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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.07.2021
PRONOUNCED ON : 27.07.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1608 of 2008
& M.P.Nos.1 of 2008 and 1 of 2014

Ms.Selvarani ...Appellant/3rd Respondent/3rd Defendant

Vs.

1. S.Srinivasa Chettiar ...1st Respondent/Appellant/Plaintiff
Kulandaivelu (died)

2. Ms.Suseela ...2nd Respondent/2nd Respondent/2nd Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 18.08.2008 passed in A.S.No.20 of 2004 on the file of the Subordinate Court, Namakkal reversing the judgment and decree dated 31.03.2004 passed in O.S.No.657 of 1997 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.Bharath Gowtham
for T.R.Rajaraman

For Respondent-1: Mr.Mukunth
for M/s.Sarvabhauman Associates

Respondent 2 : No Appearance

J U D G M E N T

The 3rd defendant in O.S.No.657 of 1997, on the file of the learned Principal District Munsif, Namakkal, is the appellant herein. Before the said Court, the 1st respondent herein filed the above referred suit, as against the appellant and two others, seeking the relief of declaration, declaring the property shown in rough sketch as 'P1', is the absolute property of plaintiff and for consequential injunction restraining the defendants from putting the sewerage water and sunshade and for costs.



2. By judgment and decree dated 31.03.2004, the learned Principal District Munsif, Namakkal, had dismissed the suit in entirety.

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3. Aggrieved over the said findings, the plaintiff preferred an appeal, in AS No.20 of 2004 on the file of the learned Subordinate Judge, Namakkal. By judgment and decree dated 18.08.2008, the learned Subordinate Judge, Namakkal, had allowed the appeal filed by the plaintiff and granted the decree, as prayed for in O.S.No.657 of 1997. Feeling aggrieved over the judgment and decree dated 18.08.2008, the 3rd defendant in the suit, preferred this second appeal.

4. For the sake of convenience, hereinafter, the appellant is called as '3rd defendant' and the 1st respondent is called as 'plaintiff'.

5. The laconic averments made in the plaint, are as follows:

(i) Originally the suit schedule property belongs to one Kandasamy Pandaram. On 31.01.1962, the plaintiff has purchased the said property for a valuable consideration of Rs.5,000/-. After made purchase, the plaintiff constructed two houses in the said land and as of now his daughters are residing there. The Door numbers pertains to the suit property is No.46 and 46A. The 1st defendant owns the property on the western side of the suit schedule property. He has also constructed a house in his property and handed over the same to his daughters. The door numbers pertains to the 1st defendant's property are 46B and 47.

(ii) When at the time of constructing his house, in order to put up the sunshade, staircase and also for receiving air and light, the plaintiff left two feet width land on the western side of his building. In the appending plan, the constructed portion of the plaintiff, was marked as 'P'. The disputed land measuring two feet width available in between the properties of plaintiff and the defendant, is shown as 'P1' and the property belonging the defendant is shown as 'D'.

(iii) Now, on 15.11.1997, during the time of construction, by encroaching the plaintiff's land, the defendants have set up the drainage pipe in 'P1' area. Further, they attempted to put up a sunshade in the area left out by the plaintiff. The efforts made by the elderly people for compromising the issue, all ended in vain. Hence, the suit.

6. The averments found in the written statement filed by the defendants, are as follows:



(i) The averments found in the plaint are entirely false. Only with the help of the defendants, the plaintiff has purchased his property. The property belongs to the defendants are all purchased in the name of the 2nd defendant with the constructed building. After made purchase, the 2nd defendant made some repair works on the northern side of his property and thereafter, he was residing in the said portion. The 3rd defendant is also residing in the eastern portion of his property for the past 10 years.

(ii) The entire building now in the possession of the 3rd defendant was constructed on the basement, which is found available before their purchase. While at the time of constructing the house by the predecessor in title of the plaintiff and defendants, both of them entered into a compromise and left two feet commonly for their usage. Accordingly, 'P1' marked area belongs to both plaintiff and defendants. The drainage water pertains to both building are running through the said area. There was no attempt made by the defendants by putting the sunshade and by putting the drainage pipe. Even assuming that the Court has come to the conclusion that the disputed property belongs the plaintiff, the defendants are having the right to enter into the said property for the purpose of white washing and repairing their property. The suit filed by the plaintiff is liable for dismissal.

