

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 921 of 2019

P.Mani ..Appellant/Defendant
Vs.
T.Balan ..Respondent/Plaintiff

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree in A.S.No. 254 of 2015 dated 10.07.2018 passed by the Learned IVth Additional Judge City Civil Court, Chennai confirming in O.S.No. 3412 of 2013 dated 14.07.2015 by the Learned XIV Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr. K.Mani

For Respondent : Mr.M.Dinesh for
M/s. Nithyesh & Vaibhav (Caveator)

J U D G M E N T

This second appeal has been filed by the defendant in O.S.No. 3412 of 2013. The said suit was filed by the plaintiff / respondent herein, seeking permanent injunction restraining the defendant in any manner interfering or disturbing the right of the plaintiff to use the common pathway measuring 220 sq.ft. in length and 6 sq.ft in breadth located at the Southern end of Plot No.59 of Corporation Division No.117, Nungambakkam, Egmore Taluk.

2. The plaintiff claims that he is the owner of the 756 sq.ft. in Plot No.59. The total extent of Plot No.59 is about 1512 sq.ft. The defendant is the owner of the remaining 756 sq.ft., having purchased that portion from one Durai, who is the brother of the plaintiff.

3. According to the plaintiff, there is a common pathway on the Southern side of Plot No.59, which known as "Nara Santhu" through which the people in locality go to Bajanaikoil, 2nd Street. The claim is resisted by the defendant contending that there is no such pathway. The defendant also claimed that the

suit has framed without a prayer for declaration is not maintainable. Certain other projections made by the defendant over the said pathway and disputes with reference to providing electricity connection to the house of the defendant led to animosity between the parties. Therefore, according to the defendant, the suit is one to claim a right over the defendant property in the guise of claiming the right over the pathway.

4. The Trial Court after framing necessary issues concluded that the defendant himself has admitted the existence of common pathway. The Trial court further relied upon the boundary recitals i.e., Ex.B1, the sale deed in favour of the defendant to conclude that there is a pathway on the Southern Side of Survey No. 59, which is being used by the public of the area. Upon such finding, the Trial Court granted a decree for injunction.

5. Aggrieved, the defendant preferred an appeal in A.S.No. 254 of 2015. The defendant also filed C.M.P.No. 356 of 2017 seeking leave to produce certain additional evidence. The lower Appellate Court found that the additional evidence that was sought to be produced is not required to enable it to pronounce the judgment on the controversy. On the said finding, the petition to produce additional evidence is dismissed by the lower Appellate Court. On merits, the lower Appellate Court found that the description of property in Ex.B1, sale deed dated 20.02.1996 would show the existence of the pathway. The lower Appellate Court adverted the oral evidence of D.W.1 wherein he has clearly admitted the existence of the pathway. The survey sketch issued by the Central Survey Office, prepared in the year 1964 marked as Ex.P5 also proves the existence of the suit pathway. The lower Appellate Court had also adverted to the order of this Court made in W.P.No. 15672 of 1994 and 15379 of 2000, wherein this Court has observed that the defendant himself has claimed that there is a pathway and the plaintiff was in fact attempting to encroach upon the same while getting electricity connection. On the above factual conclusions, the lower Appellate Court dismissed the appeal confirming the judgment and decree of the Trial Court. Aggrieved, the defendant has come forward with this second appeal.

6. I have heard Mr.K.Mani, learned counsel appearing for the appellant and Mr.M.Dinesh, learned counsel appearing for the Caveator.

7. Mr.K.Mani, learned counsel appearing for the appellant would vehemently contend that the suit as framed is not maintainable in as much as the plaintiff has not sought for declaratory relief. I am unable to agree with the said contention of the learned counsel.

8. No doubt true, defendant denied the existence of the pathway and the legal right of the plaintiff to use the pathway. On facts, both the Courts below have come to conclusion that the existence of the pathway has been proved by substantial evidence and the very documents produced by the defendant would show the existence of the pathway as well as the right of the people in the locality to use the same.

9. In the light of the factual findings of the Courts below and the fact that the plea relating to the maintainability of the suit in the absence of prayer for declaration was not raised before the Courts below and there was no issue framed in that regard, I do not think I can entertain such a plea in this second appeal. Hence, I do not find any question of law and much less a substantial question of law in order to enable this Court to entertain this appeal. Accordingly, the appeal is dismissed without being admitted.

10. The learned counsel appearing for the appellant would however submit that in the guise of using the pathway, the plaintiff is now attempting to interfere with the proprietary rights in the property purchased by him under Ex.B1. It is open to the defendant to take whatever steps he can to protect his rights as a rightful owner of the property purchased by him under Ex.B1.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

Kkn

TO

1.The IV Additional Judge,
City Civil Court, Chennai.

2.The XIV Assistant Judge,
City Civil court, Chennai.

+1cc to Mr.K.Mani, Advocate, S.R.No. 79000

+1cc to Mr.Nithyaesh & Vaibhav, Advocate, S.R.No. 78692

S.A.No. 921 of 2019

VG I(CO)
GN(11/11/2019)