

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2020

CORAM:

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.2081 of 2004
and CMP.No.17698 of 2004

Chakrapani ... Appellant/ Appellant / 1st Defendant

Vs

1.Saravanan

2.Dhandapani (Died)

.... Respondents / Respondents / Plaintiff,
2nd Defendant

3.Revathy

4.Umamaheswari

5.Parvathavarthini

... Respondents

(Respondents 3 to 5 are brought on record as LRs of the deceased R2, viz., Dhandapani, Vide order of Court dated 18.09.2019 made in CMP.No.15327 to 15329/2019 in S.A.No.2081/2004)

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 13.02.2004 made in A.S.No.16/2003 before the I Additional Sub Court, Cuddalore, confirming the judgment and decree dated 22.11.2002 in O.S.No.32/99 on the file of the Additional District Munsif Court, Cuddalore.

For Appellant : Ms.R.Meenal

For Respondents : Mr.T.Dhanyakumar [R1]

R2 - Died (Steps taken)

R3 to R5 (No appearance)

JUDGMENT

The first defendant in O.S.No.32/1999, which was laid for declaration of the character of the suit property as a common pathway, and a relief for mandatory injunction and also for a relief of prohibitory injunction, who having successively lost both before the trial Court as well as before the first appellate Court, has come forward with this appeal. Parties would be

2. The case falls under a very narrow compass, therefore, the pleadings are only reproduced to the minimum extent required.

- A certain Srinivasa Mudaliar was entitled to a parcel of land. It was a house-site. This plot of land is sandwiched between two streets, one on the north and the other on the south. While so, under Ext.A1, Will dated 02.09.1971, Srinivasa Mudaliar divided the property into five plots and bequeathed each of the plots to each of his five children, of whom, four are sons, and one daughter. The division is as below :

- The northern most plot abutting the street on the north was allotted to his son Deivanayagam. The second plot from the north was allotted to his another son Mohanakrishnan. The third plot from the north (the middle plot) was allotted to Lakshmananadas. The fourth plot from the north was allotted to last of his two sons, Pandurangan. Sulochana is the only daughter and she was given southern most plot. The Will provides that a strip of land with a width of 9 feet along the eastern boundary of the entire plot should be left as a common passage. The dispute is over this common passage.

●The parties here are purchasers from the legatees under Ext.A1, Will. This can be stated as follow :

- So far as the northern most plot, which came to be allotted to Deivanayagam is concerned, he sold his plot on 17.12.1981 to his brother Lakshmanadas, allottee of the middle plot, who in turn had sold the same to the plaintiff Vide Ext.A2, sale deed dated 27.06.1988.
- As regards the second plot from the north, which was obtained by Mohanakrishnan under Ext.A1 Will is concerned, on 16.10.1979, he sold the same to his brother Pandurangan's wife Renganayagi. On 17.12.1981, Renganayagi sold it to one Ramalinga Reddiyar, who in turn had sold it to one Ranganathan on 22.07.1985, and this Ranganathan had sold this plot to the plaintiff under Ext.A3, sale deed dated 22.01.1992. On the basis of Ext.A2 and Ext.A3, sale deeds, the plaintiff acquired title to the northern two plots.
- So far as the defendants are concerned, the first defendant had purchased the middle plot allotted to Lakshmanadas and also the plot to its south allotted to Pandurangan Vide Ext.B1, dated 19.12.1990.
- Sulochana, the allottee of the southern most plot that abuts the street on south, had sold her plot to

the second defendant under Ext.A7 dated 07.09.1994.

- The sales in favour of the parties to the suit are not in dispute.

- While so, the purchaser (1st defendant) who purchased the property from Lakhmanadas and Pandurangan under Ext.B1 sale deed, is stated to have put up an asbestos shed and obstructed the 9 ft., wide portion earmarked for usage as a common pathway, and this has triggered exchange of Ext.A5=Ext.B2, suit notice, followed by a reply from the first defendant under Ext.A6=Ext.B9, reply notice. This was followed by Ext.B3, a rejoinder, and the suit came to be laid.

3.1 When the matter went to trial, both sides adduced oral and documentary evidences. The plaintiff was examined as P.W.1 and Sulochana as P.W.2. For the defendants, the first defendant's wife was examined as D.W.1. In particular, the plaintiff has examined Sulochana, the allottee of the southern most plot as P.W.2. The Court has appointed a Commissioner for local inspection. The Commissioner's report came to be marked as Ext.C1.

3.2 After appreciating the evidence before it, the trial Court found preponderating merit in the case of the plaintiff, and decreed the suit. In the first appeal preferred by the first defendant, the decree of the trial Court came to be confirmed. Hence, the first defendant has come before this Court with this second appeal.