7. Based on the abovesaid pleadings, the learned Principal District Munsif, Namakkal, framed necessary issues and tried the suit. On the side of the plaintiff, the plaintiff examined himself as PW1 and marked two documents, as Ex.A1 and Ex.A2. On the side of the defendants, the 1st defendant-Kulandaivelu was examined as DW1 and marked two documents as Ex.B1 and Ex.B2. Apart from that, the learned Advocate Commissioner, appointed by the trial Court for noting down the physical features was examined as CW1 and further, his reports and plan were marked as Ex.C1 to Ex.C4.

8. Having considered the materials placed before him, the learned Principal District Munsif, Namakkal, vide judgment and decree dated 31.03.2004, dismissed the suit filed by the plaintiff.

9. Aggrieved over the same, the plaintiff preferred an appeal in AS No.20 of 2004 on the file of Sub Court, Namakkal. By judgment and decree dated 18.08.2008, the learned Subordinate Judge, Namakkal, reversed the findings arrived at by the trial Court and decreed the suit, as prayed for.

10. Aggrieved over the said findings of the Court below, the 3rd defendant is before this Court with the present Second



Appeal. When the Second Appeal came up for admission, this Court formulated the following substantial questions of law.

"a. When the suit being one for declaration of title and it is settled in law the plaintiff has to succeed in his case on the strength of his case, is the learned Sub Judge correct in reversing the judgment and decree of declaration and injunction, when the plaintiff failed to prove that the disputed passage is a common passage?

b. When the plaintiff himself has admitted, construction to an extent of 42 feet leaving the western side passage still, is the learned Sub Judge right in granting decree?

c. When the plan filed by the Commissioner clearly shows that the area of the occupation of the plaintiff is 13.8 metres (feet), is the learned Sub Judge right in ignoring the said evidence and granting a decree in favour of the plaintiff?

d. Is the learned Sub Judge right in granting a decree for injunction with reference to projecting sunshade and drainage sullage water in favour of the plaintiff especially, when the evidence clearly discloses the lane, obviously a passage is a common one and the report of the Commissioner proves the same?

Substantial Questions of Law (a) to (d):

11. It is an admitted case of either side that the plaintiff has purchased his property, vide Ex.A1-Sale Deed dated 31.01.1962. Similarly, the defendants have have purchased their property vide Ex.B1 and B2 sale deeds dated 25.09.1978. Further, the property purchased by the defendant was situated in the western side of the suit property.

12. It is also an admitted fact that there was a passage, measuring two feet width situated in between the houses owned by the plaintiff and the defendant. In respect to the same, for easy understanding, along with the plaint, the plaintiff has appended a rough sketch, in which he has marked the disputed area as 'P1'. Further, the said rough sketch was marked as Ex.A2.

13. Before this Court, in respect to the substantial questions of law framed, the learned counsel appearing for the appellant/3rd defendant would contend that in the evidence given by PW1, he has admitted that the building constructed by him was only on the compound wall, which was situated at the time of his purchase.



14. He would further contend that the first appellate Court while at the time of disposing the appeal, held that since the defendant has claimed the title in the suit passage, he is having the duty to prove his title in the suit passage. He added further that the said findings arrived at by the first appellate Court is not within the law already enumerated. He would further add that being the plaintiff, the plaintiff alone has to prove his case, by producing the substantial documents, but in this case, in order to prove his title, in respect to suit passage, the plaintiff has not produced the substantial documents and therefore, decreeing the suit is erroneous in law.

15. Per contra, the learned counsel appearing for the respondent/plaintiff would contend that the admission made by the defendant in his cross-examination is sufficient to hold that the plaintiff's claim is genuine. According to him, the findings arrived at by the first appellate Court is within the four corners of law.

16. Now, on considering the said submissions with relevant records, it is true, while at the time of disposing the appeal, the first appellate Court has held that the defendant is also having the duty to prove his title in the suit passage. In this regard, this Court is of the view that the stand taken by the first appellate Court is found not correct.

17. In the case of A.Subramanian and another Vs. R.Paneer Selvam, in Civil Appeal No.9472 of 2010 [decided on 08.02.2021], our Hon'ble Apex Court has clearly held that the plaintiff cannot take any advantage of the weakness of the case of the defendants. In the said judgment, it is held as follows:

" In the suit for declaration for title and possession, the Plaintiffs-Respondents could succeed only on the strength of their own title and not on the weakness of the case of the Defendants-Appellants. The burden is on the Plaintiffs-Respondents to establish their title to the suit properties to show that they are entitled for a decree for declaration."

