

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 08.02.2019****PRONOUNCED ON : 19.02.2019****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN**

S.A.No.875 of 2005
and
C.M.P. No.12307 of 2005

Krishnaveni Ammal

...Appellant

Vs.

M.Lakshminarayana

...Respondent

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.365 of 2002 dated 09.03.2004 passed by the Additional District Judge, Fast Track Court-V, Chennai reversing the judgment and decree dated 29.11.2001 passed in O.S.No.7917 of 1993 on the file of the IV Assistant City Civil Court at Chennai.

For Appellant : Mr.S.Thiruvengadam

For Respondent : No appearance. Set exparte vide order dated 08.02.2019,

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 09.03.2004 passed in A.S.No.365 of 2002, on the file of the the Additional District Judge / Fast Track Court-V, Chennai reversing the judgment and decree dated 29.11.2001 passed in O.S.No.7917 of 1993 on the file of the IV 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. Suit for Permanent injunction.

4. The case of the plaintiff in brief is that she is the owner of the property described in the plaint "A" schedule in old Door No.2/36, New Door No.40, Thirupalli Street, Madras 600 079 by way of registered sale deed dated 24.10.1966 and assessed to property tax, water charges and sewerage taxes with reference to the same. The plaintiff's husband had two wives and he had purchased benami the property bearing old Door No.1/36, New No.39, Thirupalli Street, Madras 600 079 in the name of his other

wife Kanniammal described in the plaint 'B' schedule and the abovesaid two properties are situated in the southern row of Thirupalli Street running east to west and the entrance of the plaintiff's property i.e. old Door No.2/36, new No.40 is and was from road, but for the premises bearing Door No.1/36, New No.39, the entrance is and was from the lane situated to the east of the property bearing old Door No.2/36, New No.40, Thirupalli Street, Madras 600 079. At the first floor level, both the properties abovesaid were constructed as if they were one and the same and one could have ingress and egress from each of the property from the other and the drainage and sewerage connection for both the properties were passing underneath the lane situated on the east of the property bearing Door No.40, Thirupalli Street, Madras 600 079 and the plaintiff has been assessed to tax with reference to the same and the tax has been duly paid by the plaintiff. The plaintiff's husband and Kanniammal had sold the property bearing No.39, Thirupalli Street, Madras 600 079 to the defendant by way of the sale deeds dated 26.04.1982 and 24.06.1982 and by way of the abovesaid sale transactions, the defendant was given only undivided share in the lane running east of the property belonging to the plaintiff and west of the property purchased by him. Ever since the purchase of the property by the plaintiff, the drainage and sewerage

connection is passing only through the lane which is the common passage for both the parties and the defendant did not apply for separate drainage and sewerage connection and not assessed to the same and while so, the defendant's counsel sent a notice on 06.10.1993 intimating that the corporation authorities had asked the defendant to disconnect the existing sewerage connection of the plaintiff and thereby, the defendant is unlawfully attempting to interfere with the drainage and sewerage connection to the plaintiff's property running through the lane on the eastern side of the property ever since the date of her purchase and hence according to the plaintiff, she has been necessitated to lay the suit for appropriate relief.

5. The defendant resisted the plaintiff's case contending that he had purchased the property bearing old Door No.1/36, New No. 39, Thirupalli Street, Madras 600 079 in two parts by way of the sale deeds dated 26.04.1982 and 24.06.1982 and the portions purchased by the defendant consists of the passage of an extent of 3 feet x 52 feet, which leads from Thirupalli street to its back portion on the south of the plaintiff's property admeasuring a total extent of 1476 sq. ft and by way of conveying the undivided half share in the abovesaid sale deeds in favour of the defendant, the

