal of encroachment can be ordered without ascertaining the extent and location of encroachment in a property?

2. Whether the plaintiff is entitled to a decree for mandatory injunction to remove the superstructure constructed and situate within the four boundaries of defendant's property, even if the construction without any sanction?

13. The suit has been filed for various reliefs as stated above. The entire plaint proceeded as if the defendant after purchase of the neighbouring land has put up unauthorized construction in Survey No.2836 of 2005 in entirety without any planning permission. Further, it is also stated in the plaint

that eastern side passage available between the plaintiff's house and the defendant's house is the absolute property of the plaintiff from certain point. Further, it is the contention of the plaintiff that the defendant had encroached upon his property about 9 inches and has also put up projection on the western wall. Further, he has also parked cart and other vehicles in the common passage. Therefore, sought various reliefs. Since, the plaintiff asserts ownership on the pathway leading from Strahans Road, this Court has to decide whether the plaintiff has absolute ownership over the pathway leading to his building.

14. The plan attached to the plaint and the photographs Ex.A.23 series will infact give a clear picture of the suit property. The plan attached to the plaint clearly indicate that there is a common passage measuring 10 ft width from the Strahans Road leading to the property of one Sundaraswamy shown in the plaint plan. It is the contention of the plaintiff that the common passage is upto the plaintiff's house entrance which situated in the northern side is common for both plaintiff and the defendant. Thereafter, the common passage absolutely belongs to him. To show that the common passage absolutely belong to him beyond the particular feet of 70 ft. as contended by the plaintiff, absolutely, there is no document whatsoever filed by him.

15. In this regard, this Court had called for the records from trial Court and perused the documents filed by the plaintiff himself. Ex.A.28, a copy of the sale deed in favour of the defendant when carefully seen, the defendant has purchased to an extent of 1400 sq.ft. including 3 x 70 ft common pathway with right to ingress and egress and right of laying drainage, water and electricity connection. The boundaries mentioned in the above document clearly show that right is given to enjoy the common passage measuring 3 ft x 70 ft.

16. It is to be noted that the defendant has purchased a built up house in the above document bearing old Door No.70 and 71. Ex.P.29, another sale deed in favour of the defendant makes it very clear that entire 10 ft. common passage right has been given to the defendant. In fact, the common passage has been given up to Sundaraswamy house for ingress and egress. In the above common passage by the sale deed, the defendant has been given absolute right, right of usage of the common passage. The boundaries set out in both the documents Ex.A.28 and Ex.A.29 makes it clear that the common passage in the plan attached to

the plaintiff lead to one Sundaraswamy house, is common to all, including the defendant. Therefore, the contention of the plaintiff that beyond one particular point, the common passage belong to the plaintiff cannot be accepted. In fact the Courts below have not even referred to the documents and simply carried away by the evidence of the plaintiff that he is the owner of the property.

17. The plan attached to the plaintiff and the photographs clearly indicate that in between the plaintiff's house and the defendant's house, this common passage is very much available from the boundaries i.e., from Strahans Road till one Sundaraswamy house. It can also be clearly found out in Ex.P.28 and Ex.P.29. Hence, the contention of the plaintiff that the common passage is absolute property of the plaintiff cannot be countenanced.

18. Further, the allegation of the plaintiff that after purchase of the building, the defendant has put up unauthorized construction namely in Door No.148 also cannot be countenanced for the simple reason that the major portion of the building has been purchased by the defendant under Ex.A.28. He purchased with the built up area. Therefore, it cannot be said that only the defendant has put up an unauthorised construction.

Though the evidence of the defendant indicate that for violation the prosecution proceeded against the building owner and they have paid fine. Such admission cannot be construed that the defendant only paid the fine. But the fact remains that such violation also subsequently regularized by the Corporation which has been established before this Court by producing the records of the Corporation. It has also not been disputed by the other side.

