

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.03.2019

PRONOUNCED ON : 02.04.2019

CORAM:

THE HON'BLE MR.JUSTICE **T.RAVINDRAN**

S.A.No.802 of 2006

Lakshmi,
W/o.Narayanan,
67, K.C.Thottam,
Swamy Iyer New Street Extension,
Coimbatore-1.

Appellant/Defendant

Vs.

1. Vijayalakshmi,
W/o.M.Rajan,
No.56-C, K.C.Thottam,
Swamy Iyer New Street Extension,
Coimbatore-1.

2. Sujatha,
W/o.M.Murthy,
No.56-C, K.C.Thottam,
Swamy Iyer New Street Extension,
Coimbatore-1.

Respondents/Plaintiffs

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 30.06.2005 in A.S.No.59 of 2004 on the file of the II Additional Subordinate Court, Coimbatore, confirming the judgment and decree dated 18.08.2004 in O.S.No.1453 of 2002 on the file of the Principal District Munsif Court, Coimbatore.

For Appellant : Mr.C.R.Prasanan

For R1 : Mr.M.Baskar

For R2 : No appearance

JUDGMENT

Challenge in the second appeal is made to the judgment and decree dated 30.06.2005 passed in A.S.No.59 of 2004 on the file of the II Additional Subordinate Court, Coimbatore, confirming the judgment and decree dated 18.08.2004 passed in O.S.No.1453 of 2002 on the file of the Principal District Munsif Court, Coimbatore.

2. The parties are referred to as per their rankings in the trial court for the sake of convenience.

3. Suit for mandatory injunction and permanent injunction.

4. The case of the plaintiffs in brief is that the first plaintiff purchased an extent of 927 sq.ft. within the stated boundaries by way of a registered sale deed dated 01.10.1992 from Smt.Visalakshmi Ammal and Dr.P.Soundarajan and similarly the second plaintiff

purchased an extent of 927 sq.ft. within the stated boundaries from the abovesaid vendors by way of a registered sale deed dated 01.10.1992 and according to them, the defendant's property located on the South-East of the property acquired by the plaintiffs as abovesaid and in the plaint plan, the property purchased by the plaintiffs have been shown as "ABCD" and the property belonging to the defendants has been shown as "EFGH" and according to the plaintiffs, after purchase, they had demolished the old structure and constructed a new building and it is further stated that there is a 4 feet East-West passage available to the defendant to reach his property from North-South main road and the 4 feet passage is located to the South of the plaintiffs' property and the plaintiffs had purchased the property measuring 28 feet North-South on both sides namely East and West and the plaintiffs have put up construction leaving 2 feet space on the South to have access to their outer southern wall for maintenance and the plaintiffs have also located windows and ventilators on the South eastern wall to have light and air and accordingly from the date of construction in the year 1992, they had been enjoying the light and air to the property through such windows and ventilators and it is stated that the defendant, while putting up the construction in her property had illegally and unauthorizedly covered

the passage portion by putting terrace and on account of the same, the light and air available for the ground floor of the plaintiffs' property had been curtailed and the plaintiffs objected to the same and despite the same, it is stated that the defendant had in a high handed manner put up 'RCC' terrace and thereby prevented the plaintiffs from enjoying the light and air and also the defendant has put up construction including the 2 feet space left by the plaintiffs on the Southern side and had erected 5 pillars joining 'CD' walls with the intention of putting cross walls between the portion and if the defendant is allowed to proceed with the construction, the passage of light and air would be totally shut down and accordingly, it is stated that the plaintiffs had been necessitated to institute the suit against the defendant for appropriate reliefs.

5. The defendant resisted the plaintiffs' suit contending that the suit laid by the plaintiffs is not maintainable either in law or on facts and disputed the claim of the plaintiffs that they had both purchased the property measuring 28 feet North-South on both sides namely East-West and disputed their case as regards their putting up construction in their property leaving 2 feet on the Souther side for the purpose of having access to their outer southern wall and thereby,

they had been receiving air and light through the windows and ventilators put up by them through the South eastern wall and according to the defendant, the plaintiffs' property measures only 24 feet North-South on both sides and 77 feet and 3 inches on the East-West and further stated that the plaintiffs had constructed Southern wall on the boundaries of their property without even leaving few inches and they had not put up any door or entrance to have access to their outer southern wall as put forth in the plaint and the plaintiffs had constructed the house only in the year 1998. It is put forth by the defendant that by way of construction put up by the defendant in her property, the light and air flow into their property has not been curtailed in any manner and contra allegations made by the plaintiffs with reference to the same are false and according to the defendant, she has put up the ground floor portion in the year 1998 itself by putting terrace, etc., and also put up a gate on the entrance of the passage. The defendant never encroached into the plaintiffs' property in any manner and the plaintiffs had not objected the constructions put up by the defendant in her property, on the footing that, by way of the same, the flow of light and air had been shut down. The defendant had constructed the first floor portion and completed the same on 27.12.2002 itself and when the plaintiffs had purchased the property

