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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

S.A. NO.93 OF 2017

AND

C.M.P.NOS.17310 OF 2018 AND 1852 OF 2017

1.S.Dhanasekar

2.S.Chandrasekar

.. Appellants/
Respondents 2 &3/Defendants 2 &3

Vs

1.G.Krishnamoorthy

2.Anusiya

3.Hemalatha

4.S.Kishore Kumar

.. Respondents/
Appellants 1-4/Plaintiffs 2-5

Second Appeal filed under Section 100 of Civil Procedure Code, 1908, against the judgment and decree of the learned XV Additional Judge, City Civil Court, Chennai, made in A.S. No.161 of 2015 dated 06.08.2016 partly reversing the judgment and decree of the learned XVIII Assistant Judge, City Civil Court, Chennai made in O.S. No.3986 of 2011 dated 18.02.2015.

For Appellants	:	Mr. M.Balasubramanian
For Respondent	:	M/S.N.Srinivasulu for RR 1 to 4

JUDGMENT

This Second Appeal is preferred by the defendants 2 and 3 in suit in O.S. No.3986 of 2011 on the file of the XVIII Assistant Judge, City Civil Court, Chennai. The respondents in this second appeal filed the suit in O.S. No.3986 of 2011 to declare the passage described in the Schedule-B in the sale deed dated 30.07.1975 as their exclusive passage and for mandatory injunction directing defendants 1 to 3 to remove the building erected by encroaching a portion of the said passage. The suit is also to declare the settlement deed dated 17.10.2008, executed by the first defendant in favour of defendants 2 and 3 as null and void in respect of half share in the pathway described as Schedule-B.



2. The case of the respondents before the trial Court is that the father of plaintiffs 1 and 2 and the first defendant are brothers. It is admitted that the father of plaintiffs 1 and 2 and the first defendant purchased a property bearing old No.26, New Door No.3 Dharmaraja Street which is also known as Gopal Menon Street, Chennai, by a sale deed dated 30.07.1975. It is also admitted that as per the sale deed, the property more specifically described in Schedule-B was conveyed in favour of plaintiffs 1 and 2 and the property more specifically described in Schedule-C was conveyed in favour of first defendant. It is the case of the plaintiffs that the Schedule-B as described in sale deed clearly shows that the common passage marked as No.3 in the plan annexed to the sale deed was conveyed only in favour of the father of plaintiffs 1 and 2. Stating that the property that was conveyed in favour of the first defendant does not include any portion of passage, it is contended that plaintiffs 1 and 2 are the exclusive owners of B schedule along with the common passage as per the sale deed. In the plaint it is stated that the plaintiffs are in continuous possession and enjoyment of the passage along with the property described as B-Schedule in the sale deed. It is also the case of the plaintiffs that the defendants have made temporary structure obstructing the passage and therefore they are entitled to a decree for mandatory injunction directing the defendants 1 to 3 to remove the building erected in the encroached portion of the passage.

3. The trial Court after framing necessary issues dismissed the suit even after holding that the plaintiffs are entitled to use the passage described within B schedule in the sale deed dated 30.07.1975. The trial Court considered the admission of P.W.1 during his cross examination to the effect that a stair case was constructed by the first defendant, facing the common passage, and that the stair case is being used by the first defendant from the year 1978. The trial Court, based on the admission of the plaintiff to the effect that the defendants are also enjoying the right of easement, found that the plaintiffs cannot be granted a decree for exclusive title over the passage in the plaint B-Schedule. Since the passage itself is described as 'Common', the trial Court held that the plaintiffs are not entitled for declaration that B-Schedule passage is their exclusive passage. Since the exclusive title over plaint B-Schedule was negatived, the trial Court also refused to grant prayer to declare the settlement deed as null and void. The decree for mandatory injunction was also negatived by the trial Court. Aggrieved by the judgment and decree of the trial Court, an appeal in A.S. No.161 of 2015 on the file of XV Additional City Civil Court, Chennai was filed, whereupon, the lower appellate Court set aside the judgment and decree of the trial Court and granted relief to the plaintiffs declaring the



exclusive ownership of the plaintiffs over the common passage. Consequently, other reliefs are also granted in favour of the plaintiffs. Aggrieved by the same, the above second appeal is preferred by defendants 2 and 3.

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4. At the time of admitting the second appeal, this Court framed the following Substantial Questions of Law:

" 1. Whether the first appellate Court is right in holding that the plaintiffs are the exclusive owners of common passage contrary to the sale deed dated 30.07.1975 i.e. Ex.A1 and Ex.B1 joint patta dated 28.02.1978 and admissions of P.W.1 in the box?

2. Whether the first appellate Court is right in stating that the defendants are not entitled to the common passage since the defendants are not sharing the cost of construction of the wall in the common passage in the year 2008 for the damages caused by the plaintiff at the time of their construction?