4. This appeal is admitted on the following substantial questions of law :

1. Whether in law the Courts below are right in failing to see that the principles set out in Illustration 7 of Section 128 of the Indian Succession Act would apply to the case and that the legatees under Ext.A1, Will, were not entitled to the legacy as they did not follow the terms of the Will within a reasonable time?
2. Whether in law the Courts below are right in granting the first defendant a decree for mandatory injunction, when admittedly a house existed in the suit property for more than 100 years?
3. Whether in law the Courts below are not wrong in failing to consider the oral and documentary evidence in their proper perspective and in giving perverse findings of fact, thus requiring interferences under Section 100 of C.P.C.,?

5.1 The learned counsel for the appellant argued that P.W.1, the plaintiff in this case, has admitted that at no time, Srinivasa Mudaliar, the original owner of the property had used the suit property as a pathway, nor had any of his legatees ever used the suit property as a pathway. The learned counsel attempted to support it with the testimony of P.W.2, the only surviving children of Srinivasa Mudaliar, at the time when the trial took place, to aid her.

5.2 The learned counsel for the appellant also argued that a suit for declaration of title and for mandatory injunction must be laid within three years of arising of the cause of action, and inasmuch as the plaintiff had purchased the properties under Ext.A2 and Ext.A3, the latest of which is 1992, the suit should have been laid in 1995, but was laid only in 1999. Here, the sale in favour of the appellant was prior to Ext.A3, in the year 1990. If the pathway has not been used at any time, then the plaintiff cannot seek a declaration for existence of a pathway some 11 years after he had made his first purchase under Ext.A2. She also argued that the shed has always been there in the portion, which the plaintiff contends is a part of the common passage.

6. Per contra, the learned counsel for the first respondent/ plaintiff would argue that it is not Ext.A1 Will, alone which indicates that a strip of land was earmarked for usage as a common pathway, but, Ext.A2 and Ext.A3, sale deeds in favour of the plaintiff and Ext.A7 in favour of the second defendant, also indicate the same. Only in Ext.B1, sale deed, under which the first defendant had purchased the property, the pathway portion is shown as Item Nos.2 and 3, and has been shown as an independent plot of land without reference to any pathway.

7.This Court considered the rival submissions and perused the materials placed on record.

8.1 As to the first leg of the argument of the learned counsel for the appellant, that the portion in the suit property has never been used as pathway is concerned, the entire property is bounded on the east and west by the properties of third parties. The access to the property is only from the north and the south, where there are two streets abutting the property. And, if this property has to be divided from north to south into five plots, and if a passage is not provided, then the legatees of the northern most plot (Deivanayagam) and the southern most plot (Sulochana) alone would have access to the main street, either on the north or on the south. Admittedly, between the northern most plot and southern most plot, there are three other plots, of which the one allotted to Mohanakrishnan was purchased by the plaintiff and the plots allotted to Lakshmanadas and Pandurangan,

was purchased by the first defendant. When the passage is not there, then Mohanakrishnan, Lakshmanadas and Pandurangan would never have access. Therefore, the argument of the counsel that a strip of land with a width of 9 ft., along the eastern boundary of the entire property as has been indicated in Ext.A1 Will, was never used as a passage, will be fallacious in the face of ground reality, affecting the property.

8.2 The next point to be considered is, there was an asbestos shed put up obstructing the pathway, in the next three years time before the institution of the suit. Ext.B1, sale deed is of the year 1990, and it did not mention about this shed, obstructing the pathway. The Commissioner finds that this pathway does not have a door number, which implies the asbestos shed was not assessed to property tax.

8.3 The entire evidence on record does not indicate that the obstruction has come well before three years prior to the date of the suit in 1999. Necessarily, the available evidence preponderates the probability that the building ought to be a recent origin. At any rate, the finding as to the common passage, and the obstruction made on it by the first defendant is a question of fact, and even a probable finding on them would not invite the interference of this Court in the second appellate stage, unless the first defendant / appellant could pin-point any perversity in appreciating the evidence by the Courts below. If the sale deeds are analysed, they all trace title of the respective vendors to Ext.A1, Will executed by Srinivasa Mudaliar. As already indicated, this Will recites that 9 ft., width strip of land along the eastern boundary be left for usage as a common pathway for all the five legatees under the Will. This implies, the plaintiff starts with an advantage.

9. The valiant efforts of the learned counsel for the appellant does not extend to the extent of convincing this Court that the findings of the Courts below are very perverse.

10. In conclusion, the appeal is dismissed and the judgment and decree dated 13.02.2004 made in A.S.No.16/2003 before the I Additional Sub Court, Cuddalore, confirming the judgment and decree dated 22.11.2002 in O.S.No.32/99 on the file of the Additional District Munsif Court, Cuddalore, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To:

1.The Additional District Munsif
Cuddalore.

2.The I Additional Sub Judge,
Cuddalore.

3.The Section Officer
VR Section, High Court, Madras

1 cc to MR.T.Dhanyakumar, Advocate, Sr. 23381

1 cc to M/s. R. Subramanian, Advocate, Sr. 22908

S.A.No.2081 of 2004

SAI (CO)
kk 28/12



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