



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 04.01.2022

DELIVERED ON : 10.02.2022

WEB COPY

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)No.185 of 2005

Vipin Chandra Babu ... Appellant/ Appellant/1st Defendant
Vs.
1.Tharakeswari ... Respondent/Respondent/Plaintiff
2.Sarojini
3.Devaki
4.Padmanabhan
5.Ramachandra Naidu
6.Boopathy ... Respondents/
Respondents 2 to 6/
Defendants 2 to 6

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated, 19.11.2004, made in A.S.No.10 of 2002 on the file of Sub-ordinate Judge, Srivilliputtur, confirming the judgment and decree, dated, 04.03.2002, made in O.S.No.399/1999 on the file of Principal District Munsif Court, Srivilliputtur.

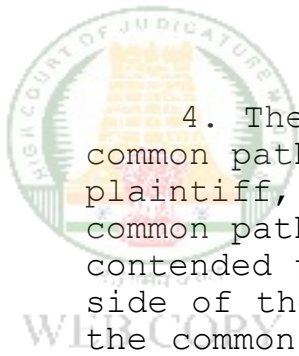
For Appellant : Mr.S.Sivathilakar
For Respondents : R.Rajaraman
for R1
R2 to R6 Exparte

JUDGMENT

The 1st defendant is the appellant.

2. The plaintiff has filed a suit for declaration that the suit schedule property is a common pathway for the plaintiff and the defendants. The plaintiff further prayed for a permanent injunction that the defendant should not construct any balcony to an extent of 4 feet facing the common pathway. He further prayed for a mandatory injunction to remove the first floor balcony to an extent of 2 ½ feet.

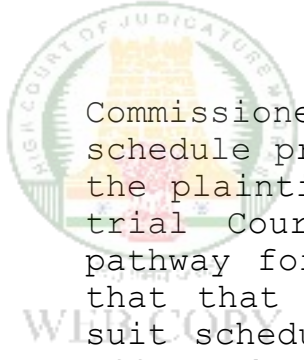
3. The suit was decreed with regard to the prayer for declaration of title and mandatory injunction. The 1st defendant filed A.S.No.10 of 2002 before the Subcourt, Srivilliputtur. The appeal was dismissed. As against which the present second appeal has been filed by the 1st defendant.



4. The plaintiff had contended that suit schedule property is a common pathway to the plaintiff and the defendants. According to the plaintiff, his property is located in the southern most end of the common pathway, facing the common pathway. The plaintiff had further contended that the 1st defendant's property is located on the western side of the common pathway and it is located on the northern end of the common pathway. The plaintiff had further contended that he had purchased the suit schedule properties as a vacant site under Exhibit A.2 on 29.06.1994 and thereafter, he had constructed a house property. According to the plaintiff, the suit lane is the only access for the plaintiff to reach the Municipal road on the northern side. The plaintiff had further contended that the 1st defendant demolished the 1st floor in his house property and attempted to put up an RCC 1st floor. During construction, the 1st defendant proclaimed that he is going to extend a balcony into the common passage for an extent of 4 feet. In case of such protrusion into the common common passage, the rights of the plaintiff to get air and light will be affected. Pending suit the 1st defendant has completed the construction of the balcony to an extent of 2 ¼ feet. Hence, the plaintiff prayed for declaration that the suit schedule property is a common pathway and for permanent injunction restraining the defendant from putting up any construction in the common pathway. He had further prayed for a decree for mandatory injunction for the removal of the balcony.

5. The defendants have filed a written statement disputing the right of the plaintiff over the suit schedule pathway. He had further contended that the plaintiff is having an alternative pathway to reach his house. The defendants contended that he has not encroached into any portion of the suit schedule property. He has only demolished existing sunshade and put up a balcony in the place of the sunshade in the 1st floor. He further contended that there has been no objection from the other defendants, namely, D.2 to D.6. The defendants filed an additional written statement challenging the inclusion of a prayer for mandatory injunction. He had further contended that the construction has been completed and in no way it affects the rights of the plaintiff to access his house property. The defendants further contended that his house property is 30 years old and the sunshade is also as old as his house. Only the said sunshade has now been replaced by way of balcony in the 1st floor. According to the defendants, there is no new construction encroaching upon the alleged common pathway, which is shown as the suit schedule properties.