measuring 24 feet North-South and 77 feet and 3 inches East-West, they cannot put forth a false case as if their property is measuring 28 feet North-South and thereby, it is found that the plaintiffs had encroached 4 feet into the defendant's property and the description of the property in the plaint is misleading and the report of the Advocate Commissioner reveals that the passage is measuring 4.5 feet and the passage in question had been allotted to the usage of the defendant's property and not to the plaintiffs and accordingly, it is only the defendants who had been in the possession and enjoyment of the passage in question and therefore, the plaintiffs cannot lay any claim or title over the passage and the plaintiffs without any cause of action, had come forward with the suit and hence, the suit is liable to be dismissed.

6. In support of the plaintiffs' case PW1 was examined and Exs.A1 to A12 were marked. On the side of the defendant Dws.1 and 2 were examined and Exs.B1 to B4 were marked and Exs.C1 to C6 were also marked.

7. Based on the materials placed on record and the evidence adduced by the respective parties and the submissions made, the

Courts below were pleased to accept the plaintiffs' case and accordingly, granted the appropriate reliefs in favour of the plaintiffs. Challenging the same, the present second appeal has been preferred.

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

"(1) Whether in law the Courts below erred in granting a decree for mandatory injunction directing demolition of construction put up in an area, which the plaintiff does not have title even as per his sale deed in Exs.A1 and A2 and on both oral and documentary evidence after mis-reading the entire evidence on record resulting in perverse finding as hold in judgment reported in (2000) 1 LW 853 and (2001) (i) J. 788.

(2) Whether in law, the lower Appellate Court erred in casting the burden of proof on the defendant, that too after framing an incorrect issue to prove that the defendant has title to the suit property or not and giving a finding in favour of the plaintiff with regard to the title of the suit property as held in the judgment reported in 2000 (i) CTC 654."

9. The plaintiffs have laid the suit against the defendant claiming various reliefs and the dispute between the parties is found to be with reference to the passage lying in between the plaintiffs' property and the defendant's property. The passage in question and in dispute is found to be lying to the South of the plaintiffs' property and to the North of the defendant's property and as such claiming that the plaintiffs had purchased the property measuring 28 feet North-South on both sides and accordingly, put forth the case that they had put up the construction in their property leaving 2 feet space on South to have access to their southern wall for maintenance and on that premise, it is also put forth by the plaintiffs that they had put up windows and ventilators in their southern wall and gaining light and air through the said windows and ventilators since the date of the construction in the year 1992 and complaining that the defendant by way of putting up new construction in her property had intruded into the passage area by putting up walls, terrace, etc., and thereby hindered the flow of light and air to the plaintiffs' property unlawfully and accordingly, seeking the appropriate reliefs against the defendant, the plaintiffs have laid the suit.

10. The defendant in toto had disputed the claim of the plaintiffs that they had purchased the property measuring 28 feet North-South on both sides and therefore, according to the defendant, the plaintiffs' case that they had put up the construction leaving 2 feet space on the southern side for maintaining the southern wall, etc., is totally false. On the other hand, it is the specific case of the defendant that the plaintiffs had purchased the property only measuring North-south 24 feet and beyond that the plaintiffs are not entitled to lay any claim over the property belonging to the defendant or over the passage to the South of their property and according to the defendant, the passage in question is earmarked for her enjoyment for gaining access to her property from North-South main road and the plaintiffs cannot be allowed to lay any claim or title over the same and therefore, the plaintiffs cannot complain that the defendant had, by putting up terrace portion over the same, is attempting to restrict the flow of light and air to their property one way or the other and hence, according to the defendant, the plaintiffs without any cause of action has laid the suit on false pleas.

