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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.07.2021

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A.No.830 of 2008

and

CMP.No.1 of 2008

1. R. Krishnamoorthy (Deceased)
 2. Mrs. K. Vishnu Priya
 3. Mrs. R. Sridevi
 4. Mr. K. Ramanujam
- (Appellants 2 to 4 brought on record
as LRs of the deceased)

...Appellant/Appellant/Plaintiff

versus

1. R. Govindarajan

...Respondent/Respondent/Defendant

Second Appeal filed against the judgment and decree dated 25.04.2006 passed in A.S.No.685 of 2005, on the file of II Additional City Civil Judge at Chennai concurring the decree and judgment passed in O.S.No.1941/99 dated 17.09.2003 on the file of VIII Assistant City Civil Judge, Chennai.

For Appellants : Mr. George Graham
for M/s. Devadason and Sager

For Respondent : No appearance

JUDGMENT

The plaintiffs are the appellants before this Court challenging the judgment and decree in A.S.No.685 of 2005 on the file of the II Additional Judge, City Civil Court, Chennai confirming the judgment and decree of the VII Assistant, City Civil Judge, Chennai in O.S.No.1941 of 1999 dated 17.09.2003.

2. The suit was originally filed by R.Krishnamoorthy, against the respondent/defendant herein. Krishnamoorthy died pending the appeal and the appellants have been brought on record as his legal representatives.

3. The suit in question was filed by the plaintiffs for the following reliefs:



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a) for a mandatory injunction directing the defendant to remove the constructions which are made on the top of the common pathway even though objected to repeatedly;

b) for a permanent injunction restraining the defendant from putting up any construction on the common pathway and also any construction which obstructs the light and air of the plaintiff's portion in the 1st floor.

Case of the Plaintiffs:

4. The case of the plaintiffs is that the suit property which formed a part of the house and ground bearing Door No.32, Mosque Street, Saidapet originally belonged to the first plaintiff and defendant's father Mr. Rengaramanuja Mudaliar. The said Rengaramanuja Mudaliar owned other two properties as well. He had executed a registered Will dated 19.01.1989 in which he had appointed one P.Kulash as a sole executor. Rengaramanuja Mudaliar passed away on 27.06.1993 and the executor had filed a petition for probate of the said Will in O.P.No.371 of 1996. The petition was allowed by this Court by order dated 10.01.1997. As per the Will, the plaintiff's father had bequeathed a portion of the property to the plaintiff and defendant and another portion to his grandson Prabakaran through his predeceased son. Under the Will, the portion allotted to the plaintiff was marked as C Schedule, the defendant was allotted B Schedule and minor Prabakaran was allotted D Schedule. The said Prabakaran being a minor his portion was leased out by the Executor.

5. It is the further case of the plaintiff that the portion which was allotted to the defendant abutted Mosque street and measured North to South 12 ½ feet, East to West 38 feet. The plaintiff's portion which was adjacent to the property allotted to the defendant measured North to South 12 ½ feet and East to West 38 feet and the portion behind the plaintiff's property was the portion allotted to minor Prabakaran which also measured North to South 12 ½ feet, East to West 33 feet. Under the Will, a common passage measuring 3 ½ feet North South and 33 feet East to West was left for the use of the plaintiffs, defendants and their men. That apart, a portion of the property measuring North South 12 ½ feet East West 4 feet between the portions allotted to the plaintiffs and minor Prabakaran was left in common in which there was a common staircase, common well and a toilet. The portion that was allotted to the defendant consisted of a shop portion abutting the road. The defendant demolished the shops and after demolishing put up a terrace building in the ground floor.



6. The plaintiff would contend that the defendant had chosen to close this pathway on the Southern side of his portion by putting up a concrete construction on the pathway. The plaintiffs' portion consists of both ground and first floor and the first floor portion had a window opening into the portion allotted to the defendant through which the plaintiff has been enjoying air and light without interruption for well over the prescribed period.

7. The defendant without leaving any space for light and air to enter into the premises has constructed the first floor which has now made the window of the plaintiff's property redundant. Despite several attempts to mediate, the defendant had refused to demolish the construction and on the contrary had started threatening the plaintiff. Therefore, left with no other alternative the plaintiff had come forward with the above suit.

