

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 19.07.2019
CORAM: The Hon'ble Mr.Justice N.Seshasayee

S.A.No.984 of 2006
and
M.P.No.1 of 2007

1.V.Ramachandran
2.V.Sathyanarayan
3.S.K.Senthil Kumar ...Appellants/Defendants 1-3

Vs.

1.C.Padmanabhan(died)
2.V.N.Geethakrishnan
3.P.Ranganayagi
4.P.Sivaraman
5.A.Manimala ...Respondents 1 & 2/
Plaintiffs 1 & 2

[RR3 to 5 brought on record as LRS of the deceased R1
viz., Padmanabhan Vide Order of Court dated 28/06/2019
made in CMP Nos.8434,8440 & 8446/19 in SA No.984/06]

Prayer:- Second Appeal filed under Section 100 of Civil
Procedure Code against the decree and judgment passed in
A.S.No.188 of 2005 on the file of the Additional Sub-Court,
Salem, dated 07.03.2006 in reversing the judgment and decree in
O.S.No.99 of 2002 on the file of the Principal District Munsif
Court, Salem, dated 27.10.05.

For Appellants : Mrs.V.Srimathi
For Respondents : No appearance

JUDGMENT

In a suit for both prohibitory injunction and mandatory
injunction, the trial Court dismissed the suit, and in an appeal
preferred by the plaintiff, the first appellate Court allowed
the same. Challenging the same, defendants 1 to 3 have preferred
the present appeal. Parties would be referred to by their rank
before the trial Court.

2. The pleadings on either side in this case are lengthier
than what are necessary. Therefore, facts in controversy are
stated to the extent required. For appreciating and
understanding the facts require an element of visualisation.

The brief facts are;

- The dispute relates to, what the plaintiff calls as a portion of his property. The admitted facts on both sides is that the property of the plaintiff and the defendants are all residential properties and they face the street on the north and their respective backyard lie on the south. The plaintiff's property is on the far west, and to its immediate east lies the property of the fourth defendant, and to its further east lies the property of the first defendant. These properties respectively fall within Sy.Nos.13, 14 and 15. The plaintiff's property is in the shape of English alphabet 'L', that the horizontal arm of 'L' forms its southern portion. To the north of this horizontal arm lies the property of the fourth defendant, and to its further, lies the property of the first defendant.
- According to the plaintiff, this horizontal arm of the 'L' shaped property at the south was used as a scavenger lane for the benefit of plaintiff's property and its adjacent eastern properties. Beyond this scavenger lane lies Velachetty Street which was previously known by 'Pillayar Koil Street'.
- The plaintiff would allege that due to passage of time, with all the parties developing better amenities for their toilet-facilities, when they constructed toilets with septic tanks in the backyard of their respective properties, the need of using the scavenger lane on the south came to an end. Therefore, according to him he closed the western end of the scavenger lane that opens into Velachetty Street.
- The cause of action for the suit is now founded on his allegation that the first defendant has put up a toilet and a septic tank to the south of his property that approximates the eastern extremity of the scavenger lane. If a degree of visualisation is permitted, this toilet is constructed right on the horizontal arm of 'L' earlier referred to, to the south of the property of the first defendant. The second defendant is the brother of the first defendant and the third defendant is his contractor. It is to prohibit these defendants from going ahead with the construction, the plaintiff had laid the suit with further decree for mandatory injunction to remove whatever construction that have been made.

2.2 The fourth defendant, the immediate adjacent owner of the plaintiff, did not contest the suit. Defendants 1 to 3 filed

their written statements, wherein they allege:

- There existed a scavenger lane measuring about 3 feet to the south of the properties of the plaintiff, the fourth defendant and certain Kothandaraman, from whom these defendants had derived title. After 1975, all the parties had constructed separate toilet facilities and septic tanks, owing to which, the need for using the scavenger lane for its originally intended purpose came to an end. Thereafter, each of the owners of the properties on the north have begun to use the scavenger lane in vertical strips that lies immediately to the south of their respective properties. All the parties have constructed their respective septic tanks only there.
- At the time of his construction, the plaintiff had put a door on the eastern end but, this was objected to by the vendor of these defendants. But, then the plaintiff had stated that he needed an access to his septic tank from the street. But, first defendant's vendor Kothandaraman had closed this scavenger lane on the west, at its street-end, and since 1976 Kothandaraman was in exclusive use of this portion. And, to provide access to the plaintiff to the septic tank from the street on the east, a door was provided in the south-east extremity.
- While so, on 30.11.2000, defendants 1 and 2 have purchased the property from Kothandaraman. The southern boundary of this property is shown as Velachetty street. In these circumstances, the plaintiff has no cause of action to lay the suit since the property does not belong to him.

3. The dispute went for trial, and before the trial Court both sides adduced oral and documentary evidence. On appreciating the evidence before it, the trial Court came to the conclusion that the plaintiff has not proved his cause of action and dismissed the suit. On his appeal to the first appellate Court, it reversed the decree of the trial Court, and allowed it by relying on the boundary description of the properties. Based on the title deeds of the plaintiff, the defendants have contended that to the south of their property lies only the Velachetty street and not the lane. However, the first appellate Court relied on the testimony of D.W.2, the fourth defendant, in the suit to arrive at a conclusion that the lane (horizontal arm of 'L') extends well into the southern portion of the defendants' properties. The first Appellate Court would thus conclude that as of today only the user of this scavenger lane has changed but, the title continues to be with the plaintiff. Challenging the decree, the defendants 1 to 3 have preferred this appeal.

