

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.02.2019

PRONOUNCED ON : 12.03.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S.A.Nos.1151 of 2005 & 1223 of 2006

T.G.Balachandran ...Appellant/Plaintiff in
S.A.No.1151 of 2005
and 1st respondent in S.A.No.1223 of
2006

K.Jeevambal ...Appellant/1st Defendant
in S.A.NO.1223 of 2006
and 1st Respondent/1st Defendant
in SA.No.1151 of 2005

Vs.

Corporation of Chennai
rep. by its commissioner
Rippon Buildings,
Chennai 600 003

Chennai Metropolitan Development Authority
rep. by its Secretary,
having office at
Thalamuthu Natarajan Maligai
Egmore, Chennai 600 008 ..Respondents 2 & 3/Defendants 2 & 3
in Both the Appeals.

Prayer in S.A.No.1151 of 2005

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 20.03.2002 made in O.S.No.8731 of 1995 on the file of the III Assistant Judge, City Civil Court, Chennai and confirmed in A.S.No.164 of 2003 on the file of Principal Judge, City Civil Court, Chennai dated 23.04.2004.

Prayer in S.A.No.1223 of 2006

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in Cross Appeal No.343 of 2003 dated 23.04.2004 in A.S.No.164 of 2003 on the file of the learned Principal Judge, City Civil Court, Chennai, confirming the judgment and decree in O.S.No.8731 of 1995 regarding the mandatory injunction for the removal of the encroachments on the 3 feet common passage dated 20.03.2002 on the file of the III Asst. Judge, City Civil Court, Chennai.

In S.A.No.1151 of 2005

For Appellant : Mr.B.Thanikachalam

For Respondents : Mr.A.N.Viswanatha Rao for R1 & R2
for R3 - No apperance. Set exparte
vide order dated 22.02.2019

In S.A.No.1223 of 2006

For Appellant : Mr.A.N.Viswanatha Rao

For Respondents : Mr.B.Thanikachalam for R1
for R2 & R3 - No apperance. Set
exparte vide order dated 22.02.2019.

COMMON JUDGMENT

Second Appeal Nos. 1151 of 2005 and 1223 of 2006 are directed against the judgment and decree dated 23.04.2004 in A.S.No.164 of 2003 and Cross Appeal No.343 of 2003 on the file of the Principal Judge, City Civil Court, Chennai, confirming the judgment and decree dated 20.03.2002 passed in O.S.No.8731 of 1995 on the file of the III Assistant Judge, City Civil Court, Chennai.

2. The second appeal No. 1151 of 2005 has been admitted on the following substantial questions of law.

"a) Whether the courts below were right in holding that the dispute between the plaintiff and the 1st defendant is only against the 3 feet common passage, when, in fact, the construction made by the first defendant was in flagrant violation of the provision of the Tamilnadu Town and Country Planning Act 35/1972?

b) Is not the appellant entitled for a mandatory injunction when an unauthorised construction started by the first defendant was objected immediately and respondent 2 and 3 have stood merely as spectators enabling the first respondent to complete the construction?

c) Whether the appellant is entitled to a mandatory injunction against defendants 2 and 3 to remove the unauthorised construction of the first respondent after completion of construction?

d) Are defendants 2 and 3 entitled to remain silent and disregard of provisions

of Act 35/1972 when an unauthorised construction was started?

e) Is the appellate court entitled to negative the prayer for mandatory injunction stating that the respondents 2 and 3 alone are entitled to initiate action against the first respondent ignoring the provisions of the Act 35/1972?

f) Is the first defendant entitled to claim a right of passage in the 3 feet common passage without payment necessary court fee for the same in the sale deed?

3. The second appeal No. 1223 of 2006 has been admitted on the following substantial question of law.

"a) In the absence of evidence and pleadings on the contra whether the courts below were right in coming to the conclusion that the appellant was bound to remove the roof slab, when the same is not hindering any movement in the 3 feet common passage below in the ground floor?

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

5. For the sake of convenience, the Parties are referred to as per their rankings in the trial Court.

6. The suit has been laid by the plaintiff for mandatory injunction against the defendants. Briefly stated, according to the plaintiff, he is the owner of the premises bearing door No.34, K.P.Koil Street, Saidapet, Chennai and the first defendant is the owner of the premises bearing door No.33, K.P. Koil Street, Saidapet, Chennai and the first defendant's property is located on the western side of the plaintiff's property and as per the sale deed dated 27.08.1980, the defendant has got the right of the way only on the southern side of the pathway, however, she has constructed two entrances facing the pathway on the southern side high handedly and illegally without obtaining any such sanction from the corporation and also encroached on the road side and inasmuch as the pathway provided on the southern side is already crowded with several tenants occupying the properties, further according to the plaintiff, pending suit, the first defendant having also completed the unauthorised construction by opening two door ways, two windows and two ventilators

facing the common pathway, according to the plaintiff, he has been necessitated to seek the appropriate reliefs against the defendants.

