

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 03.12.2019

Date of Verdict : 09.12.2019

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1313 of 2005
and C.M.P.No.17654 of 2005

1. Rajendran
2. Mallika

...Appellants/Defendants

Vs.

Santha Sarathy

...Respondent/Plaintiff

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 13.02.2004, in A.S.No.93 of 2002 on the file of the VII Additional City Civil Court, Chennai, confirming the decree and judgment dated 26.07.2001 in O.S.No.12403 of 1996 on the file of the XVI Assistant City Civil Court, Chennai.

For Appellants : Ms.A.Nilaphar

For Ms.R.Meenal

For Respondent : Mr.A.Kothandaraman

JUDGMENT

This second appeal is directed as against the judgment and decree dated 13.02.2004, passed in A.S.No.93 of 2002 on the file of the VII Additional City Civil Court, Chennai, confirming the judgment and decree dated 26.07.2001 in O.S.No.12403 of 1996 on the file of the XVI Assistant City Civil Court, Chennai.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The suit is filed for mandatory injunction and permanent injunction.

4. The case of the plaintiff in brief is as follows :-

4.1. The plaintiff is an absolute owner of the property situated at No.3, Burrah Sahib Street, Mount Road, Chennai - 2, having purchased the same from one Gopalakrishnan by a registered sale deed dated 08.03.1973. The sale deed includes the right to use of the common passage, which is located on the eastern side of the plaintiff's property, which leading from Burrah Sahib Street, Chennai-2, and ends in the property at No.2, Burrah Sahib Street, Chennai-2, which belongs to the defendants herein. After purchase of the property by the plaintiff, the defendants purchased the property bearing Door No.2, Burrah Sahib Street, Chennai - 2. Originally one Kabaleshwara rao was the owner of the said house and subsequently, he sold out the property to one Sherfunisa Begum, who in turn sold out the property to the defendants herein.

4.2. The common passage was called as private common passage for four house owners namely the plaintiff i.e., the owner of Door No.3, the defendants i.e., the owner of Door No.2, and the owners of door Nos.1 and 2A. The suit property has been used for the above said four persons. The common passage is measuring with 49 feet length and 6¾ feet width. The plaintiff is having access to her property through the common passage, and her house having three ventilators and one window in the ground floor and five ventilators and one window in the first floor and two ventilators and one window in the second floor, facing the common passage.

4.3. Further even before the date of purchase by the plaintiff, the vendor of the defendants viz., Kabaleeshwara Rao filed a suit in O.S.No.1914 of 1968 before the II Assistant City Civil Court, Chennai, as against the said Gopalakrishnan, who is the vendor of the plaintiff, for the relief of injunction not to interfering with the exclusive possession and enjoyment of the passage. The said suit was dismissed and as against which, the said Kabaleshwara Rao filed an appeal suit in A.S.No.54 of 1972 before the Principal City Civil Court, Chennai and the same was also dismissed on 23.08.1973. In fact, the plaintiff herein had been impleaded as second respondent and contested the appeal proceeding. Thereafter, the said Kabaleshwara Rao sold out the property to one Sherfunisa Begum, who in turn sold out the property to the defendants, as such the judgment and decree passed by the Courts are binding on the defendants.

4.4. Even then, the defendants have put up two pillars in the common passage over night, which mentioned as X, Y in the Rough Sketch enclosed along with the plaintiff and infringed the right of use and easement of the plaintiff. The suit schedule mentioned property is a common passage as such, the defendants have no right to claim exclusive right in the common pathway. Therefore, the pillar erected by the defendants have to be removed. The acts of the defendants to put up construction in the suit schedule property is illegal and hence the plaintiff necessitated to seek the relief of mandatory injunction and permanent injunction as against the defendants and filed this suit.

5. The defendants resisted the plaintiff's suit by admitting the fact that the purchase of the house property by the defendants as well as the plaintiff. But the suit property is absolutely owned by them and they have full right and control over the property including the passage as mentioned by the plaintiff. In fact, the revenue authorities had granted patta to them to an extent of 1040 sq.ft. The defendants categorically denied that the common passage for all the persons.

