

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.02.2019

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY
S.A.No.358 of 2013
and M.P.No.1 of 2013

1. Premalatha
2. T.R.Nirmal Kumar ... Appellants/Plaintiffs

1. Rajeswari
2. Kumar
3. Vani
4. Manikandan ... Respondents/Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 23.12.2009 made in O.S.No.5886 of 2007 on the file of the Vth Assistant Judge, City Civil Court, Chennai and confirmed in A.S.No.280 of 2011 dated 11.09.2012 on the file of the IIIrd Additional Judge, City Civil Court, Chennai.

For Appellants : Mr. K.P.Gopalakrishnan

For Respondents : Mr. P.B.Balaji for R1
Mr.M.A.Lakshmipathi for R2 to R4

JUDGMENT

Challenge in this second appeal is made by the plaintiffs against the judgment and decree dated 11.09.2012 made in A.S.No.280 of 2011 on the file of the IIIrd Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 23.12.2009 made in O.S.No.5886 of 2007 on the file of the Vth Assistant Judge, City Civil Court, Chennai.

2. The parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction and mandatory injunction.

4. In brief, according to the plaintiffs case, the suit property was purchased by Dilli Mudaliar, he was in absolute possession and enjoyment of the said property bearing Door No.8,

High Road, Choolai. On 06.02.1974 he executed a settlement deed in favour of his daughter D.Girija Ammal under which he had given life interest to his daughter and after her life time to her children who shall enjoy the property with absolute right. The properties settled in favour of Girija Ammal and her children bearing door Nos.47,49,51 Choolai Bazaar Road, Choolai, Chennai - 600 112. The said Girija Ammal died on 21.07.2002 leaving behind her only son C.B.Srinivasan. The said Srinivasan is the only legal heir of Girija Ammal as absolute owner sold land and building measuring 1843 sq.ft to one Sivanandham and Sasikala on 22.08.2005. Srinivasan also gave power of attorney for the remaining extent of 466 sq.ft in favour of one N.Janarthanam, Sivanandham, Sasikala and C.B.Srinivasan were the absolute owners of the schedule mentioned property. On 30.11.2006, the said Sivanandham, Sasikala and Srinivasan executed a sale deed in favour of the plaintiffs herein for a valuable consideration of Rs.21,00,000/-. The property sold under the sale deed included common right in the common passage on the North side of the property leading to Choolai High Road.

5. The said Dilli Mudaliar executed another settlement deed on 25.05.1974 according to which he had settled 3 properties bearing Door Nos.7/8, 8/8 and 9/8, Choolai Bazaar Road in favour of his daughter Mallikammal. Under the settlement deed only life interest was given to Mallikammal and absolute right to her sons and daughters equally. Ever since, the settlement deed Mallikammal was in possession and enjoyment of the said properties. She died intestate on 16.04.2003 leaving behind her husband Krishnamoorthy, daughter Radhika and son Sathish Kumar as legal heirs. According to the settlement deed the son and daughter of Mallikammal became absolute owners of the suit property. The legal heirs of Mallikammal had executed a registered sale deed in December 2006 in favour of V.Kasiyalan and Mrs.Mallika for valuable consideration. They sold all the three properties. Dilli Mudhaliar also settled three more properties in favour of another daughter Rajeswari. When Dilli Mudaliar purchased the properties measuring about 10 ground and 196 sq.ft. It was agreed that he shall put up a wall on the East side of his property to a length of about 254 sq.ft running North to South. In the settlement deed dated 06.02.1974 the eastern boundary had been mentioned as private road. In the sale deed dated 28.08.2005, by C.P.Srinivasan in favour of Sivanandham and Sasikala common passage had been mentioned. In the sale deed in favour of the plaintiff from Sivanandham and others also the common passage had been mentioned. The sale deed executed by legal heirs of Mallikammal also the common passage had been mentioned. The document in favour of Rajeswari also the common passage had been mentioned. For the houses bearing present Door Nos.26, 27 & 28 the access from Choolai High Road