19. Now, the question remains to be seen is whether there was any encroachment on the plaintiff land by the defendant and whether the defendant has put up any construction protruding the plaintiff's land has to be seen. Though in the plaint it has been stated that the defendant has encroached into the plaintiff's land, absolutely there is no materials available on record to show that the encroachment has been made on the plaintiff land. The photographs filed by the plaintiff clearly indicate that except opening the windows on the western side of the defendants building, no other construction has been put up on the common passage. Admittedly, the western wall belong to the defendant. There is very much gap of 10 ft from Strahans Road to Sundaraswamy's house. Therefore, the contention of the plaintiff that without leaving any gap between the two buildings, the defendant constructed a building is also contrary to the facts.

20. As already stated, the photographs exhibited by the plaintiff clearly indicate that there are sufficient space between two buildings. The common pathway is coming from Strahans Road goes up to one Sundaraswamy's property. The common pathway is infact 10 ft width as per the documents. A careful perusal of the photographs makes it clear that on the northern wall, the defendant has made an opening to fix the window on his western wall. Except that, there is no other construction, whatsoever, made in the common pathway. Therefore, when the allegation of the plaintiff that there was an encroachment on his property has not been established, the trial Court and the first appellate Court have not even gone into the documents. Simply on the basis of the evidence of P.W.1 and subsequent admissions of the defendant that water may fall on the common passage, decreed the suit for various reliefs. On the facts of the case, this Court find that there is much gap between the plaintiff's and the defendant's land. The allegation of the plaintiff that he owns the common passage is also not correct. The documents Ex.P.28 and Ex.P.29 establish otherwise.

21. Further, the photographs clearly indicate that the defendant made an opening on the western side wall to put up a ventilator. There is much gap between his house and the plaintiff's house. In fact, the photographs indicate that only the plaintiff has put up projection protruding to the common passage and the same can be seen from the photographs. Therefore, even assuming that there is a building violation or permission is not obtained while putting up windows in the western wall of the defendant, that cannot be a ground for granting permanent injunction and also mandatory injunction to demolish the entire building and also permanent injunction to use the common pathway in entirety.

22. The photographs and the plan attached to the plaint clearly indicate that source of air and light to the plaintiff land would not diminish in any way because of the defendant's building. There is sufficient gap between the two buildings. It is to be noted that in a city like Chennai, constructions have gone vertically and the space has become scarce. In this regard, this Court in a judgment Jallaludeen Vs. R.S.Chinnaiyan Chettiar and others reported in 1999 (3) Law Weekly 447 this Court has held as follows :

"In city life construction have grown vertically and space has become scarce and

therefore, adjacent owners do not depend upon others for light and air. In the present case, the plaintiffs or the defendants as the case may be do not depend upon natural flow of light and air, but they depend upon artificial light instead of vertical flow of light and air. On a perusal of evidence of P.Ws.1 and 2 it could be seen that nothing has been established to hold that the defendant's additional construction has resulted in diminution of air or light to the plaintiff's property. In the absence of inference with the usual flow of light and air, the plaintiffs have no cause of action nor they, could restrain the defendants from putting up any construction within the defendant's limit. Assuming that there has been a deviation from the approved plan, it has not been established that the defendants by such deviation have caused obstruction to the free flow of air and light into plaintiff's property."

23. Considering the above judgment and also the facts of the case, since the trial Court and the first appellate Court has not even gone into the documents and carried away by the evidence of P.W1 and decreed the suit for various reliefs. Though the plaintiff has alleged various grounds in his pleadings, his main grievance appears to be only with regard to the opening of the window on the western side wall of the defendant. Ex.A.1 and Ex.A.2 are earlier point of time documents, namely the letters said to have been sent by the plaintiff. His specific request to the defendant is not to make any openings on the western side wall and close the window put up by him. According to him, the opening of such windows and ventilators will be infringement of his right of privacy. Ex.A.2 is also a similar letter addressed to the defendant. From these documents and the nature of the suit filed and the evidence, it can be easily found that the main grievance of the plaintiff appears to be against the opening of the window by the defendant in his western wall as it will affect the privacy of the plaintiff.