3. Whether the first appellate Court is right in setting aside the portion of the settlement deed dated 17.10.1978 executed by the first defendant in favour of defendants 2 and 3 with regard to the $\frac{1}{2}$ share in the common passage as per Ex.A1 and Ex.B1?"

5. Learned counsel appearing for the appellants while pointing out the judgment of the lower appellate Court submitted that the findings of the lower appellate Court are contrary to the records particularly against the admission of plaintiffs regarding enjoyment of property for a long time. Learned counsel appearing for the appellants relied upon a few paragraphs of the judgment of lower appellate Court wherein the lower appellate Court has indicated that the disputed passage is also being used by the first defendant from the year 1978 without any objection by the plaintiff's father. Therefore it was suggested by the counsel for the appellants that the passage should be held as common to both plaintiffs and first defendant.

6. Learned counsel for the appellants pointed out that patta for the passage is standing in the name of plaintiff's father and first defendant and that therefore, the passage has to be considered as a common passage which is used by both the plaintiff's father and first defendant for a longtime.

7. This Court heard the arguments of both counsel appearing for the appellants as well as the respondents, at length.

8. The first plaintiff's father and first defendant purchased certain properties jointly. It is not in dispute that



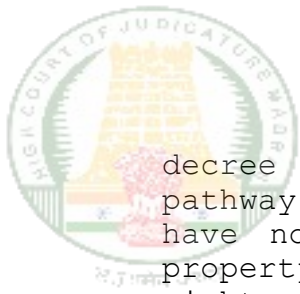
the suit B-Schedule property comprises land measuring about 946 $\frac{1}{4}$ Sq.ft along with the common passage. The property purchased by the father of the first plaintiff and first defendant is described in the document of sale deed dated 30.07.1975 with reference to boundaries and measurement. The properties are further described by referring to a plan which was also appended / annexed to the sale deed. As per the plan, the property marked as No.1 was annexed together with the common passage numbered as '3'. Going by the original sale deed along with the plan, this Court has no hesitation to hold that the plaintiffs alone were given right of ownership over the common passage and that the defendants were not given any right in respect of common passage.

9. The issue regarding title over the passage has to be considered based on pleadings, documents and evidence. The document of sale marked as Ex.A1 along with plan gives a clear indication that no part of the passage was given to the first defendant. However, this Court has noticed that the lower appellate Court has also observed as follows:

"...

But at the same time, the defendants cannot take advantage of absence of the objections by the plaintiff and stake claim of ownership over the passage and they can claim ownership only to the extent conveyed under Ex.A.1 sale deed i.e. 891 $\frac{3}{4}$ sq.ft. alone. If at all they are entitled for any right in the passage, it can only be right of user of passage/easementary right and they can claim nothing more than that."

10. Since the ownership and easementary right are two different rights, the lower appellate Court has recognised the appellants right of easement to use the passage. However, the right of easement recognised by the appellate Court is not granted to the first defendant. It is true that the lower appellate Court cannot grant a decree in favour of the defendants merely on the basis of admission of plaintiffs. However, the description of passage as a common passage and the admission as to the enjoyment of the first defendant clearly indicate that the first defendant was using the common passage. The construction of a building facing the passage also indicates that the first defendant was also using the passage with the knowledge of the plaintiffs for a longtime. Since the plaintiffs admit that the first defendant was using it for a longtime, this Court also holds that the first defendant may claim easementary right to use the common passage for convenience. However, the first defendant has not filed any suit. As pointed out earlier, the appellants have no title to the B-Schedule property. Therefore, the lower appellate Court is right in granting a



decree for declaration as to the ownership over B-Schedule pathway in favour of the plaintiffs. Similarly the defendants have no right to put up any obstruction over the B-Schedule property and as such, an act of encroachment will affect the right of plaintiffs as declared by the lower appellate Court. Since the first defendant has no title over the B-Schedule property, the settlement deed is also invalid as it was executed in respect of the undivided share over the passage in favour of defendants 2 and 3. However, the defendant's right to use the passage by way of necessity or prescription cannot be negated.

11. This Court is of the view that the defendant's right to use the common passage as held by the lower appellate Court is not lost by the relief granted in favour of the plaintiffs in the suit. Hence, the judgment of lower appellate Court or this Court on the second appeal cannot be interpreted to deny the right to use the common passage to the limited purpose of having access to stair case that is now constructed by the defendants. Subject to this observation, this Court finds no merits in this second appeal.

12. Accordingly, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar

//True Copy//

bkn Sub Assistant Registrar

To

1. The XV Additional Judge,
City Civil Court, Chennai
2. The XVIII Assistant Judge,
City Civil Court, Chennai

Copy To

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

+2ccs to M/S.N.Srinivasulu Advocate, SR.NO.22695
+1cc to M/S.M.Balasubramanian Advocate, SR.NO.22356

S.A. No. 93 of 2017

LN(CO)
PM/21/10/2021