is only the common passage. The electrical lines, drainage and water pipe, etc., are all situated in the common passage only. The plaintiff is the owner of the properties bearing door Nos.26, 27, 28 and has to use the common passage for the ingress and egress. Nobody can prevent or obstruct the right of the plaintiff in the common passage. The defendants knowing fully well about the common passage and all the owners of the properties having access over the common passage cannot claim any exclusive right in the common passage or put up construction affecting the right of other users of common passage. In spite of the above fact, the defendants have put up the construction over the common passage on the ground and thereby affected the right of the other owners including the plaintiffs. This has caused obstruction in the common pathway. The plaintiff demanded the defendant to remove the illegal construction and encroachment in the common pathway but the defendant did not heed. Hence the suit for injunction restraining the defendant from putting up any further construction and also to remove the construction already put up.

6. The case of the defendants in brief, the third settlement deed was executed by Dilli Mudaliar in favour of the first defendant and this defendant without any modification or alteration to the then existing building constructed by the said Dilli Mudaliar is enjoying and is in possession of the property. The entire buildings over the extent of land owned by Dilli Mudaliar, were constructed by him and there was an understanding among the family members that the passage will be used in common as it and as in where condition. She is using the property as it was constructed and used by Dilli Mudaliar. No construction whatsoever had been made by this defendant. The plaintiffs are recent purchasers and they know the existence of the construction if at all over the common passage and their predecessors in title since having not objected to any construction if at all made in common passage, hence the plaintiffs are estopped under law and in equity to question the same and these plaintiffs are not entitled to raise any objection for the existence of the construction over the passage, without admitting any construction over the common passage. Therefore it is clear that the plaintiffs are not entitled to question the construction that were made by Dilli Mudaliar. Further the structure of building was well in prevalence on the date of the purchase made by the plaintiffs. Therefore the plaintiffs are not entitled to question this defendant with respect to the constructions made decades ago. Suit had been filed as a representative suit for other owners of the property also as per the pleadings in paragraph No.19. Therefore without obtaining permission the suit ought not to have been entertained and hence the same is liable to be dismissed. The plaintiffs property is having staircase leading

to the first floor rising from the passage. The pleading is not particular as to which defendant had put up construction, to what extent and how the same is obstructing the movement of the plaintiffs. Having not specifically pleaded the same, the plaintiffs are not entitled for any reliefs from this Court as such the suit is liable to be dismissed.

7. The suit was filed by the plaintiffs for the following relief:-

a) granting a mandatory injunction directing the defendants or any person claiming right, title or interest under them to demolish all the construction put up by them in the common passage morefully described in the schedule hereunder.

b) granting a permanent injunction restraining the defendants or any person claiming right, interest and title under them from putting up any construction or obstruction in this common pathway morefully described in the suit schedule hereunder and;

8. The plaintiffs are residing at No.8, Choolai High Road, Chennai which is the end of the road. The case of the plaintiff is that as far as the defendants they have constructed beyond the entitlement and further that he has also contended that defendants have also admitted but encroached the public road and trying to put up construction. Therefore he approached this Court by filing the suit directing the defendants to demolish unauthorised constructions and also not to put up any construction on the public road. It was the contention of the defendants that they have not done any unauthorised construction on the public road and further they would not put up any construction in future. Considering the facts and circumstances of the case, the trial Court dismissed the suit and also the plaintiffs filed the appeal before the First Appellate Court. The First Appellate Court also confirmed the trial court judgment and dismissed the appeal.

9. On 25.01.2019, when the matter came up for hearing, this court framed the following substantial question of law, which reads as under:-

1. The courts below having held that there is common passage and the stair case construction of the defendant is in the common pathway are right in dismissing the suit?.

10. The learned counsel for the appellants submitted that they conceded with the judgment and decree passed by the courts below as far as prayer "A" is concerned and as far as prayer "B", the learned counsel for the appellants submitted that the defendants and the residents therein making attempt to put up the construction on the public pathway, therefore it is just and necessary to prevent such unauthorised construction and this

court is required to pass necessary orders restraining the defendants from putting up any construction. The learned counsel further submitted that the Courts below did not consider all the above facts and even though they have specifically pleaded that they are making attempt to put up construction. Further the learned counsel for the appellants also insisted this Court to pass appropriate orders to allow the suit filed by the plaintiff as far as prayer "B" is concerned. Prayer "B" reads as follows:-

"B. Granting a permanent injunction restraining the defendants or any person claiming right, interest and title under them from putting up any construction or obstruction in this common pathway morefully described in the suit schedule hereunder".

