

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 31.03.2023

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

S.A.(MD).No.516 of 2017
and
C.M.P.(MD).No.11031 of 2017

1.Ramar

2.Malarkodi

... Appellants/Appellants/Defendants

Vs.

S.Muthuvalli

...Respondent/Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of CPC to set aside the judgment and decree dated 16.08.2017 passed in A.S.No.8 of 2017 on the file of the 2nd Additional Subordinate Court, Madurai by confirming the judgment and decree dated 25.11.2016 passed in O.S.No.20 of 2012 on the file of the Additional District Munsif, Madurai by allowing this appeal.

For Appellants : Mr.A.R.Sethupathy

For Respondent : Mr.S.Arivalagan

JUDGMENT

This Second Appeal has been filed challenging the concurrent findings of the Courts below. The appellants are the defendants in the suit in O.S.No.20 of 2012 on the file of the Additional District Munsif Court, Madurai. The suit was filed for mandatory injunction to remove the gate put up by the appellants/defendants on the EF portion on the western side of the EFGH portion of the common pathway and for permanent injunction restraining the appellants/defendants from preventing the respondent/plaintiff from using EFGH common pathway.

2. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit. The plaintiff claims right over the EFGH common pathway mentioned in the suit schedule and traces the title to the same as follows:

a) The plaintiff purchased the suit schedule property from R.Subramani by a sale deed dated 31.07.1995 registered as Document No.1947/1995. According to the plaintiff, as per the said sale deed, on the northern side, there is a 3 feet common pathway and the measurement of the North-South on the western and eastern side is 21¼ feet.

b) According to the plaintiff, her vendor got the suit schedule property by way of a registered settlement deed dated 12.08.1971.

c) According to the plaintiff, as per the settlement deed, her vendor and the northern side owner had to form a common pathway by allotting 1½ feet each and thereafter, they formed a common pathway in order to enable both the parties to carry out necessary repairs on both sides of the properties.

d) Further, it is the case of the plaintiff that the joint family property allotted to R.Subramani, her vendor by oral partition and the seller of the suit schedule property and the seller of the defendants' portion were jointly owned property belonging to R.Subramani and others.

e) The plaintiff filed O.S.No.659 of 1994 against her vendor in respect of the suit schedule mentioned property and it ended in compromise and the said R.Subramani sold the same to the plaintiff.

f) According to the plaintiff, in the first week of October 2011, dispute arose between the plaintiff and the defendants in respect of the suit schedule mentioned property and the EFGH portion in the plaint plan is a common pathway and ABCD portion belongs to the plaintiff and IJKL belongs to the defendants.

g) According to the plaintiff, the defendants put up the gate on the EF portion on the EFGH common pathway. The plaintiff lodged a complaint before the Police against the defendants on 10.10.2011 in respect of the encroachment. The North-South measurement on the western and eastern side

is 21¼ feet and according to the plaintiff, at present the measurement is 19 feet. The plaintiff claims that her share in the common pathway is 1½ feet and the defendants have encroached more than ¾ feet of the plaintiff's share. Since the defendants did not remove the gate put up in the EF portion of the common pathway despite the reminders sent by the plaintiff, the suit was filed.

3. However, the defendants, as seen from the written statement filed by the first defendant, have stated that they are not parties to the suit in O.S. No.659 of 1994 and the compromise decree passed therein cannot bind them. They have stated that the measurement in the rough sketch of plaintiff is false and EFGH portion is part and parcel of the defendants' property. Therefore, they have stated that the plaintiff does not have any right, title or interest over the EFGH portion as the said property is the exclusive property of the defendants. They have denied that the gate was put up by the defendants only in the month of October 2011, as according to them, the gate is in existence for several years. They have stated that there is no common pathway and therefore, the question of preventing the plaintiff to enter the EFGH portion does not arise. They have also pleaded that the suit is bad for non-joinder of proper and necessary parties and the Court fees of the said property were not valued by the plaintiff properly.

4. The Trial Court based on the pleadings of the respective parties framed the following issues:

"a) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for?

b) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

c) Whether the suit is bad for non-joinder of necessary parties?

d) To what other relief the plaintiff is entitled there to?"

5. Before the Trial Court, the plaintiff filed five documents, which were marked as exhibits A1 to A5 and two witnesses were also examined on her side, namely, the plaintiff herself as P.W.1 and Mr.R.Vadivelu as P.W.2. On the side of the defendants, three documents were filed, which were marked as exhibits B1 to B3. The first defendant R.Ramar was examined as D.W.1 on the side of the defendants.

