

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2019

PRONOUNCED ON : 26.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1393 of 2005

K.Kannan ...Appellant/Defendant

Vs.

K.Gopalakrishnan ...Respondent/Plaintiff

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 09.12.2004 in A.S.No.62 of 2003 on the file of the Additional District Court (FTC No.V), Chennai, confirming the judgment and decree dated 12.09.2002 in O.S.No.1436 of 1998 on the file of the II Assistant City Civil Court, Chennai.

For Appellant : Mr.K.A.Ravindran

For Repondent : Mr.N.R.Anantharamakrishnan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 09.12.2004 passed in A.S.No.62 of 2003 on the file of the Additional District Court (FTC No.V), Chennai, confirming the judgment and decree dated 12.09.2002 passed in O.S.No.1436 of 1998 on the file of the II Assistant City Civil Court, Chennai.

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

3. The second appeal has been admitted on the following substantial question of law:

"Whether the Courts below have right in decreeing the suit inspite of the fact that under Ex.B1 the vendor has conveyed to the appellant, the rear terrace portion enjoyed by them when the same is not affecting the respondent's right to use the passage?"

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. The suit has been laid by the plaintiff against the defendant for the reliefs of mandatory injunction and permanent injunction. For the sake of convenience, the dispute between the parties is determined based on the rough sketch filed by the plaintiff along with the plaint as well as the Commissioner's report and plan marked in the proceedings as Exs.C1 and C2 respectfully. It is not in dispute that the property belonging to the plaintiff and the defendant originally belonged to Shenbagavalli and her husband. It is found that the plaintiff by way of a sale deed dated 30.12.1985 marked as Ex-A1, purchased the rear portion of the property measuring East to West 31 feet and North to South 14 feet in the backyard area from the original owners and accordingly, the original owners had also carved out a passage on the Southern side out of the portion retained by them measuring 3 feet North to South and 51 feet East to West and also conveyed the same to the plaintiff by way of the abovesaid sale transaction. Thus, it is seen that inclusive of the abovesaid passage, for enabling the plaintiff to gain access to the rear portion, the original owners had conveyed absolute right to the plaintiff in respect of the said passage also. On a perusal of the recitals contained in Ex-A1, it is found that the vendors therein had not retained any interest in the passage conveyed to the plaintiff by way of Ex-A1 sale transaction described as Item-II in the above sale deed. Accordingly, claiming exclusive title, possession and enjoyment of the passage as well as the rear portion purchased by him by way of Ex-A1, it is stated by the plaintiff that his vendors did not claim any interest over the passage in dispute. From the materials placed on record, it is found that the retained portion had been sold by the original owners to the defendant by way of a sale deed dated 23.02.1993 marked as Ex-B1. As rightly determined by the Courts below, on a perusal of the recitals contained in Ex-B1, the defendant has no right or interest over the passage in dispute and on the other hand, the property comprised in Ex-B1 sale transaction is shown to be located to the North of 3 feet passage to the house bearing Door No.2/2, New Bungalow Street, which property belongs to the plaintiff. Therefore, Ex-B1 sale transaction does not cover the passage in dispute as having been conveyed to the defendant and on the other hand, admits that it is only the plaintiff who has been conveyed the title to the said passage in dispute by way of Ex-A1 sale transaction.

6. Alleging that the defendant without any authority had put up certain intrusions over the passage belonging to the plaintiff while putting up the terrace portion and also

endeavouring to put up the terrace portion covering the entire passage and thereby hindered the right of the plaintiff in respect of the same, accordingly, the plaintiff has come forward with the suit seeking the reliefs of mandatory injunction and permanent injunction against the defendant.

7. The defendant would only contend in the written statement that inasmuch as by way of Ex-B1 sale transaction, he had been given rights to open terrace over the passage to the rear portion, rights and privileges in a way of appertaining thereto, accordingly on the strength of the said recitals, he had also put the construction over the passage, while putting up the terrace construction and the same cannot be prevented by the plaintiff. Furthermore, it is also put by the defendant that the vendors had also been enjoying the passage in question by putting the open terrace construction over the said passage and the plaintiff having failed to object to the same at that point of time, it is stated that he cannot be allowed to lodge a complaint when the defendant put up such a terrace construction over the passage and contended that the plaintiff's suit should fail.