4.The appeal is admitted for considering the following substantial questions of law:

a)Whether the lower appellate Court is justified in granting the decree for injunction, when the appellant has put up an extensive structure consisting of nearly 2nd floors and should it not have held that the plaintiff has acquiesced the construction and is legally disentitled to seek for its removal?

b)When the user of the property for scavenging had lost relevance and had been discontinued, whether the lower appellate Court is justified in recognizing the grant of easement contrary to Sec.41, 42 & 43 of Easement Act?

c)Whether the lower appellate Court is justified in not appreciating the fact that on destruction of either heritage, the easement in respect of the property automatically ceases and on the facts of the case whether the lower appellate Court has not committed serious error in directing a mandatory injunction when the plaintiff had raised a western toilet in the year 1973 thereby making the user of the pathway superfluous and without necessity?

5.The learned counsel for the appellants argued that under Ext.A-1, partition deed, dated 22.08.1964, the plaintiff was allotted properties detailed in A schedule thereto, in which the scavenger lane now in dispute is earmarked for the common use of the plaintiff's property and the property of the fourth defendant alone. So far as, defendants 1 and 2 are concerned they trace their title to Ext.A2 = Ext.B9 sale deed, and Ext.A3 = Ext.B11, documents. In trying to rest his title to the 'horizontal arm of the 'L' shaped scavenger lane on the south, beyond his western boundary, the plaintiff relies on Ext.A.11 and Ext.A1. So far as Ext.A11 and Ext.A1 are concerned, they do not disclose, that it extend beyond the eastern side of the fourth defendant's property. So far as the first defendant's property is concerned, which is to the immediate east of the fourth defendant's property, both Ext.A.2 and Ext.A.3 show there existed only a street. Since the initial burden is on the plaintiff to establish that the suit lane actually stretches up to the eastern boundary of these defendants' property, and when the title documents did not show that it so stretches till the eastern extremity of these defendants' property, any inference

that the suit property extends up to the eastern extremity of these defendants property is inconceivable. Though the first Appellate Court had touched upon this point, it negated its effect based on the testimony of D.W.2, argued the counsel.

6.The plaintiff has passed away and his legal representatives are brought on record , but, they chose not to contest the appeal.

7. There are two aspects that favour the appellants;

- A. Both the title documents that the plaintiff relies on namely Ext.A.1, partition deed, dated 22.08.1964, and Ext.A.11, dated 26.02.1890, a document belonging to one of their predecessors in title, the disputed lane on the south is shown to have been left for the benefit of the plaintiff's property and the property now under the ownership of the fourth defendant. It does not refer to the property of the defendants 1 and 2 at all.
- B. Turning to the second part, in defendants' title documents under Ext.A.2=Ext.B.9 and Ext.A.3=Ext.B.11, the southern boundary is shown as Velachetty street. This necessarily would imply that the suit lane could not have stretched to occupy any portion to the south of the first defendant's property. Turning to other documents, when Ext.A.15 is perused, it is a certified Survey plan that shows the properties of the plaintiff, fourth defendant and defendants 1 and 2. It is seen that Sy.No.13 is assigned to the plaintiff's property and that stretches partially into the south of the properties of these defendants. In other words, the suit lane is seen stretched partially into south of the properties of the defendants, and for the remaining portion on the south of the defendants property lies the Velachetty street.

8. This suit is not laid for declaration of title, but for bare injunction. The plaintiff makes a bare assertion that the defendants 1 and 2 have constructed a building in the suit lane but, he has not taken out a Commission to indicate where the said construction was made within the suit lane, or if it is beyond it on the east. This becomes relevant in the context of the boundary description already discussed. In other words, there is a decree of uncertainty, if not lack of clarity as to how far the disputed lane stretches on the east. This burden is on the plaintiff which he has not discharged.

9.Turning to the approach of the first Appellate Court, it amazes this Court as to how D.W.2, the fourth defendant came to examine himself when she did not contest the suit, nor is she seem to have been examined on the side of these appellants. A

party with no contest has no right to substantiate a case that she has never put forward, unless the Court examines her as a Court witness under Order XVI Rule 4 CPC. All she has is a right of cross examination of the plaintiff to highlight the weaknesses in the plaintiff's case, and nothing beyond it. Therefore, much credence cannot be given to the testimony of D.W.2. If the testimony of D.W.2 is ignored, then there is a compelling need for issuance of a Commission for local inspection, and to have the advantage of his report. The initial burden is always on the plaintiff, and in discharging the same, not only he chose to have a Commission appointed, but the Courts below too appreciated whatever evidence available on record wrongly, as the reading of documentary evidence did not even conclusively indicate that the plaintiff is the owner of the entire stretch of the disputed portion of the lane in question.

10. In the result, this second appeal is allowed and the decree and judgment passed in A.S.No.188 of 2005 on the file of the Additional Sub-Court, Salem, dated 07.03.2006 reversing the judgment and decree in O.S.No.99 of 2002 on the file of the Principal District Munsif Court, Salem, dated 27.10.2005 is set aside. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

tsg

To:

- 1.The Additional Sub-Court,
Salem.
 - 2.The Principal District Munsif Court,
Salem.
 - 3.The Section Officer
VR Section, High Court, Madras.
- +1 cc to M/s.V.Raghavachari Advocate sr61765

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