Written Statement of the defendant:

8. The defendant had filed a written statement inter alia denying the various allegations set out by the plaintiff. The defendant had categorically stated that he had not put up any obstructions in the pathway and on the contrary an additional width of 2 to 3 feet has been provided. The defendant had put up a construction in the portion allotted to him. The defendant would further submit that the defendant's enjoyment of light and air through the windows situate on the Southern Western and Northern sides had not been obstructed in any manner and the plaintiff could not claim any easementary right to light and air through the window situate on the eastern side, since that portion has been allotted to the defendant.

9. The defendant would further submit that the suit filed for a mandatory and permanent injunction without seeking the relief of declaration for the easementary right was not maintainable.

Trail Court:

10. Trail Court framed the issues and recasted the same which reads as follows:

" 1. Whether the plaintiff has made any encroached construction over the common passage?

2. Whether the plaintiff is entitled to mandatory injunction as prayed for ?

3. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for ?



4. To what relief is the plaintiff entitled ?''

11. The plaintiff had examined himself as P.W.1 and marked 8 documents on his side. On the side of the defendant, he examined himself as D.W.1 and one Kulashekaran one of the brothers of the plaintiff and defendant who was given in adoption as DW2. An Advocate Commissioner had been appointed for local inspection and his report and plans been marked as Ex.C.1 to C.3.

12. The learned Assistant City Civil Judge on considering the evidence on record, had partly decreed the suit by granting a permanent injunction restraining the respondent from putting up any further construction over the suit common passage in the first floor. This order was passed after the learned Judge had perused the commissioner's report and plan. The learned judge has also noted the fact that the construction over the suit pathway had been made only in the first floor which caused no hindrance or obstruction to the plaintiff ingress and egress into his property. Therefore, the learned judge had restricted the injunction to the putting up of further construction in the common passage on the first floor. The said judgment and decree was challenged by the plaintiff by filing A.S.No.685 of 2005 on the file of the II Additional City Civil Court, Chennai. The learned Judge confirmed the judgment and decree of the Trial Court. It is challenging the same that the present appeal has been filed.

Question of Law:

13. The Second Appeal was admitted on the following substantial question of law:

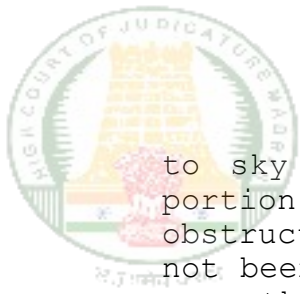
" When the Trial Court and the Appellate Court found that the defendant has encroached and put up construction in the common pathway, whether the refusal to grant mandatory injunction is justified."

Submissions:

14. Mr. George Graham, learned counsel appearing on behalf of the appellant would contend that the Lower Appellate Court having found that a construction had been put up over the suit pathway in the first floor which was beyond the portion allotted to the defendant ought to have followed it up with a decree for mandatory injunction. Apart from the above submissions, no other submission has been made by the learned counsel.

Discussion:

15. From a perusal of the Advocate Commissioner's report, it is seen that the original common pathway in the first floor had ended at the points Q P and from the points Q to R it was open



to sky and therefore the plaintiff was never in use of that portion. As regards pathway in the ground floor there is no obstruction and the ingress and egress through the pathway has not been obstructed. It is only a roof that has now been put up over the pathway. Therefore, there is no error in the judgment and decree of the Courts below. Further, the decree for permanent injunction has not been challenged by the defendant and consequently, the defendant cannot put up any further construction in the portion which is the extension into the area which was open to the sky and extending from the old pathway. Therefore, the question of law is answered against the plaintiff and the Second Appeal stands dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

s/d-
Assistant Registrar(CS-VII)

True Copy

Sub-Assistant Registrar

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To

- 1.The II Additional City Civil Judge, Chennai
2. The VIII Assistant City Civil Judge, Chennai.

S.A.No.830 of 2008
and
CMP.No.1 of 2008

GPL(CO)
SP(16/09/2021)