



S.A.No. 603 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2024

CORAM

THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

S.A.No. 603 of 2006
and Cross Objection No.4 of 2009

S.A.No. 603 of 2006

K.Annapoorna

... Appellant

Vs

V.Anbalagan

... Respondent

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 25.10.2005 passed by the Principal sub ordinate Judge, Salem in A.S.No.111 of 2005 in so far as dismissing the relief of mandatory injunction is concerned, and thereby partly allowing the judgment and decree dated 21.04.2005 passed by the Principal District Munsif, Salem in O.S.No.783 of 2001.

For Appellant : Mr.M.Sriram
for Mr.P.Sathish

For Respondent : Mrs.Hema Sampath
Senior Counsel
for Mr.T.Sezhian

Cross Objection No.4 of 2009

V.Anbalagan

... Cross Objector

Vs



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K.Annapoorna

... Respondent

PRAYER:- Cross Objection filed under Order 41 Rule 24 of Civil Procedure Code against the judgment and decree dated 25.10.2005 in A.S.No.111 of 2005 on the file of the Principal Subordinate Court, Salem, reversing the judgment and decree dated 21.04.2005 in O.S.No.783 of 2001 on the file of the Principal District Munsif's Court, Salem.

For Cross-Objector : Mrs.Hema Sampath
Senior Counsel
for Mr.T.Sezhian

For Respondent : Mr.M.Sriram
for Mr.P.Sathish

COMMON JUDGMENT

The plaintiff is before this court on an appeal. This appeal is filed challenging the judgment and decree dated 25.10.2005 in A.S.No. 111 of 2005 on the file of Principal Subordinate judge Salem reversing the judgment and decree dated 21.04. 2005 in O.S.No.783 of 2005 on the file of Principal District Munsif, Salem.

2. For the sake and convenience, the parties are referred to as per their ranking in the original suit.

3. According to the plaintiff, she is the owner of the property bearing Door No. 80A, Gandhi Road, having purchased through sale deed dated



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11.02.1978. She had purchased the vacant site and put up a residential house and living there for nearly 23 years. The property has access to the road on the South, further to the road on the West and North of the property. The property is situated, North of Gandhi Road, East of 20 feet North South road and in the South of 12 feet East-West road and even in the sale deeds purchased by her she is entitled to have access to the common road from her property. The defendant had purchased the property on the North of the plaintiff's property on 25.03.1992 and she had demolished the Kalyana mandapam and put up a residential house. Further, even in the sale deed executed in favour of the defendant, the road on the North of the plaintiff's property and the 12 feet East West road is mentioned. Therefore, it is clear that the defendant had purchased the property only on the North of 12 feet East West road and that the road is common. Taking advantage of the absence of the plaintiff, the defendant had put up a septic tank in the 12 feet pathway and tried to construct a portion encroaching the pathway. In the Mediation, the defendant had agreed not to put up construction in the 12 feet pathway. But, however, on 13.10.2001 he had brought bricks and dumped in the place and hurriedly dug the portion to put up a septic tank within the 12 feet East West pathway. Therefore, the plaintiff had come up with the suit for declaration, injunction and also for a mandatory injunction to remove the construction made in the 12 feet pathway.



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4. The defendant had resisted the suit by filing a written statement, admitting that there is a pathway on the Western side of the property purchased by the plaintiff and also admitting that there is a pathway on the Northern side of the plaintiff's property. But, the said road is not existing or existed to the entire Northern boundary of the plaintiff's property. Even though only the plaintiff had the right upto the gate installed by her, she is only introducing the right to use the common pathways in the sale deed by way of interlineation. Though the breadth of the pathway on the Northern side of the plaintiff's property is given, the length of the pathway is not given. The East West length of the said pathway is only 32 feet and the pathway is mainly intended to reach the plot which has been purchased by the defendant. Further, the defendant contends that the septic tank is below the ground level and not in anyway a hindrance to the user and therefore, sought for dismissal of the suit.

5. During the trial, on the side of the plaintiffs PW 1 was examined and Exhibits A1 to A3 were marked and on the side of the defendant DW1 and DW2 were examined and Exhibits B1 to B10 were marked.