11. The plaintiffs claim to have purchased their property based on the sale deeds dated 01.10.1992 and the certified copies of the

same had been marked as Exs.A1 and A2. On a perusal of Exs.A1 and A2, it is found that as rightly put forth by the defendant, the plaintiffs had purchased the property only measuring 24 feet North-South on both sides and therefore, when Exs.A1 and A2 clearly depict that the properties comprised therein measures only 24 feet North-South, it does not stand to reason as to on what basis, the plaintiffs have come forward with the case, as if, they had purchased the property measuring 28 feet North-South. Even the Trial Court has also determined that on the basis of the sale deeds of the plaintiffs marked as Exs.A1 and A2, they have purchased only 24 feet North-South and not 28 feet as put forth by the plaintiffs.

12. As could be seen from title deeds marked as Exs.A1 and A2 projected by the plaintiffs, they had purchased their property within the specific boundaries and on a perusal of the same, it is found that their properties are found to be located as lying to the North of the East-West 4 feet common passage earmarked for gaining access to the property purchased by Lakshmi, wife of Narayanan, namely the defendant, to the South of 4 feet passage for enabling the plaintiffs to gain access to their property acquired by them under the documents in question from the 20 feet North-South main road, to the West of the

property purchased by M.Sujatha and to the East of 20 feet North-South road. It is found that when within the specific boundaries, the plaintiffs had acquired the property only measuring 24 feet North-South on both sides and when the vendors had clearly earmarked the 4 feet passage on the Northern side of the said property for enabling them to gain access to their respective properties, the case projected by the plaintiffs that they own property measuring 28 feet North-South on both sides is found to be totally a false case. On that score alone, the plaintiffs' case should have been rejected by the Courts below.

12. As rightly pointed out by the defendant's counsel, when the plaintiffs had been conveyed the property by describing that they can use the 4 feet space or passage on the northern side of their property for gaining access, the plaintiffs instead of utilizing the same, had come forward with the false case, as if, they own property measuring 28 feet North-South. It is seen that the plaintiffs have projected the case that they had put up the construction in their property alienated to them measuring 28 feet North-South leaving 2 feet space on the southern side, thereby meaning that they had put up the construction to the extent of 26 feet North-South. It is thus found that the plaintiffs had intruded or encroached into the defendant's property one way or

the other and put up the unlawful construction and in such view of the matter, the plaintiffs being the offending parties cannot be allowed to seek the assistance of the Courts to obtain the reliefs as prayed for by projecting the false case as if they own the property measuring 28 feet North-South on both sides.

13. However, the plaintiffs would project the case that their vendors' title deeds, in particular, marked as Exs.A4 and A5, depicted the property belonging to them as measuring 28 feet North-South and in such view of the matter, according to them, they had been conveyed only the property under Exs.A1 and A2 measuring 28 feet North-South. The above point, seems to have waived with the minds of the Courts below and on that footing, they had preceded to grant the reliefs as prayed for by the plaintiffs. However, when as per the title deeds of the plaintiffs marked as Exs.A1 and A2, they had been conveyed only the property measuring 24 feet North-South and not more than that and the 4 feet passage on the Northern side of the property had been clearly earmarked for only using the same as a passage to both the plaintiffs for gaining access to their respective properties, in such view of the matter, the plaintiffs cannot be allowed to ignore the same and lay a false claim or right or interest in respect

of the 4 feet passage lying on the southern side of the property, which passage, as rightly put forth by the defendant's counsel, has been earmarked only for the defendant and others for gaining access to their respective properties and in such view of the matter, when the very basis of the plaintiffs' case seems to have been founded on the premise that they own property measuring 28 feet North-South, on the other hand, the materials placed on record go to show that they own property only measuring 24 feet North-South, the plaintiffs suit should have been rejected at the threshold and instead the Courts below seem to have accepted their case one way or the other.

14. Only on the premise that they own property measuring 28 feet North-South, the plaintiffs have projected the case claiming certain reliefs particularly, over the alleged 2 feet space as well as the 4 feet passage on the southern side of the same. If really the plaintiffs had been granted any right over the passage lying on the southern side of the property, the plaintiffs should have asked for the necessary reliefs of declaration with reference to the same, as to on what mode of right, they claim title to the same, whether as the absolute right or claiming any easementary right over the same. However, on a reading of the plaint, the plaintiffs are found to have laid the suit claiming the