5.1. Further the judgement and decree obtained by the plaintiff is prior to the sale of ground in passage, and the same was sold by one Muttavalli in favour of the defendants predecessor in title. Therefore, the orders passed by the Civil Courts are not binding on the defendants. They have not caused any obstruction of free light or air to the plaintiff by way of construction of any superstructure by them. The plaintiff never used the portion belonging to the defendants and the suit schedule property cannot be termed as passage. Therefore, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

6. In support of the plaintiff's case, P.W.1 to P.W.4 were examined and eight documents were marked as Ex.A.1 to Ex.A.8. On the side of the defendants D.W.1 to D.W.4 were examined and Ex.B.1 to Ex.B.8 were marked. Ex.C.1 and Ex.C.2 were marked as Court documents. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court decreed the suit in favour of the plaintiff as prayed for. Aggrieved over the judgment and decree of the trial Court, the defendants preferred an appeal suit in A.S.No.93 of 2002 before the VII Additional City Civil Court, Chennai. The first appellate Court on appreciating the materials placed on records, dismissed the appeal by confirming the judgement and decree passed by the

trial Court. Challenging the same, the defendants have come forward with the present second appeal.

7. At the time of admission of the second appeal, the following substantial questions of law were framed :-

1) Whether in law the Courts below are right in failing to see that as no easementary right was asserted in the plaint, a decree could not be granted for mandatory injunction?

2) Whether in law the Courts below are not wrong in holding that the judgment in the prior suits would bind the appellants as they were ignorant of the decree?

3) Whether in law the Courts below are right in overlooking that without clear pleadings supported by evidence to prove the damage suffered by the plaintiff, the onus should not be cast on the defendants to prove the negative?

8. The learned counsel appearing for the appellants/defendants submitted that plaintiff did not state any thing, in the plaint, as to how her easementary rights were affected. Even according to the plaintiff, the defendants had put up two pillars marked as X, Y in the rough sketch submitted along with the plaint, there is no averments to show that the easementary right of the plaintiff infringed by the defendants. The prayer of mandatory injunction itself is vague and no particular construction mentioned in the plaint. When the defendants were granted patta to an extent of 1040 sq.ft., which includes the passage as mentioned in the plaint, there is no question of causing any obstruction of free light or air to the plaintiff by way of construction of any superstructure by the defendants.

8.1. The learned counsel appearing for the appellants/defendants further submitted that pending the suit, an Advocate Commissioner was appointed to inspect the suit property and to note down the physical features. According to the Advocate Commissioner, in the rough sketch submitted along with the report, Nos.5 and 6 were marked as pillars put up by the defendants. No.6 pillar is adjacent to the property of the plaintiff. Without considering those facts, the Courts below decreed the suit as prayed for.

9. Per contra, the learned counsel appearing for the respondent/ plaintiff submitted that the sale deed dated 08.03.1973, categorically mentioned about the common passage ad

measuring 49 feet length and 6¾ width for four owners. Now admittedly, the defendants put up the construction for stair case to first and second floor of their house situated at Door No.2, Burrah Sahib Street, Chennai - 2. Even according to the Advocate Commissioner, there are two pillars, in which one pillar is situated on the eastern side and another one on the western side and adjoining the eastern side pillar, a stair case is running to a width of about 3¾ feet. On the western side of the passage, is the entrance leading to the property in No.2A, Burrah Sahib Street, Chennai - 2. At the end of this passage, there are two pillars, one at the eastern side and another at the western side. The windows found in the eastern wall of the plaintiff are locked, due to the construction of the stair case by the defendants. Therefore, the construction put up by the defendants in the common passage, which meant for all house owners. Considering the above facts and circumstances, the Court below rightly allowed the suit as prayed for.

10. Heard Ms.A.Nilaphar, learned counsel appearing for the appellants and Mr.A.Kothandaraman, learned counsel appearing for the respondent.