defendant had acquired the entire lane abovesated and the claim of the plaintiff that it is the common passage or lane of the property of the plaintiff as well as the property acquired by the defendant is false. The plaintiff is not entitled to claim any share in the lane lying to the east of her property and the plaintiff is trying to take advantage of the term "undivided half share in the lane" in the sale deeds of the defendant and misinterpreted the same to claim unlawful entitlement to the disputed lane. The sale deed of the plaintiff does not give any right to her over the lane and the entrance to the defendant's premises is and was from the lane situated on the east of the plaintiff's property and with regard to the drainage and sewerage connection, the defendant came to understand that the drainage and sewerage connection of the plaintiff were illegally connected to the sewerage line of the defendant which passes through the lane and the defendant was not made aware of the abovesaid position at the time of the purchase of the property by him and only when the officials of the water supply and sewerage board inspected the drainage connection, the defendant came to know about the same and accordingly, they had directed the defendant to set right the illegality by way of a notice. On receipt of the same, the defendant directed the plaintiff through his counsel to disconnect the illegal drainage and sewerage

connection of her property running through the lane and instead of complying with the abovesaid request, the plaintiff had come forward with the suit containing false allegations and the plaintiff is not entitled to any common right in the lane and also not entitled to take water and sewerage connection for her property through the lane and the claim of the plaintiff that the water and sewerage had been running through the lane since the date of purchase of her property is false and the plaintiff has no cause of action to institute the suit and is liable to be dismissed.

6. In support of the Plaintiff's case, P.W.1 was examined and Exs.A1 to A10 were marked. On the side of the defendant D.W.1 was examined and EXs.B1 to B8 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to grant the relief in favour of the plaintiff as prayed for. On appeal by the defendant, the first appellate court on an appreciation of the materials placed on record and the submissions made, was pleased to set aside the judgment and decree of the trial court and resultantly, dismissed the suit laid by the plaintiff. In the first appellate court, Exs.C1 and C2 were

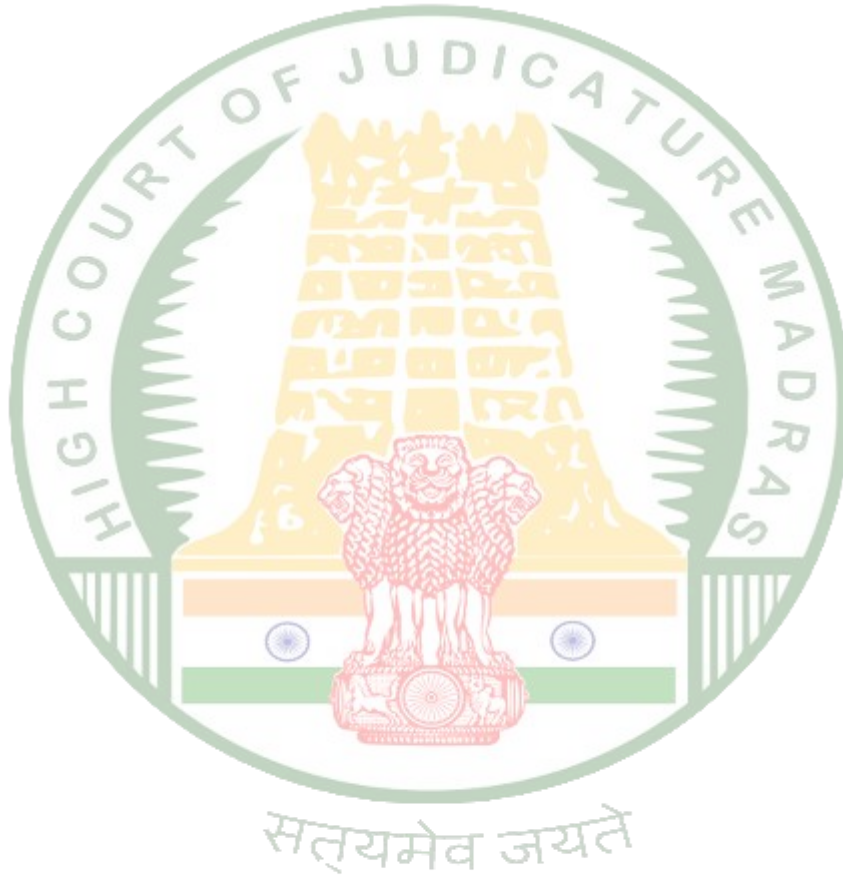
marked. Impugning the same, the present second appeal has been laid.