8. However, as rightly determined by the Courts below, when by way of Ex-A1 sale deed, the plaintiff has been given exclusive right over the passage in question and the vendors had not retained any right over the passage with themselves in any manner and by way of Ex-B1 sale transaction, the vendor had conveyed only the remaining area excluding the passage in dispute and in fact showing the passage in dispute as the Southern boundary to the property comprised in Ex-B1 sale transaction, in such view of the matter, the case projected by the defendant that he had been given the right over the passage in question for putting up or extending the terrace construction, as such, cannot be countenanced in any manner. As found by the Courts below, when after the conveyance made in Ex-A1, the vendors had not retained any title in respect of the passage in question, even assuming for the sake of arguments that any such right of the property in dispute had been conveyed to the defendant by way of Ex-B1 sale transaction by the vendors, the same would not convey a valid title to the defendant as the vendors had not retained any such title to themselves enabling them to convey the same to the defendant. As further noted by the Courts below, when the plaintiff is not a signatory to Ex-B1 sale transaction, the recitals contained in the said document would not bind upon the plaintiff in any manner and in such view of the matter, the defendant cannot be allowed to claim any right over the passage in question based upon certain recitals contained in his sale deed as such.

9. In this matter to understand the intrusions made by the defendant in the passage in question and whether he has put up any terrace construction over the passage obstructing the right of the plaintiff in the enjoyment of the same, as could be seen from the Commissioner's report and plan marked as Exs.C1 and C2 in the proceedings, it is noted that the defendant has put up new construction in the terrace area and thereby he is found to have put up the terrace overhanging the passage to some extent as noted by the Advocate Commissioner in the portion marked as "CDEF" in Ex-C2 plan and shown as "CDGHC" in the plaint plan. Accordingly, it is found that the defendant without any entitlement had put up the terrace construction over the passage belonging to the plaintiff in the abovesaid area and the same would obstruct the free right of way of the plaintiff in respect of the passage belonging to him. As rightly determined by the Courts below, the plaintiff would be entitled to seek the relief of mandatory injunction with reference to the same. Considering the nature of construction put up by the defendant in the area as noted by the Advocate Commissioner, the same being a recent origin and without authority the defendant cannot be allowed to contend that the terrace construction hanging over the passage had been put up by the vendors themselves and the same having not been objected by the plaintiff, he cannot restrain the defendant from putting up such construction. However, when the said construction are noted to have been put up fresh by the Advocate Commissioner and as determined by the Courts below, in my considered opinion, the defendant cannot be allowed to contend that his vendors had also put up such terrace construction over the passage in question. However to buttress the said case, the defendant has not endeavoured to examine the vendors with reference to the same. Therefore, when the defendant is found to have put up the unauthorized construction over the passage without any right or entitlement to the same, the Courts below are justified in directing the defendant to remove the same by granting mandatory injunction to the plaintiff. Similarly the acts of the defendant go to disclose that his intention is to obstruct the right of the plaintiff in the usage of the passage in question by attempting to put up new construction over the same. In such view of the matter, the Courts below are also justified in granting the relief of permanent injunction sought for by the plaintiff qua the remaining portion of the passage as determined by the Courts below.

10. The counsel for the defendant contended that by putting up terrace construction over the passage, in the light of the conveyance in favour of the defendant under Ex-B1, the plaintiff's right to use the passage is not hindered in any manner and therefore, put forth the case that the judgment and decree of the Courts below are liable to be set aside. However,

the abovesaid contention does not merit acceptance. When as above pointed out, the defendant having not been given any right over the passage in question and the vendors had also not shown to have retained any right over the passage in question, the defendant cannot be allowed to claim any right or interest over the passage in question on the strength of certain recitals contained in Ex-B1 sale transaction. In such view of the matter, the defendant cannot be allowed to put forth the contention that the terrace construction hanging over the passage in question would not hinder the free access of the plaintiff in respect of the passage and in such view of the matter, the defendant is found to have interfered with the plaintiff's right to use the passage in question without any authority and in such view of the matter, the Courts below are justified in granting the appropriate reliefs in favour of the plaintiff.

11. In such view of the matter, I do not find any reason to interfere with the judgment and decree of the Courts granting the appropriate reliefs in favour of the plaintiff in the matter.

12. In my considered opinion, no substantial question of law is found to be involved in this second appeal. Be that as it may, the substantial question of law formulated in the second appeal is accordingly answered against the defendant and in favour of the plaintiff.

In conclusion, the second appeal fails and is accordingly dismissed with costs. Connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

nsd

Sub Assistant Registrar

To

1. The Additional District Judge, FTC No.V, Chennai.

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

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

+1cc to Mr.N.R.Anantharamakrishnan, Advocate, S.R.No.29077

+1 cc to Mr.K.A.Ravindran, Advocate, S.R.No.28402

S.A.No.1393 of 2005

SR(CO)

SSM(24/09/2019)