11. Per contra, the learned counsel for the defendants fairly submitted that the defendants will not put up any construction on the public pathway as alleged by the appellants.

12. Considering the facts of the case, this Court also deems it fit to pass appropriate orders restraining the defendants as well as the plaintiffs not to put up any construction on the public road as prayed for.

13. Admittedly no one is entitled to put up any construction in the public road; if at all put up any construction, the same is liable to be demolished by the Corporation or local authorities who shall carry out the same, in accordance with law. However, while holding so, this Court directs the defendants as well as the plaintiffs not to put up any construction or obstruction in the common pathway morefully described in the suit schedule property. Accordingly, the substantial question of law formulated in the second appeal is answered in favour of the plaintiffs.

14. The second appeal is partly allowed. No costs. Consequently connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1. The Vth Assistant Judge,
City Civil Court, Chennai.
2. The IIIrd Additional Judge,
City Civil Court, Chennai.

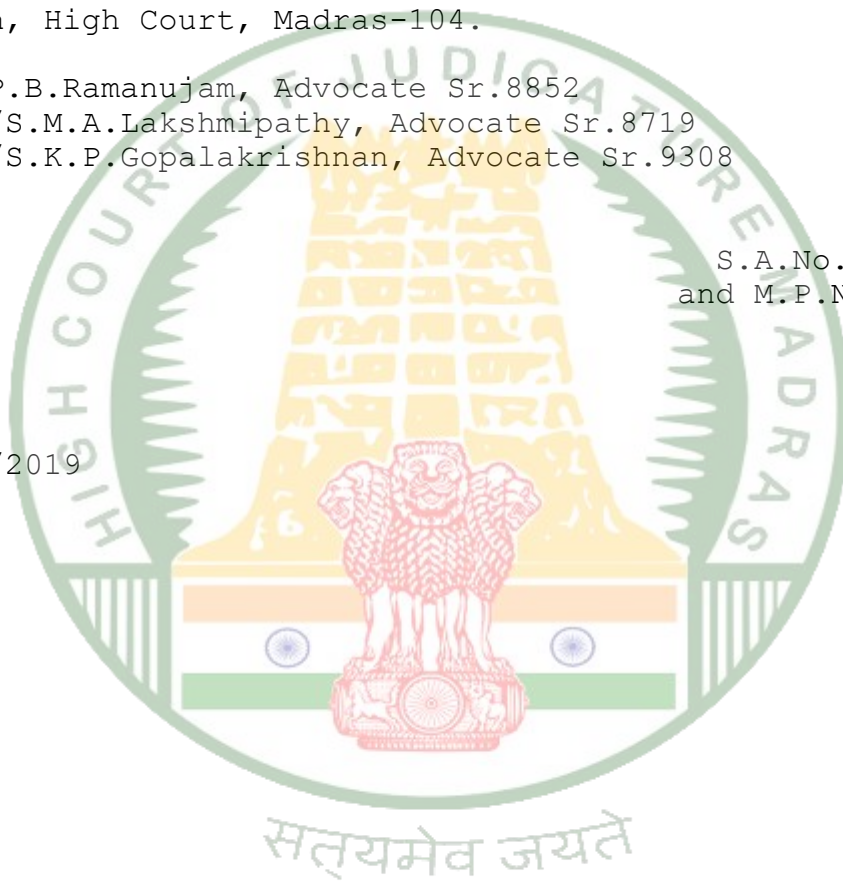
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The Section Officer,
VR Section, High Court, Madras-104.

+1cc M/S.P.B.Ramanujam, Advocate Sr.8852
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+1cc to M/S.K.P.Gopalakrishnan, Advocate Sr.9308

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