

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.08.2019

PRONOUNCED ON : 28.08.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.347 of 2016

Ramachandran @ N.R.Chandran ...Appellant/Appellant/Defendant

Vs.

M.Sundararajan .. Respondent/Respondent/Plaintiff

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 15.09.2011 passed in A.S.No.36 of 2010 on the file of the VII Additional Judge, City Civil Court, Chennai, confirming the Judgment and Decree dated 25.06.2009 passed in O.S.No.2236 of 2006 on the file of the I Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.G.Jawaharlal

For Respondent : Mr.G.Mohanaranjan

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 15.09.2011 passed in A.S.No.36 of 2010 on the file of the VII Additional Judge, City Civil Court, Chennai, confirming the Judgment and Decree dated 25.06.2009 passed in O.S.No.2236 of 2006 on the file of the I Assistant Judge, City Civil Court, Chennai.

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

3.Suit for mandatory injunction and permanent injunction.

4.The suit has been laid mainly for the reliefs in respect of the common passage described in the plaint schedule and according to the plaintiff, he has been enjoying the common passage having a width of 3' for taking water, drainage, electricity connection etc., and also admitted that the defendant is also having right in the passage and the grievance of the plaintiff is that the defendant, while putting up the first floor construction in his property, extended the roof level over the common passage by putting up

centring sheets and coloum boxes, despite the objection put forth by the plaintiff and as the abovesaid offending construction put up by the defendant affected the plaintiff's free access, free flow of air and light through the common passage and hence, according to him, he has been necessitated to institute the suit for seeking appropriate reliefs against the defendant.

5.The defence has been put forth that only after obtaining the oral consent of the plaintiff, the construction over the common passage had been raised by the defendant and the plaintiff had not objected at the time of putting up the construction on the part of the defendant and therefore, according to the defendant, the plaintiff's suit is not maintainable and the same is liable to be dismissed.

6.As regards the plea of the defendant that oral consent had been obtained from the plaintiff, while putting up the first floor construction, particularly, extending over the common passage, there is absolutely no material on the part of the defendant. Similarly, the claim of the defendant that the plaintiff has encroached into his property also cannot be accepted, particularly, in the absence of any material pointing to the same as well as no counter claim having been projected by the defendant with reference to the same.

7.From the materials available on record, both the parties have admitted that common passage belongs to them and in such view of the matter, the defendant cannot be allowed to raise any construction over the common passage so as to obstruct the plaintiff's access through the same as well as prevent the free flow of air and light through the common passage. It is admitted by the defendant during the course of his evidence that the common passage lies to the north of the plaintiff's property and to the east of his property measuring a width of 3'. Furthermore, the mason, who had put up the construction on behalf of the defendant, examined as DW2 has also admitted that the construction had been made by encroaching over the common passage and further, admitted that the construction over the common passage could be removed at any point of time. The argument put forth by the defendant that the construction put up by the defendant over the common passage would not hinder the plaintiff's access through the same, as such, cannot be accepted. When it is found that the common passage is entitled to be utilised by the plaintiff in all ways and in such view of the matter, by putting up the construction over the common passage, as rightly determined by the Courts below, the plaintiff is hindered in having access through the same as well as the free air and light through the passage has also been obstructed to the plaintiff and in such view of the matter, the Courts below are found to be justified in ordering the removal of the offending construction as well

as granting the relief of permanent injunction as prayed for by the plaintiff.

8.The defendant's counsel contended that the first appellate Court has only confirmed the decree of permanent injunction granted by the trial Court and not concurred with the determination of the trial Court and gone into the question whether the plaintiff is entitled to seek the relief of mandatory injunction as prayed for. However, considering the points framed by the first appellate Court for determination and when the first two points pertain to whether the defendant had put up the unlawful construction over the common passage and when those two points had been answered against the defendant and when the first appellate court had also determined that the defendant cannot claim any exclusive right over the common passage and also further determined that by putting up the unlawful construction over the common passage, the free flow of air and light had been obstructed to the plaintiff, in such view of the matter, it is found that the first appellate Court had also gone into the issue whether the plaintiff is entitled to seek the relief of mandatory injunction and accordingly, answering the above two points against the defendant and thereby, concurred with the judgment and decree of the trial Court wholly.

9.The defendant's counsel put forth the contention that the plaintiff being the silent spectator to the construction put up by the defendant and not put forth any objection to the same, in such view of the matter, according to him, the plaintiff is not entitled to seek the relief of mandatory injunction on the ground of acquiescence and at the most, he would only be entitled to compensation. However, considering the materials available on record, when as above pointed out, the defendant has failed to establish that he had obtained the oral consent of the plaintiff in putting up the offending construction and furthermore, when the plaintiff has laid the suit immediately on the raising of the offending construction on the part of the defendant, in such view of the matter, there is no question of any acquiescence on the part of the plaintiff qua the offending construction put up by the defendant and in such view of the matter, the plea of acquiescence put forth by the defendant cannot be applied to the facts and circumstances of the cast at hand.

10.The defendant's counsel, in support of his contention, placed reliance upon the decision reported in 1980 TLNJ 352 (R.S.Muthukrishna Goundar Vs. A.Arunachalam and others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

11.In the light of the abovesaid factors, the Courts

below having assessed and analysed the materials placed on record in the proper perspective as well as the principles of law governing the issues involved between the parties and accordingly, the reasonings and conclusions of the Courts below not suffering from any perversity or infirmity, in all , it is found that the second appeal is not entitled for acceptance.

For the reasons aforesaid, no substantial question of law is found to be involved in the matter and resultantly, the second appeal is dismissed. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

sms

To

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

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

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

+1cc to M/s.G.Jawaharlal, Advocate SR.73520
+1cc to Mr.G.Mohanaranjan, Advocate SR.74521

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CB(16/09/2020)