6. The trial Court considered Exhibit A.2-sale deed in favour of the plaintiff, which discloses that suit schedule property is the pathway for the plaintiff to reach the municipal road on the northern side. The trial Court also relied upon the order passed by Town Survey Officer under Exhibit A.3 on 18.10.2000, in which, the suit schedule survey number was shown as a common pathway to the



Commissioner's report and plan which indicated that the suit schedule property is a common pathway and it is the only access for the plaintiff to reach main road. Based upon the said findings, the trial Court concluded that suit schedule property is a common pathway for the plaintiff and the defendants. He further concluded that the 1st defendant has made arial encroachment over the suit schedule property in the 1st floor. The said encroachment will affect the rights of the plaintiff. Hence, the trial Court granted a decree for declaration that suit schedule property is a common pathway. Since the defendants have completed the construction, the trial Court rejected the prayer for permanent injunction but granted a prayer for mandatory injunction.

7. The First Appellate Court concurred that the findings of the trial Court and arrived at a finding that the suit schedule property is a common pathway and the 1st defendant has put up a balcony in the 1st floor facing the suit schedule lane. The First Appellate Court also found that in view of the said encroachment, the plaintiff will not be in a position to transport any goods through the suit schedule property. Based upon the said finding, First Appellate Court dismissed the appeal. As against the concurrent findings, the 1st defendant has filed the second appeal.

8. The Second Appeal has been admitted on the following substantial questions of law:

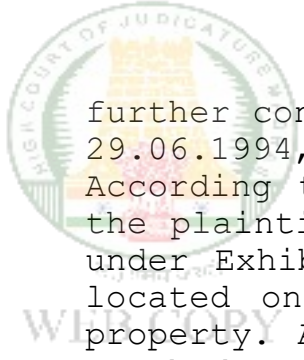
(i) Whether the order passed by the Tashsildar during the pendency suit without notice to the other joint pattadars will bind the appellant/1st defendant?

(ii) Whether the order passed by the Tahsildar in Exhibit A.3 would be binding on the Civil Court and whether the Civil Court is not entitled to decide the rival claims independently?

(iii) Whether the Courts below are right in law shifting the burden of proof on the appellant/1st defendant to prove that the suit property is not a common pathway?

(iv) Whether in the Courts below are justified in decreeing the suit in the absence of any title or right given to the plaintiff's predecessor in title under Exhibit B.2 the settlement deed and whether the vendor of the plaintiff can enlarge the title under the sale deed Exhibit A.2 which is very recent origin?

9. The learned counsel for the appellant contended that Exhibit B.1 is the parent document of the plaintiff, in which there is no reference about the suit schedule property as a common pathway. He

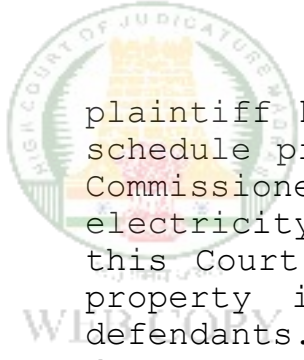


further contended that for the first time, under Exhibit A.2, dated, 29.06.1994, the concept of a common pathway has been introduced. According to the learned counsel for the appellant, the vendors of the plaintiff have no right to convey what was not conveyed to them under Exhibit B.1. He further contended that his house property is located on the western side and at the northern end of the suit property. According to him, the suit property is 30 years old. The sunshades of the ground floor windows were protruding into the suit property for more than 30 years. While constructing the 1st floor he converted the sunshades into a balcony facing the suit property with a width of 2 ¼ feet. Hence, according to the 1st defendant, he has not made any new constructions in the suit schedule property. He further contended that the rights of the plaintiff are no way affected by the constructions. According to the defendant, the suit property is having a width of 6.23 feet at the northern end near the house property of the defendant. Hence, any protrusion into the suit schedule property to an extent of 2 ¼ feet can never be considered to affect the rights of the plaintiff. According to the learned counsel for the defendants, the Courts below have not properly appreciated the oral and documentary evidence and granted a decree in favour of the plaintiff.

