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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.No.756 of 2016

J.Rock Beller

.. Appellant/Plaintiff

Vs.

1. S. Krishnan

2. S.Mohan

.. Respondents/Defendants

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 16.06.2016 made in A.S.No.18 of 2016 on the file of the VI Additional Judge, City Civil Court at Chennai, reversing the judgment and decree dated 10.07.2015 in O.S.No.2775 of 2012 on the file of the XVI Assistant Judge, City Civil Court at Chennai.

For Appellant : Mr.M.J.Jaseem Mohammed

J U D G M E N T

The present Second Appeal has been filed against the judgment and decree dated 16.06.2016 made in A.S.No.18 of 2016 on the file of the VI Additional Judge, City Civil Court at Chennai, reversing the judgment and decree dated 10.07.2015 in O.S.No.2775 of 2012 on the file of the XVI Assistant Judge, City Civil Court, Chennai.

2. The plaintiff is the appellant. He filed a suit for permanent injunction on the basis of the title of his vendor for using six feet common pathway. According to the plaintiff, the property originally belonged to one Ponnusamy, who had three sons namely, P.Singaram, P.Aruldoss and P.Bairavan. He died intestate leaving behind his three sons. All the three sons also died intestate leaving behind their children as legal heirs. The legal heirs have entered into an oral partition for the entire extent in S.No.140. The plaintiff purchased the shares of children of P.Aruldoss and P.Bairavan Subsequent to the oral partition made among the legal heirs. Six feet common pathway was left for use of all the shareholders including the vendor of the plaintiff and the defendants.



3. Even during the life time of the plaintiff's vendor's father namely, P.Aruldoss, the defendants prevented him from laying electricity cable in the ground across the said common pathway. Therefore, he filed a suit in O.S.No.3060 of 1990 on the file of the IV Assistant City Civil Judge, Chennai and it was decreed on 20.12.1993. On purchase of this property from legal heirs except the defendants, the plaintiff has right to use six feet common pathway. However, the defendants disturbed and prevented the plaintiff from using the said common path way. Therefore, he issued a legal notice on 16.04.2012 and lodged a complaint to the Commissioner of Police on 20.04.2012. On the enquiry conducted on 21.04.2012, the Police advised them to approach the Civil Court for appropriate remedy. Hence, he filed a suit for injunction.

4. Before the trial Court, the plaintiff examined himself as P.W.1 and the vendor was examined as P.W.2 and one another witness as P.W.3 and marked documents as Ex.A1 to Ex.A18. On the side of the defendants, they examined themselves as D.W.1 and D.W.2 and marked a document, Ex.B1. After elaborate trial, the trial Court decreed the suit, against which, an appeal was filed and the Lower Appellate Court reversed the findings of the trial Court and dismissed the suit. Aggrieved over the same, the plaintiff is before this Court.

5. According to the plaintiff/appellant, the judgment of the First Appellate Court is against the law and the valid decree passed in previous suit and also the finding of the Lower Appellate Court that declaratory relief has to be sought is contrary to rudimentary principles laid down by the Hon'ble Supreme Court.

6. I have heard the submissions made by Mr.M.J.Jaseem Mohammed, learned counsel for the appellant.

7. The Lower Appellate Court while reversing the judgment has held that the finding of the trial Court on the issue of title on the basis of the ex parte judgment is not sustainable. Further, it is held that the partition deed will not confer the title of the parties. It is also observed that the plaintiff should have filed a comprehensive suit seeking for relief of declaration and consequential relief of injunction or possession as the case may be. Therefore, it was held that the suit is not maintainable.

8. The learned counsel for the appellant would submit that if the matter is remanded back, he would work out his remedy before the trial Court. In this regard, it is to be stated that the First Appellate Court has held that the Court fee was paid only for permanent injunction and not for declaration of title. Therefore, it is not feasible to remand the suit.



9. The learned counsel for the appellant would further submit that in that event, he may be permitted to withdraw the Second Appeal with liberty to file a comprehensive suit for declaration of title and consequential relief.

10. Accordingly, the appellant is permitted to withdraw the suit with liberty to file a comprehensive suit for declaration of title and consequential relief. Hence, the Second Appeal is dismissed as withdrawn. There shall be no order as to costs.

Sd/-
Assistant Registrar (CS-IX)

// True Copy //

Sub Assistant Registrar

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To

1. The VI Additional Judge, City Civil Court, Chennai.
2. The XVI Assistant Judge, City Civil Court, Chennai.

Copy to

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

S.A.No.756 of 2016

RSI(CO)
B.VC (28/10/2021)