reliefs of mandatory injunction and permanent injunction only on the footing, as if, they own absolute right over the passage in dispute on the premise that they own property measuring 28 feet North-South. In such view of the matter, when the plaintiffs had not laid the suit claiming any easementary right over the passage in question and on the other hand, they are claiming the reliefs as prayed for on the premise that they have absolute right over the same and when the basis of the claim of title and easementary right do not go with each other and are found to be contradictory to each other, in such view of the matter, the plaintiffs having put forth the case that they are seeking the reliefs based on the claim of title and on the other hand, when it is seen that the plaintiffs have no right whatsoever with reference to the alleged 2 feet space said to have been left by them on the southern side as well as the 4 feet passage on the southern side of the same which has been earmarked for the defendant and others to gain access to their properties and on the other hand, when the Courts below are found to have granted the reliefs to the plaintiffs on the footing that the alleged construction put up by the defendant would hinder the flow of light and air to the plaintiffs' property through the windows and ventilators put up by them in their southern wall and thereby, the plaintiffs are entitled to exercise their easementary right

over the same, however, when such claim of easementary right had not been projected by the plaintiffs and on the other hand, they had put forth their case based on the claim of title and when two rights as abovenoted are mutually contradictory to each other and would not reconcile to each other in any manner, the Courts below had failed to note the position of law with reference to the abovesaid aspects of the matter and totally erred in accepting the plaintiffs' case without any basis whatsoever.

15. The defendant's counsel pointed out the inconsistencies in the pleadings put forth by the plaintiffs and the reliefs as prayed for by them and in this connection, he placed reliance upon the decision reported in **(91) LW 76 [E.Elumalai Chetty Vs. Naina Mudali & others]**, wherein this Court has held that the claim made by way of title and the claim made by way of easementary right are contradictory to each other and the position of law with reference to the same has been outlined in the abovesaid decision as follows:

"Easements, Pleadings – Contradictory nature of a claim for easement and a claim of title – Inconsistency in Pleading – Plaintiff having failed on question of title specifically pleaded by him cannot turn round and ask for reliefs on the basis of easement."

Pleadings – See Easements.

The conception of easementary right cannot go with the claim of title and both are contradictory to each other. A title to the property and a right of easement over it are conceptions totally distinct and contradictory to each other. One is the right to possess, enjoy and use the land in assertion of that right and to the exclusion of another; while a right of easement is a right in, to or over the property of another. One is a personal right while the other is annexed to and claimed over the land of another and it runs with it. A relief claimed on the basis of title is totally inconsistent with the relief claimed on the basis of the other.

Held: In this case the plaintiff having failed on the question of title specifically pleaded by him cannot turn round and ask for reliefs on the basis of easement."

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16. The materials placed on record would go to show that the 4 feet passage lying on the southern side of the property acquired by the plaintiffs by way of Exs.A1 and A2 is shown to have been earmarked only for the usage of the defendant and others. The plaintiffs in the guise projecting a false case that they own property measuring 28 feet

North-South cannot be allowed to claim any right whatsoever in the said 4 feet passage on the southern side and in such view of the matter, the further case put forth by the plaintiffs that the defendant by way of putting up or erecting pillars in the said passage or raising terrace over the said passage is hindering their passage of light and air to their property cannot at all be countenanced. When the passage in question i.e., the 4 feet passage on the southern side of the plaintiffs property has been exclusively earmarked only for the defendant and other property holders, when the plaintiffs have not been given any right over the passage and when the plaintiffs have also not established that they have been exercising any easementary right over the same and when the plaintiffs have also not come forward with the case in a clear manner as to whether they are claiming any right over the passage in question by way of title or by way of easementary right and if by way of easementary right, as to on what kind or nature of easementary right and when the plaintiffs have failed to establish that they have any title or right or interest to the passage in question and also have failed to establish that they have any easementary right over the same by prescription, as they have failed to place materials that the said passage had been in their usage and enjoyment beyond the prescriptive period and when their documents Exs.A1 and A2 had not

granted them any such right over the passage in question, thereby the easementary right by way of grant is ruled out and when the plaintiffs are found to have access to their property directly from North-South main road as well as from the 4 feet passage left on the northern side of the property and thereby, the plaintiffs also cannot claim any easementary right by necessity over the passage in question and when the plaintiffs cannot be allowed to blow hot and cold for claiming the right over the passage in question and the plaintiffs have raised their case only based on title and when that factor having not been established on the part of the plaintiffs and inconsistent to the said case and without pleadings or materials, the plaintiffs also cannot be allowed to claim easementary right over the passage in question and in such view of the matter, the suit laid by the plaintiffs is found to be mis-conceived and unsustainable in the eyes of law and the Courts below without properly appreciating the pleadings put forth by the plaintiffs as well as the materials placed on record as well as the nature of the right which the plaintiffs seek to enforce, having also not been established by the plaintiffs, totally erred in upholding the plaintiffs' case and granting the reliefs in their favour. It is thus found that the judgment and decree of the Courts below are based upon the total misconception and the erroneous appreciation of the materials