10. Per contra, the learned counsel for the respondent contended that the suit schedule property is a pathway. Apart from the said pathway, there is no other access to the plaintiff. He further contended that the defendant has put up a balcony in the 1st floor to an extent of 2 ¼ feet protruding into the common pathway. In view of the said encroachment, the defendant will not be in a position to take heavy goods through the pathway. According to the plaintiff, the pathway is reflected in his sale deed under Exhibit A.2. The learned counsel for the respondents further contended that any construction put up by the defendant will affect the light and air for the property of the defendant. He further contended that the Courts below after carefully considering the oral and documentary evidence, let in by either side as decreed the suit as prayed for. Hence, he prayed for dismissal of the second appeal.

11. I have carefully considered the submissions on either side.

12. It is the specific case of the plaintiff that the suit schedule property is a common pathway for the plaintiff and the defendants. The plaintiff's property is located in the southern most end while the defendants' property is located on the northern most end of a lane having north-south measurement of around 31 feet. The east-west measurement at the northern end is 1.9 meters and at the southern end, it is 2.1 meters. The plaintiff has relied upon Exhibit A.2-sale deed in his favour to contend that the said sale deed has conferred upon him a right of passage over the suit schedule properties. Though the defendants have contended that the plaintiff has not proved his right to use the passage in his deposition, they have admitted that the plaintiff is using the passage. The Commissioner's report also clearly indicates that the



plaintiff has no other access to his property other than the suit schedule property to reach the main road on the northern side. The Commissioner's report also indicates that sewage canals and electricity pipelines are drawn through the suit pathway. Hence, this Court can safely come to a conclusion that the suit schedule property is a common pathway for both the plaintiff and the defendants. The Courts below have considered the oral and documentary evidence and arrived at a correct finding.

13. The issue now that arises for consideration is whether the balcony put up by the 1st defendant over the common lane at a height of 10 feet with a width of 2 $\frac{1}{4}$ feet would amount to encroachment over the common pathway and if so whether the plaintiff is entitled to a decree for mandatory injunction for the removal of the said balcony. The plaintiff in his deposition had admitted that the 1st defendant's house property was located even before the plaintiff purchased the property. According to the plaintiff, the 1st defendant's property is 30 years old and there was a sunshade in the 1st defendant's property at the height of 10 feet facing the suit schedule property. The plaintiff has claimed that the said sunshades have been replaced by way of balcony in the 1st floor facing the suit property. This arial encroachment would affect his right to get air and light through the common pathway. He further contended that the plaintiff will not be able to transport heavy materials through the common pathway.

14. From the deposition of the plaintiff and the Commissioner's report, it is evident that the suit lane is having a width of 6.23 feet near the defendants' property. There is no offending construction in the ground floor portion. The old sunshades which were at the height of 10 feet from the ground level have been replaced with a balcony during new construction by the 1st defendant. The balconies are protruding to an extent of 2.14 feet into the common lane at a height of 10 feet. Whether this could be considered to be an encroachment over the common lane warranting a decree for mandatory injunction.

15. In a Judgment reported in **A.I.R 1973 Madras 42 at para 4**, our High Court has held as follows:

"4.....

A co-owner of a common passage in a building can use such passage not only to reach his portion which he got under the partition but also to reach any addition which he may put or any accretion which he may make adjacent to his property, provided his user of the common passage does not interfere with the user thereof by the other co-owners. Likewise, the common owner of a thrashing floor can use it not only for thrashing the paddy got from the land which he got for his share in the partition. But also for