Therefore, by applying the ratio laid down in the above judgment to the case in hand, the stand taken by the first appellate Court in respect to the burden of proof, is not found correct.

18. However, before the trial Court, the learned Advocate Commissioner, who has been appointed by the trial Court to note down the physical features of suit property was examined as CW1, further, the reports and plan filed by the learned Advocate Commissioner were marked as Ex.C1 to Ex.C4.



19. While at the time of examining the learned Advocate Commissioner as a witness, he has specifically stated in his chief examination as the property pertains to the suit has not been surveyed based on the title deed having by the respective parties. He has conceded that the measurement found in the plan prepared by the Surveyor is not accurate and genuine. Therefore, it is made clear that the property pertains to the suit has not been measured according to the title deed. Therefore, in the said occasion, it is necessary to find out the title only by considering the surrounding circumstances and also by considering the admission made by either parties.

20. Before the trial Court, the 1st defendant-Kulandaivelu has been examined as DW1. He has admitted in his cross-examination as in Ex.B2, title deed, it was not stated that there was a vacant site available in the width of 1.5ft. He has also admitted that in respect to the common passage, nothing was mentioned in the title deed. He had admitted that in respect to the four boundaries, it was mentioned as the property purchased was West to the property which belongs to Srinivasa Chettiayar. So the admission made by the defendant is clear that he is not having any title document for showing the common passage.

21. On the other hand in respect to the same, PW1, has stated before the trial Court as while at the time of purchasing his property, there was a compound wall available in the western side. Further he has stated that the purchasers of the western portion have constructed their building only over the compound wall constructed by their predecessor.

22. In this regard, DW1 has also admitted that when at the time of purchasing his property, the same was a vacant site and the compound wall was available there. He has further admitted that only on the compound wall he has made further construction. So, the said evidence of DW1 is very clear that he is not having any property on the Eastern side of the compound wall.

23. The admitted case of the plaintiff and the defendant is that in the disputed area, already the plaintiff has constructed a staircase and also put up a drainage pipe. It is also an admitted case that the gap between the staircase and the defendant's building is just 1 or 2 inches. In the said situation, if really, either the defendant or his vendors, had land in the disputed area, definitely they would not have permitted the plaintiff to construct a staircase in the disputed area. Further, till the filing of the suit, neither the defendant nor his predecessor has constructed any permanent structure in the disputed area. Therefore, in all, the circumstances found in and around the case of the plaintiff



shows that the plaintiff's vendor alone left the disputed area for their convenience usage. The first appellate Court has also traversed in the same footing and decided the appeal in favour of the plaintiff. Therefore, this Court is of the opinion that there was no error in the findings arrived at by the first appellate Court.

24. Further, while at the time of deciding the issues in favour of the plaintiff, the first appellate Court granted Urban Servitude [நகர்ப்புற வசதியளிமை] to the defendant, particularly for white washing and for repairing the eastern wall constructed by the defendant. Since already as the defendant is not having any right in the disputed area, considering the facts and circumstances of the case, it is necessary to grant such right to the defendant for the purpose of maintaining his eastern side wall. So in that aspect also this Court is agreeing with the view taken by the first appellate Court.

25. Therefore, in the light of the above discussions, the substantial questions of law raised in this appeal are all answered, as above and the Judgment and decree dated 18.08.2008 passed in A.S.No.20 of 2004 on the file of the Subordinate Court, Namakkal reversing the judgment and decree dated 31.03.2004 passed in O.S.No.657 of 1997 on the file of the Principal District Munsif Court, Namakkal, is hereby confirmed. However, the defendants are at liberty to enter into the disputed 'P1' area after giving one day advance notice to the plaintiff only for the purpose of maintaining their eastern side wall.

26. With the above observations, the Second Appeal is dismissed. No Costs. Consequently, the connected Miscellaneous Petitions are closed.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

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To

1.The Subordinate Judge, Namakkal

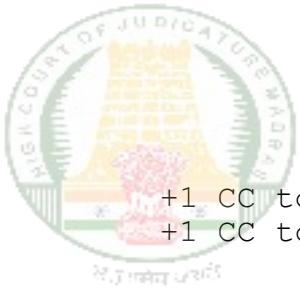
2.The Principal District Munsif, Namakkal

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The Section Officer

VR Section

High Court, Madras 104.



+1 CC to M/s. Sarvabhuvan Associates sr 35756
+1 CC to Mr.T.R. Rajaraman, Advocate sr 36471.

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GPL (CO)
SP (02/11/2021)