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

"1) Whether the judgment and decree of the lower appellate court are vitiated by misreading the documentary evidence, which clearly establishes the case pleaded and proved by the appellant?

2) Whether the findings of the first appellate court on misinterpretation of the sale deeds in favour of the respondent and holding that the respondent is entitled to the entire common passage, is correct?

3) Whether the judgment of the first appellate court in reversing the judgment of the trial court based on Commissioner's report is vitiated and erroneous?



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4)Whether the first appellate court has failed to appreciate Exs.A.3 to 8, which are receipts in the name of the appellant herein issued by the Metropolitan Water and Sewerage Board?

5)Whether the first appellate court is correct in holding that two undivided half shares have been sold to the respondent by Kanniammal, W/o. Late Natesa Mudaliar?

9. It is not in dispute that the plaintiff is the owner of the property bearing old Door No.2/36, New No.40, Thirupalli Street, Madras 600 079 by way of a deed of sale dated 24.10.1966 and the registration copy of the abovesaid document has been marked as Ex.A1. Similarly, it is also seen and not in dispute that the defendant had purchased the property bearing old Door No.1/36, New No.39, Thirupalli Street by way of the two sale deeds dated 26.04.1982 and 24.06.1982. The xerox copy of the abovesaid sale deeds has been marked as Exs.B1 and B2. From the materials

placed on record, it is found that there is a lane situated to the east of the plaintiff's property and according to the plaintiff, right from the date of acquisition of the property and the construction put up thereon, she had been using the lane on the eastern side for drawing the drainage, water and sewerage connections in respect of her property and accordingly claiming that she is entitled to half share in the lane and further according to her, only an undivided half share in the lane had been conveyed to the defendant under Exs.B1 and B2 sale transactions and in such view of the matter, according to her, the defendant is not entitled to interfere with the drainage and sewerage connection of the plaintiff running through the abovesaid lane and on the other hand, inasmuch as the defendant attempted to interfere with her possession and enjoyment of the suit lane, according to the plaintiff, she has been necessitated to lay the suit for appropriate relief.

10. Per contra, it is the case of the defendant that by way of Exs.B1 and B2 sale deeds, he had obtained the full right of the lane in question measuring an extent of 3 feet x 52 feet running from Thirupalli street to the back portion on the south of the plaintiff's property admeasuring a total extent of 1476 sq. ft. and disputed the claim of the plaintiff that he had purchased only undivided half

share in the lane and also challenged the claim of half right of share in the lane by the plaintiff and also disputed the alleged entitlement of the plaintiff to draw water and sewerage connection to her property through the said lane and according to the defendant, only on the inspection of the properties by the officials concerned, he came to know that water and sewerage of plaintiff had been drawn through the lane by illegally connecting to his connection and accordingly, had been asked by the officials to set right the same, hence, according to the defendant, he had been necessitated to issue the notice to the plaintiff to remove the same through his counsel and instead of complying with the same, according to the defendant, the plaintiff has come forward with the false suit without any cause of action and therefore, the suit is liable to be dismissed.