6. The Trial Court has decreed the suit in favour of the plaintiff by giving the following reasons:

a) Ex.A5, the compromise decree passed in O.S.No.659 of 1994 in the suit filed by the plaintiff against her vendor discloses that there was a common pathway as claimed by the plaintiff in the suit.

b) The plaintiff's witness, namely, P.W.2, the Surveyor has also deposed and Ex.X1 was marked through him and in Ex.X1, yellow colour indicates 0.6 metres of the disputed property.

c) P.W.2, the Surveyor, has also deposed that in Ex.A1 sale deed, the description of the property shows that on the northern side of the plaintiff's property, there is a 3 feet common pathway.

d) The Advocate Commissioner's report and the rough sketch, which have been marked as exhibits C1 and C2, also shows that a gate was put up by the defendants.

e) D-D1 in the rough sketch of the Advocate Commissioner's report measures 0.6 metres and in Ex.C1 Advocate Commissioner's report and as per the Surveyor's report, T.S.No.3340/47 belongs to Sangumani Paradesi Trust, whereas, the defendants have stated that it was purchased by them.

f) In the Advocate Commissioner's report (Ex.C1), it has been stated that as per the Surveyor, the suit property was within the defendants' property.

g) The Surveyor was examined as P.W.2 and his report (Ex.X1) has found that the disputed suit property is 0.6 metres, but the common pathway of EFGH portion has to be 3 feet and during cross-examination of P.W.2, he deposed that in Ex.X1, the yellow colour portion indicated therein, which is the disputed property, is a common pathway.

h) The plaintiff has discharged her burden of proof to prove the suit claim

and the burden of proof is therefore shifted to the defendants to disprove the contentions of the plaintiff.

i) The first defendant has been examined as D.W.1 and during his cross-examination, he has deposed that there is a common pathway measuring 3 feet between the plaintiff and the defendants' property.

j) In Ex.B1 sale deed dated 28.07.1993, the schedule of the property in the said document reveals that on the northern side of the plaintiff's property, there is a common pathway measuring 3 feet.

k) During the cross-examination, D.W.1 has admitted Ex.A1 and similarly D.W.1 has admitted that in Ex.B1, there was a common pathway for 3 feet and for each 1 ½ feet share and the property was purchased from the same vendor as that of the plaintiff.

l) The Trial Court has observed that no documentary evidence was produced by the defendants to show that the plaintiff has constructed her building on her 1½ feet share in the common pathway measuring a total extent of 3 feet.

m) In the Advocate Commissioner's report, it has been stated that the defendants have put up the gate on EFGH portion in EF portion restraining the plaintiff from using the common pathway. The plaintiff claimed that the measurement on the western and eastern side is 21¼ feet, but at present, the measurement is 19 feet only and in Ex.X1 in that 5.6 metres, the measurement

converted into feet for convenience, the North-South measurement on the western and eastern side is 19 feet and it was also stated in Ex.C2. As per Ex.A1 and Ex.B1, there should be 21¼ feet and there is an encroachment by the defendants. Hence, the plaintiff has a share of 1½ feet in the common pathway in EF portion on the western side of EFGH portion as per the plaint plan.

Only based on the oral and documentary evidence available on record, the Trial Court has decreed the suit in favour of the plaintiff as prayed for in the plaint as the defendants have encroached upon the common pathway by putting up a gate.

6. The Lower Appellate Court by its judgment and decree dated 16.08.2017 in A.S.No.8 of 2017 has also rightly confirmed the findings of the Trial Court by dismissing the first appeal filed by the defendants.

7. This Court on 30.11.2017 admitted the Second Appeal by formulating the following substantial questions of law:

"a) Whether the first appellate Court is right in confirming the decree of Lower Court without a prayer for declaration of title by the plaintiff/respondent?"

b) Whether the decree for mandatory injunction is sustainable in the absence of other owner Trust in respect of one of the pillars which is admittedly in the site belonging to a Trust?"

8. This Court is of the considered view that there is no necessity for the plaintiff to file a suit for declaration when the documents filed by both the parties to the suit, which have been marked as exhibits and the Advocate Commissioner's report supported by plans clearly establishes the plaintiff's claim that there is a common pathway measuring 3 feet on the northern side of her property. Only when there is a cloud over the rights of the plaintiff over the common pathway, the necessity to file a suit for declaration will arise. Therefore, the first substantial question of law formulated by this Court at the time of admission of the Second Appeal is answered against the appellants/defendants.

9. Insofar as the second substantial question of law formulated by this Court, namely, whether the decree for mandatory injunction is sustainable in the absence of other owner Trust in respect of one of the pillars which is admittedly in the site belonging to a Trust is concerned, the said question of law is also answered against the appellants/defendants by this Court as the plaintiff has discharged her burden of proving the suit claim through her oral and documentary evidence, whereas, the appellants/defendants have not produced any documentary evidence before the Trial Court to establish their claim that the plaintiff is not entitled for 3 feet common pathway, which is the subject matter of dispute in the suit.

10. For the foregoing reasons, there is no merit in this Second Appeal as the issues raised by the appellants in the grounds of appeal have all been correctly considered by the Courts below against the appellants/defendants. In the result, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

31.03.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
Lm

To

1.The II Additional Sub Court,
Madurai.

2.The Additional District Munsif Court,
Madurai.

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

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ABDUL QUDDHOSE, J.

Lm

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