11. Considering the scope of issues involved between the parties as regards in the subject matter lying in the narrow campus, it is seen that facts adduced by the respective parties as regards to their various contention need not be averted in detail. From the material placed on records, it found that the parties are not in dispute about the purchase of their respective houses situated at Door Nos. 2 and 3 at Burrah Sahib Street, Chennai - 2. Ex.A.8, the sale deed dated 08.03.1973, included the right to use of common passage which is located on the eastern side of the plaintiff's property leading to Burrah Sahib Street, ending at Door No.2, Burrah Sahib Street, Chennai - 2. In fact, the defendants purchased the property situated at Door No.2, Burrah Sahib Street, Chennai - 2, from one Sherfunisa Begum.

12. Originally the property belongs to one Kabaleshwara Rao and he sold out the property to the said Sherfunisa Begum. The said Kabaleshwara Rao filed a suit in O.S.No.1914 of 1968 before the II Assistant City Civil Court, Chennai, against the vendors of the plaintiff herein, for the relief of injunction not to interfere with the exclusive possession and enjoyment of the property. The said suit was dismissed and an appeal suit was filed by the said Kabaleshwara Rado and the same was also dismissed on 23.08.1973 in A.S.No.54 of 1972 on the file of the Principal City Civil Court, Chennai. Hence in respect of the

very same issue in the present case, the Court below had already been dealt with as against the vendors of the defendants herein. Therefore, the judgment and decree passed by the Court below in O.S.No.1914 of 1968 and A.S.No.54 of 1972 are binding on the defendants, in respect of the common passage. Those documents were marked as Ex.A.2 and Ex.A.3.

13. Further P.W.2 and P.W.3 categorically deposed that the construction put up by the defendants in the common passage, obstructs the right to use of easement of the plaintiff. The Junior Engineer was examined as P.W.4 and he deposed that in the common passage, they laid drinking water line and drainage line. Further it is also seen from the Advocate Commissioner's report and the rough sketch filed along with the report, the construction put up by the defendants only in the common passage used by the house owners in Door Nos. 1, 2, 2A and 3 in the said street, viz., Burrah Sahib Street. The relevant portion of the Advocate Commissioner's report is as follows :-

"6. There are 6 Nos. ventilators besides one big window two small windows and a window side door on the eastern side wall in the front side of the wall. The windows and ventilators approximately measure as noted down in the rough sketch. The said wall belongs to the petitioner-plaintiff on the rear side of the small wall, there is a window. There is also window in the bath room which is in the ground floor and there are windows both in the first floor and 2nd floor of the said wall. These windows have approximate measurements as noted down in the rough sketch annexed herewith. Out of the 3 windows, 2 windows are locked in the constructed portion in the suit portion and marked as B1 and B2 in the rough sketch annexed. The windows marked as B1 and B2 are in existence very near to the stair case constructed by the respondent-defendant. Out of 3 bath room windows 2 windows are near the pillar (on the western side) the window marked B3 B4 B5 in the rough sketch."

14. In fact, the defendants purchased the said house only after the purchase of the plaintiff and the sale deed includes the common passage. The recent photographs are also produced before this Court and this Court could see the obstruction infringed the right to use and easement of the plaintiff by putting up the stair case adjacent to the house of the

plaintiff. Further, Ex.B.5 marked by the defendants, the patta granted to the extent of 1040 Sq.ft., includes the building and pathway, does not mean that the defendants alone are the absolute owner of the common pathway. In the sale deed of the plaintiff, it clearly shows that the pathway started from Burrah Sahib Street and ends in the property situated at No.2 Burrah Sahib Street, Chennai-2 is a common pathway for all the owners at Door Nos. 1, 2, 2A and 3 at Burrah Sahib Street. Accordingly, all the substantial questions of law answered against the defendants and in favour of the plaintiff.

15. In the light of the above discussion, it is found that the Courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly and allowed the suit in favour of the plaintiff. Accordingly, this Second Appeal stands dismissed. Consequently, connected miscellaneous petition is closed. No order as to cost.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The VII Additional Judge, City Civil Court, Chennai,
2. The XVI Assistant Judge City Civil Court, Chennai.

Copy to

The Section Officer

VR Section High Court,

Madras-104

+1 cc to M/s.R.Subramanian Advocate sr102742

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