11. At the outset, as could be seen from the plaint averments, the plaintiff is endeavouring to claim the right of half share in the suit lane situated to the east of her property purchased under Ex.A1 sale transaction. It is not in dispute that there is a lane on the eastern side of the plaintiff's property of an extent of 3 feet x 52 feet leading from Thirupalli street and reaching upto the portion belonging to the defendant purchased by him by way of Exs.B1 and B2 sale transactions. The defendant had purchased the property

belonging to him in two parts and accordingly it is found that in each sale deed undivided half share had been conveyed to him in respect of the lane in question under the abovesaid sale transactions and by way of the same, as rightly determined by the first appellate court, the plaintiff cannot take advantage of the abovesaid recitals to contend that only an undivided half share of the lane in question had been conveyed to the defendant and the other remaining half share belonging to the plaintiff.

12. Inasmuch as the plaintiff is claiming proprietary right in respect of the lane in question i.e. claiming undivided half share right in the lane and when the same has been challenged and controverted by the defendant, as rightly pointed out by the first appellate court, it is for the plaintiff to establish that she has the proprietary right or absolute right to the extent of half share in the lane in question as putforth by her. With reference to the abovesaid claim of the plaintiff, other than Ex.A1 sale deed, there is no other material placed on the part of the plaintiff. On a reading of Ex.A1 sale deed, it is found that nothing has been mentioned about the lane on the eastern side and furthermore, when on a perusal of Ex.A1 sale deed and the property conveyed thereunder, when it is found that by way of the same, the plaintiff has been conveyed the

property bounded on the south by Venkatasubbiah's house and lane on the west by Karur Maruthamuthu Pillai house on the north by Thirupalli street and on the east by Venkata Subbaia's house and lane comprised in O.S.No.4780 R.S.No.7822/1 CC No.2520 of an extent of 1095 sq.ft, it is evident that the lane in question has been shown as one of the boundaries to the plaintiff's property conveyed to the plaintiff under Ex.A1 and in such view of the matter, when the plaintiff has not been conveyed any right in respect of the lane portion as such, the case of the plaintiff that she has right i.e. half share right in the lane in question by way of Ex.A1 sale transaction falls to the ground and rightly disbelieved by the first appellate court. On the other hand, inasmuch as the lane portion forms part of the property acquired by the defendant by way of Exs.B1 and B2 and when the defendant had purchased the property in two parts under Exs.B1 and B2 separately, accordingly, in each sale deed undivided half share in the lane had been conveyed independently and on the whole it is found that the full right over the lane in question had been conveyed to the defendant by way of Exs.B1 and B2 and inasmuch as the lane in question forms part of the property acquired by the defendant by way of Exs.B1 and B2, it is evident that as putforth by the defendant, it is he, who has absolute right to the lane in dispute and not the plaintiff. Further to

substantiate that the defendant has been conveyed the property inclusive of the lane in question, the permanent land register pertaining to his property has come to be marked as Ex.B3 and from the certified plan, found on the reverse side of the said document, it is seen that the defendant owns the property inclusive of the lane in question measuring 3 feet and 52 feet which proceeds from Thirupalli Koil Street upto his property and accordingly as above noted, when the lane portion does not form part of the property belonging to the plaintiff under Ex.A1 sale deed, the plaintiff's property has been shown bounded on one side by the lane in question and therefore, as rightly determined by the first appellate court, the plaintiff has miserably failed to establish her claim of title to the suit lane i.e. an undivided half share right in the suit lane and in such view of the matter, the plaintiff is not entitled to draw water, sewerage connection through the lane in dispute.

13. When from the above discussions, it is noted that the lane in question forms part of the property belonging to the defendant, at the most, if at all, the plaintiff would be entitled to draw the water and sewerage connection through the same, at the most, the plaintiff would be entitled to claim only easementary right in respect of the same. However, as could be seen from the plaint averments

it is found that the plaintiff has not claimed any easementary right over the lane and on the other hand has putforth the claim of proprietary right in respect of the same i.e. claiming half share right in the same and when the same is not supported by any materials, as rightly determined by the first appellate court, the plaintiff's claim of proprietary right to the lane in question cannot be countenanced and furthermore, in the sale deed marked as Ex.A1, there is no conveyance of any easementary right to the plaintiff to draw water and sewerage connection through the lane in question and equally the sale deeds of the defendant marked as Exs.B1 and B2 are found to be not saddled with any easementary right conveying the entitlement of the plaintiff to draw water and sewerage connection through the same and if really the plaintiff had been enjoying any such right, the same would have been reflected in her sale deed marked as Ex.A1 or in the sale deeds of the defendant marked as Exs.B1 and B2.