placed on record and thereby, the judgment rendered by them having become perverse, illogical and irrational and in such view of the matter, in my considered opinion, the judgment and decree of the Courts below are liable to be set aside. The Courts below are found to have totally committed a miscarriage of justice in granting the relief of mandatory injunction in favour of the plaintiffs without the plaintiffs establishing their entitlement or title to the property in dispute by misreading the evidence on record on an erroneous appreciation of the same and thereby, also found to have wrongly shifted the burden of proof on the defendant and thereby erroneously determined that the defendant is required to establish her title to the property in dispute, and thereby recklessly proceeded to grant the reliefs in favour of the plaintiffs which cannot be sustained in the eyes of law and accordingly, the substantial questions of law formulated in the second appeal are answered against the plaintiffs and in favour of the defendant.

17. The defendant's counsel in support of his contentions also relied upon the decision reported in **1999 (2) LW 596 [Lalithamaheswari Vs. Poomalai Ammal and two others]** and **1965 AIR (Mysore) 292 [Veerappa Mallappa Hadli and another Vs. Nagappa Fakirappa Hadli and others]**. The principles of law

outlined in the above decisions are also taken into consideration and followed as applicable to the case at hand.

For the reasons aforesaid, the judgment and decree dated 30.06.2005 passed in A.S.No.59 of 2004 on the file of the II Additional Subordinate Court, Coimbatore, confirming the judgment and decree dated 18.08.2004 passed in O.S.No.1453 of 2002 on the file of the Principal District Munsif Court, Coimbatore, are set aside and resultantly, the suit laid by the plaintiffs in O.S.No.1453 of 2002 is dismissed with costs. Consequently, the second appeal is allowed with costs. Connected, miscellaneous petition, if any, is closed.

02.04.2019

Index:yes
Speaking/Non-speaking order
nsd

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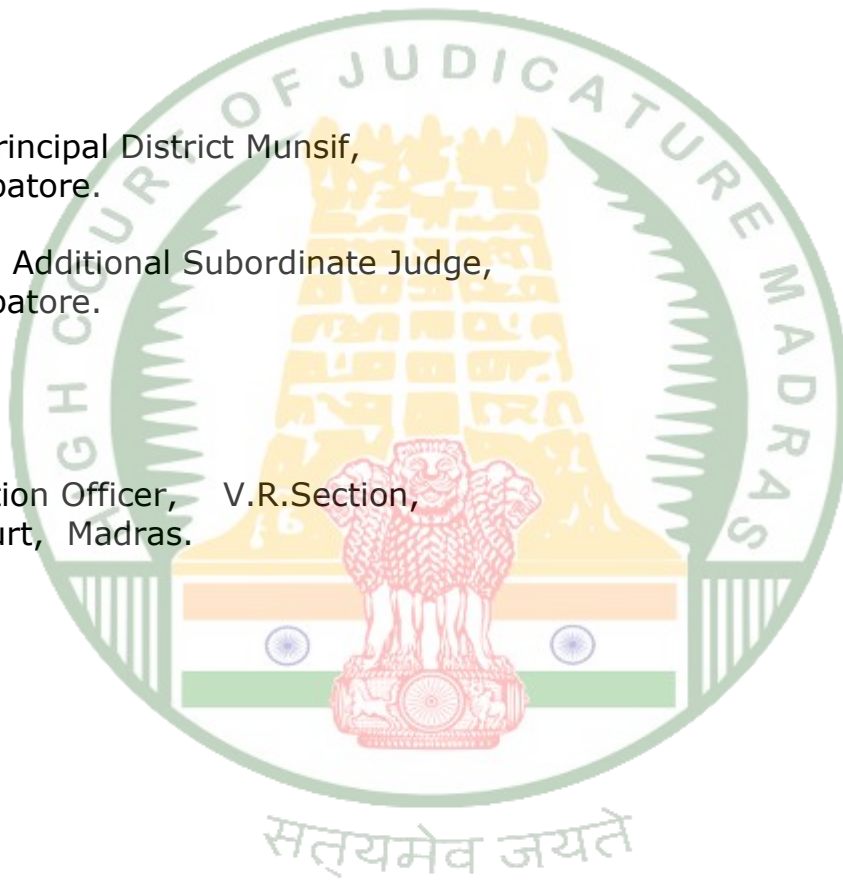
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2. The II Additional Subordinate Judge,
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T.RAVINDRAN, J.

nsd



Pre-delivery judgment made in
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