7. The first defendant contended that she has purchased the property by way of the sale deed dated 27.09.1980 and as like her vendors, had been enjoying the property with three feet width common passage on the southern side and neither the plaintiff nor the first defendant has any exclusive ownership or right of enjoyment over the 3 feet common passage and the first defendant has applied for the necessary sanction for the construction to be put up by her and the first defendant in fact, has only renovated the old structure and she has not encroached or constructed any building in the 3 feet common passage lying on the southern side of the property and therefore, according to her, the plaintiff has no cause of action and by way of the construction put up by the first defendant, she has not caused any disturbance or nuisance to the plaintiff or any one and accordingly prayed for the dismissal of the plaintiff's suit.

8. The third defendant has filed the written statement adopted by the second defendant stating that no order passed by the third defendant is liable to be questioned in any court of law and according to them, the dispute between the plaintiff and the first defendant is as regards the enjoyment of 3 feet pathway running on the southern side of the property, hence, the defendants are not necessary parties and accordingly prayed for the dismissal of the plaintiff's suit.

9. Based on the materials placed on record by the respective parties, it is found that the trial court on noting that the first defendant while putting up the construction in her property, had put up certain roof slab protruding into the common pathway and accordingly granted the relief of mandatory injunction as regards the removal of the same in favour of the plaintiff and in other aspects dismissed the suit laid by the plaintiff. Aggrieved over the judgment and decree of the trial court dismissing the plaintiff's suit as abovesaid, the plaintiff has preferred the first appeal in A.S.No.164 of 2003 and as against the judgment and decree of the trial court, granting the relief in favour of the plaintiff in directing her to remove the protruding slabs over the common passage, the first defendant has preferred the cross appeal No.343 of 2003 in the abovesaid first appeal preferred by the plaintiff. The first appellate court, on a consideration of the materials placed on record by the respective parties and the submissions made, was pleased to dismiss both the first appeal preferred by the plaintiff as well as the cross appeal preferred by the first defendant. Aggrieved over the same, the plaintiff and the first defendant have come forward with the present second appeals.

10. It is not in dispute that the plaintiff is the owner of the premises bearing door No.34, K.P. Koil Street, Saidapet, Chennai and the first defendant is the owner of the premises bearing door No.33, K.P. Koil Street, Saidapet, Chennai. The copy of the sale deed of the first defendant in respect of the premises purchased by her has been marked as Ex.A1. It is not in dispute that there is a common passage running on the southern side of the properties belonging to the plaintiff and the first defendant. Now according to the plaintiff, the first defendant, while putting up the new construction in her property, had put up windows, door ways and ventilators facing the common passage and also encroached into the common passage and the construction put up by the first defendant is unlawful without having any sanction from the concerned authorities and accordingly it is the case of the plaintiff for seeking the removal of the same and to prevent the first defendant from putting up any encroachment into the common passage, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

11. Per contra, it is the specific case of the first defendant that she had, by putting up the construction, renovated the old structure in the property belonging to her and she has not made any encroachment in the common passage on the south side and accordingly, it is stated by her that without any cause of action, the plaintiff has come forward with the suit and therefore, the suit is liable to be dismissed.

12. As rightly found by the courts below, the plaintiff has not filed the sale deed relating to his property. Be that as it may, on a perusal of the title deed of the first defendant's property marked as Ex.A1, as rightly determined by the courts below, the first defendant has purchased the property inclusive of the right in the 3 feet common passage and accordingly it is found that in the passage running on the southern side of the properties belonging to the plaintiff and the first defendant, neither the plaintiff nor the first defendant would be entitled to lay any claim of exclusive and absolute right in respect of the same and all have only common right to use the said passage. Though the plaintiff has come forward with the suit that the first defendant had, while putting up the construction in her property, made certain encroachment in the common passage, however, during the course of evidence, has admitted that no encroachment, as such, has been made by the first defendant in the 3 feet common passage and accordingly the evidence of the plaintiff itself belies his case that the first defendant has made encroachment into the common passage and put up the construction thereon.

13. Furthermore, as could be seen from the commissioner's report and plan marked in the suit as Exs.C1 to C3, it is evident that there is no encroachment made by the first

defendant in the 3 feet common passage . Thus, the courts below are wholly justified in holding that the first defendant has made no encroachment in the 3 feet common passage on ground as alleged by the plaintiff.