14. The plaintiff has putforth the case that right from the acquisition of her property and the construction put up therein, she had been drawing water and sewerage connection only through the lane in question and the same cannot be allowed to be interfered with the defendant. As rightly determined by the first appellate

court, the tax receipts projected by the plaintiff ranging from 1991 to 1993 would only go to show that for the past three years alone the plaintiff had been paying the tax with reference to the sewerage connection drawn through the lane in question and with reference to her enjoyment of sewerage connection through the lane in question prior to 1991, absolutely there is no material projected on the part of the plaintiff and therefore, the case projected by the plaintiff that she had been drawing water and sewerage connection through the lane in question from the date of acquisition of her property has been rightly negated by the first appellate court.

15. Further more, as rightly determined by the first appellate court, the plaintiff is not sure as to the nature of the right she seeks to enforce in respect of the suit lane. In such view of the matter, when her entitlement to the suit lane as put forth in the plaint is being seriously repudiated by the defendant in toto, as rightly determined by the first appellate court, the plaintiff should have come forward with the suit for the relief of declaration in respect of the same one way or the other. The failure of the plaintiff to seek the relief of declaration is also fatal to her case.

16. During the course of proceedings in the first appellate court, it is found that the commissioner had been appointed to inspect the property and the commissioner has filed his report and plan marked as Exs.C1 and C2. As rightly determined by the first appellate court, on a perusal of the commissioner's report and plan it is found that the lane is situated on the east of the plaintiff's property of the extent more or less as avered in the plaint and it could also be seen that the drainage water has been running through PVC pipe drawn through the said lane in respect of the plaintiff's property and when it is noted that the plaintiff has no entitlement to draw water and sewerage connection through the lane either by way of absolute right or by way of easementary right and when the plaintiff has failed to establish her entitlement to draw water and sewerage connection through the lane abovestated as per law and when it is seen that the drainage connection of the plaintiff is found to be connected with the defendant's drainage and in such view of the matter, the abovesaid illegality having been noted by the officials concerned, accordingly, they had directed the defendant to set right the matter and following the same the defendant has informed the plaintiff through his counsel to remove the abovesaid offending construction and instead of complying with the same, the

plaintiff is found to have rushed to the court as if she also has equal right to the lane in question. However, as above discussed, when the plaintiff has failed to establish whether her right to the lane in question is either absolute right or easementary right and on the other hand when it is noted that the lane portion forms part of the property belonging to the defendant, when the defendant only has absolute and full right over the lane in question and the plaintiff's drainage and sewerage connection found in the lane being found to be illegally fixed one way or the other, accordingly it is seen that as rightly found by the first appellate court, the plaintiff is bound to remove the same and on the other hand is found to have come forward with the suit with untenable allegations as if the defendant is attempting to interfere with her alleged possession and enjoyment of lane in question.

17. In the light of the above discussions, when the plaintiff's entitlement to the lane in question is not made out in any manner as per law, the first appellate court is fully justified in setting aside the judgment and decree of the trial court and dismissing the suit laid by the plaintiff, hence no interference is called for with reference to the same in any manner.

18. In the light of the above discussions, the substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendant.

19. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

19.02.2019

Index : Yes/No
Internet: Yes/No
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1. The Additional District / Fast Track Court-V, Chennai
2. The IV Assistant City Civil Court , Chennai.
3. The Section Officer, V.R.Section,
High Court, Madras.

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T.RAVINDRAN,J.

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Pre-delivery Judgment in
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