24. It is to be noted that as already stated, in between the plaintiff's land and the defendant's land, there is 10 ft gap and a common passage is running right from the main road. Therefore, it cannot be said that merely because the neighbour has put up the window facing the other's property, others right of privacy is affected. In a city like Chennai, when the buildings are constructed in a similar manner and the buildings constructed vertically like flats and other aspects, one cannot

contend that neighbouring buildings will affect his privacy. If such a contention is accepted in the present scenario no one can have any window or open air in the city. If at all the plaintiff is aggrieved that his privacy is affected by opening the window by the neighbour, which is situated 10 ft away from his house, it is for him to take necessary precautions to make alteration or to put up some construction so that others will not view his house.

25. It is further to be noted that the common passage is meant for all the owners of the property in the same survey number. There cannot be a blanket permanent injunction against the defendant restraining him from parking any vehicle etc. When the passage is meant for all the owners, merely in one or two occasions some body has parked his cart, that cannot be a ground to grant permanent injunction for ever. It is for the owners who are entitled to use the pathway to regulate themselves and not to cause hindrance to others. Therefore, there cannot be any permanent injunction against the owners. The substantial questions of law are answered in favour of the appellant.

26. Accordingly, this Second Appeal is allowed and the decree and judgment of the Courts below are set aside and the suit is dismissed. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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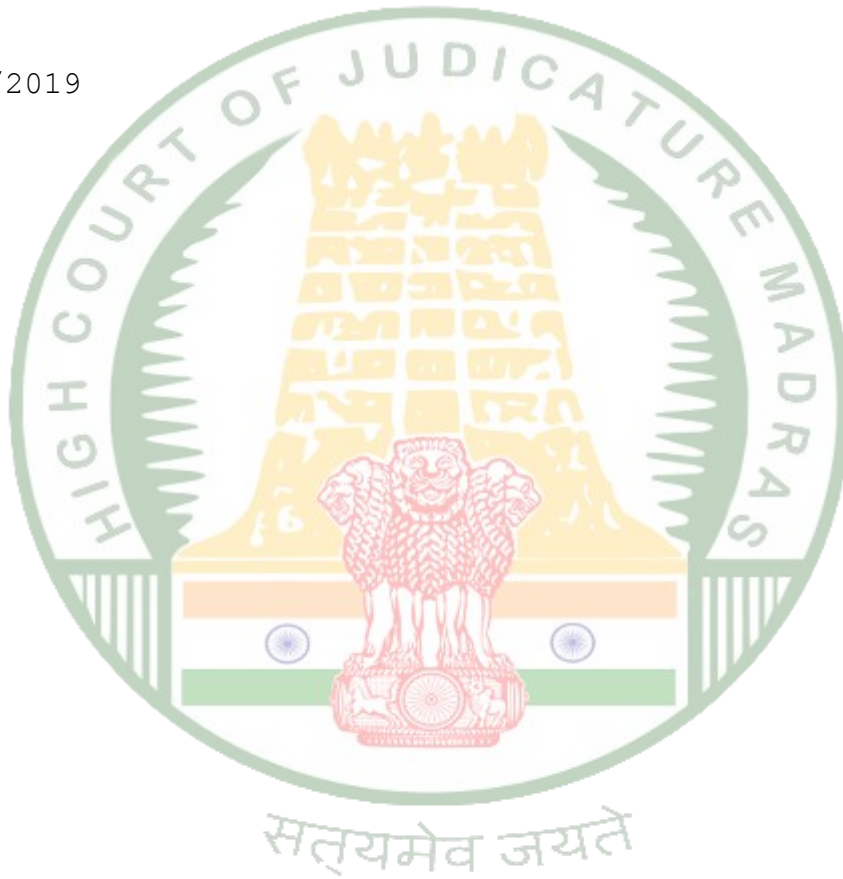
1. The III Additional Judge,
City Civil Court, Chennai.

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

+1cc to Mr.N.Jayabalan, Advocate Sr.22125
+1cc to M/s.R.Arunmozhi, Advocate Sr.20827

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