14. It is found that the suit has come to be laid by the plaintiff as against the defendants while the construction put up by the first defendant in her property was in progress. Pending suit, it is found that the first defendant had completed the construction in the property belonging to her. From the commissioner's report and plan marked as Exs.C1 to C3, it is evident that the first defendant has put up two doors, two windows and two ventilators on the southern wall of her property facing the common passage running on the southern side. It is also evident, as admitted by the plaintiff that he has also put up his door in his property only facing the common passage. It is thus seen that both the plaintiff as well as the first defendant had put up their doorways facing the common passage and both would agree that the common passage is only intended for the usage of the occupants of the premises. Furthermore, as could be seen from the commissioner's report and plan and the evidence of the plaintiff, the doorways, windows and the ventilators put up by the first defendant in her property have only inward opening and not outward opening and in such view of the matter, as rightly determined by the courts below, the doors, windows and the ventilators fixed by the first defendant in her property on the southern wall would not, in any manner, affect the usage of the common pathway by the plaintiff as put forth by him. When there is no encroachment and construction put up by the first defendant in the common passage as admitted by the plaintiff in his evidence, the doorways, windows and the ventilators put up by the first defendant only face the common passage and not put up by protruding into the common passage and when they have only inward opening and not outward opening, in all, it is found that by way of putting up the abovesaid windows, doors and ventilators, the enjoyment of the common passage of the plaintiff is not, in any way, interfered with or disturbed by the first defendant. When the plaintiff himself has admitted tat he has the door facing the common passage, it does not stand to reason how the plaintiff could make a complaint that the doors, windows put up by the first defendant facing the common passage would cause interference or disturbance to his enjoyment of the common passage as projected by him. As rightly determined by the courts below, when the title of the first defendant to her property is not disputed, the first defendant is entitled to use the property to the maximum advantage and when the first defendant has acquired right in her property inclusive of the common right in the passage on the southern side, it is seen that she would be entitled to use the common passage to the maximum extent, however, without causing interference or disturbance to the enjoyment of the same by the plaintiff and the others, who also have common right in respect of the same. In such view of

the matter, as rightly determined by the courts below, inasmuch as the doors, windows and the ventilators of the first defendant, had not been put up by protruding or encroaching into the common passage and they had been put up on the southern wall of the first defendant's property only facing the common passage with inward openings, in all, it is seen that the case of the plaintiff that he is entitled to seek removal of the same, has been rightly negatived by the courts below and no interference is called for with reference to the same.

15. Materials placed on record, particularly, through the commissioner's report and plan projected in the matter, would go to disclose that the first defendant has put up the roof slab in her property over the 3 feet common passage to a certain level and thereby, as rightly determined by the courts below, the free ingress and egress of the plaintiff through the passage would be definitely affected and accordingly, on the abovesaid materials having been projected during the course of trial and as the protruding roofing slab of the first defendant into the common passage would offend the right of the plaintiff to the usage of the same, the courts below are found to be justified in granting the relief of mandatory injunction in favour of the plaintiff with reference to the removal of the abovesaid offending roof slab construction put up by the first defendant protruding over the common passage. In such view of the matter, when it is found that the courts are entitled to grant a lesser relief based upon the materials projected in the matter, in my considered opinion, even though there is no specific prayer with reference to the removal of the protruding roof slab of the first defendant claimed by the plaintiff in the suit, that would not, in any manner, hinder the powers of the court to grant the relief of the removal of the same in favour of the plaintiff.

16. The plaintiff's counsel would contend that the officials of the corporation and CMDA had not taken appropriate action against the first defendant with reference to the construction put up by her in the property belonging to her. However, the materials placed on record, would go to show that action had been contemplated and also initiated by the abovesaid authorities against the first defendant with reference to the construction put up by her in the property and the same are pending before the appropriate authorities for adjudication. Therefore, it is seen that the authorities concerned had also initiated appropriate action against the first defendant. Further it is also seen that the plaintiff has also not established that the construction put up by him in his property had necessary sanction and approval from the concerned authorities. In such view of the matter, as rightly determined by the courts below, it is always open to the authorities concerned to take appropriate action against the offenders in the manner known to law and the plaintiff cannot be allowed to urge the courts to initiate action against such

offending construction by usurping or encroaching upon the powers conferred on the authorities as per law and therefore, the relief of mandatory injunction sought for by the plaintiff against the defendants 2 and 3 had been rightly rejected by the courts below.

17. Counsel for the plaintiff, in support of his contention, placed reliance upon the decision reported in AIR 1994 MADRAS 323 (P.A.Rani, etc., Vs.K.G.Krishnan and others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at the hand.

18. In the light of the abovesaid discussions, in my considered opinion, no substantial question of law is involved in the second appeals. Be that as it may, the substantial questions of law formulated in the Second Appeal No. 1151 of 2005 are accordingly answered against the plaintiff and in favour of the defendants and the substantial question of law formulated in the Second Appeal No. 1223 of 2006 is accordingly answered against the first defendant and in favour of the plaintiff and the other defendants.

19. In conclusion, both the second appeals are dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bga
To

1. The Principal Judge, City Civil Court,
Chennai.
2. The III Assistant Judge,
City Civil Court, Chennai.

Copy to
The Section Officer,
V.R.Section, High Court, Madras.

+lcc to Mr.Karthikaa Ashok, Advocate Sr.23800
+lcc to Mr.A.N.Viswanatha Rao, Advocate Sr.23665
+lcc to Mr.B.Thanikachalam, Advocate Sr.22955

S.A.Nos.1151 of 2005 &
1223 of 2006

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