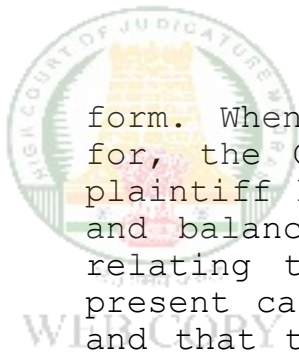


thrashing the paddy which he may get from a land which he may acquire subsequently. Such user, so long as it does not interfere with the use by the other co-owners, cannot be objected to by the other co-owners. It would be most unreasonable to say that the paddy got by the co-owner from the land which fell to his share in the partition should alone be thrashed in the common thrashing floor. Cases of extension of balcony over common passage also stand in the same footing. The principle underlying the enjoyment of common property is that one co-owner can use the common property to his maximum advantage subject of course to the rights of the other co-owner not being any way materially interfered with and without damaging or weakening the common property."

16. Our High Court in a judgment reported in **A.I.R 1928 Madras 810** as held as follows:

".....It it was used as a passage, and if, as is admitted, it is only 5 ½ feet in width, it can be used only as a passage for human beings for going in and coming out and possibly for cattle, and even as a passage it will not be available for other purposes. I put the question to the learned vakil for the respondent how his enjoyment of this common lane has been interfered with by the defendant putting up that shed or terrace over the lane. He has not been able to answer it. He merely, in answer, referred to his legal right. Of course the legal right is assumed, but when it is a question of the relative convenience or inconvenience and the extent of damage to the one party of the other, the Court is bound to take into consideration the extent to which, by reason of the encroachment of the common rights committed by the defendant, the plaintiff's enjoyment or accustomed user has been inconvenienced or interfered with."

17. The co-owner can use the common property to his maximum advantage subject, of course, to the rights of the other co-owner not being any way materially interfered with and without damaging or weakening the common property. In the present case, the entire width in the ground level up to a height of 10 feet is free from encroachment, even as per the case of the plaintiff. Above 10 feet, already sunshades were there protruding into the common lane even 30 years back. The said sunshades of the ground floor windows have now been replaced by way of a balcony of the 1st floor. Hence, the protrusions to an extent of 2 ¼ feet into the common lane are not new. But were in existence for the past 30 years in a different



form. Whenever a decree for mandatory injunction is being prayed for, the Court should not only consider the legal rights of the plaintiff but also the damage that may be caused to the defendants and balance the rights of either parties, especially in a case relating to an arial encroachment over a common passage. In the present case, the alleged encroachment is at the height of 10 feet and that too for an extent of 2 ¼ feet. The balance of 4 feet is left free from any encroachment whatsoever. The ingress and egress of the plaintiff to his house property will not be affected in any manner by the presence of the balcony. The plaintiff can also transport goods to his property since a 4 feet area is free from any encroachment whatsoever. On the other hand, the demolition of the balcony may cause huge damage to the 1st defendant, which will result in opening up of the eastern wall of the 1st floor. The grant of mandatory injunction will not only remove the balcony but also cause huge damage to the building of the 1st defendant. The plaintiff as well as the 1st defendant are entitled to take maximum advantage of the common passage without disturbing the rights of each other.

18. In view of the said discussion, we can safely come to a conclusion that the offending constructions made by the 1st defendant were only replacement of the old sunshades and cannot be considered to be a new construction. When the plaintiff has admitted that the sunshades wherein existence for the past 30 years, the sunshades, which are in a different form now cannot be considered to be an encroachment in a common passage. Hence, the Courts below were not right in granting a decree for mandatory injunction.

19. In view of the discussion, the judgment and decree of the Courts below with regard to the declaration of the suit schedule property as a common pathway are confirmed. The judgment and decree of the Courts below with regard to the granting of mandatory injunction is set aside. However, the 1st defendant/appellant shall not be entitled to make any further encroachment either in the ground floor or in the higher floors into the common pathway. The Second Appeal is partly allowed. No costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.



1.The Sub-ordinate Judge,
Srivilliputtur.

2.The Principal District Munsif Court,
Srivilliputtur.

3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.RAJARAMAN, Advocate (SR-5239[F] dated 10/02/2022)

+1 CC to M/s.S.SIVA THILAKAR, Advocate (SR-5411[F] dated 10/02/2022)

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