6. In the suit an Advocate Commissioner was appointed and the plan and report was filed as Exhibits C1 and C2. After analysing the facts,



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documents and evidence the trial Court dismissed the suit. Aggrieved by the judgment and decree, the plaintiff preferred an appeal in A.S.No.111 of 2005 on the file of the Principal Subordinate Judge, Salem. After reappraising the evidences, the lower Appellate Court by its judgment and decree, dated 25.10.2005 partly allowed the appeal and decreed the suit in respect of the declaration and in respect of 20 feet and 12 feet pathway on the West and North, had dismissed the relief of mandatory injunction. Aggrieved by the judgment dismissing the suit for mandatory injunction, the plaintiff is before this court on an Appeal. The defendant being aggrieved by the decree passed in respect of declaration and injunction, has filed a Cross Objection. This Court by order, dated 13.06.2006, admitted the appeal and framed the following substantial questions of law.

“ The Second Appeal is admitted on the following substantial questions of law:

(a) Having found that the plaintiff had established the easementary right by grant over the suit property namely, pathway, has not the lower appellate court committed an error of law in not granting the relief of mandatory injunction asked for?

(b) When the declaratory relief as referred to above is granted, would the failure to grant the relief of mandatory injunction result in the declaratory relief itself



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being nullified?”

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7. Heard Mr.M.Sriram, learned counsel for Mr.P.Sathish, counsel for the appellant in the Appeal and for the respondent in the Cross Objection and Mrs.Hema Sampath, learned Senior Counsel for Mr.T.Sezhian, counsel appearing for the respondent and Cross Objector in the Cross Objection.

8. The learned counsel appearing for the appellant argued that when the plaintiff had purchased the property as early as on 11.02.1978 as per Exhibit A2, the right over the pathway on the Western side and also the 12 feet pathway on the Northern side has been specifically given. In fact the boundaries of the property purchased clearly mentioned that the property is bounded on the West by 20 feet road and in the North by 12 feet road. When the plaintiff has been given the right even at the time of purchase by the vendors, the defendant cannot restrain the plaintiff from using the pathway on the Western and Northern side. The learned counsel further argued that even when the defendant purchased the property on 25.03.1992 in Ex.A3, the existence of the 12 feet pathway has been mentioned and the boundary to that deed shows that the defendant's property situated on the 12 feet pathway on the Southern side.



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9. The learned counsel further argued that when the defendant admits that the plaintiff is having a right to use the pathway on the Western and Northern side, the claim that even though a gate has been installed by the plaintiff, the plaintiff is not using the pathway and therefore, the plaintiff is not entitled for relief cannot be sustained. The learned counsel further argued that when the lower Appellate Court rightly found that the existence of the pathway has been mentioned both in the sale deeds marked as Exs.A2 and A3 and also found that the plaintiff is having right to access the pathway on the Western and Northern side, the dismissal of the suit in respect of the mandatory injunction for removal of the septic tank is not sustainable. When the defendant was found to have encroached the portion of the pathway on the Northern side, necessarily, the defendant ought to have been directed to remove the encroachment. The learned counsel submitted that to this extent the judgment and decree passed by the Courts below are erroneous and sought for allowing the appeal.

10. Per contra, Mrs.Hema Sampath, learned Senior Counsel appearing for the respondent would argue that the sale deed dated 11.02.1978 in Ex.A2 cannot give any specific right to the plaintiff when the defendant's vendors are not a party to the document. It is the self-serving document by which the plaintiff was able to interlineate the existence of the pathway giving a right to



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herself and that will not have any impact on the defendant. The learned Senior Counsel further argued that when at the best the plaintiff can claim right on the Northern side only to the extent of 32 feet that is where the plaintiff has kept a small door way. The plaintiff cannot claim right in respect of the entire pathway on the Northern side and the defendant has always a right to put up construction in the portion beyond 32 feet. The learned Senior Counsel further argued that in the sale deed in Ex.A3, the existence of the 12 feet pathway is mentioned, but that only gives a right to the defendant to use the entire pathway on the Southern side of his property. This mentioning of the pathway in the document will not give any right to the plaintiff to have access to the entire pathway lying on the Northern side of her property.

11. The learned Senior counsel would further argue that when it has been established that the plaintiff has not been using the pathway on the Western side and Northern side of the property, the right has been extinguished and further, the decree passed by the lower Appellate Court without mentioning the length of the pathway by restricting it to 32 feet had decreed and granted injunction to the entire extent of the pathway in the Northern side which is perverse and sought for allowing the Cross-Appeal.



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appearing on both sides and perused the materials available on record before this Court.

13. Admittedly, the plaintiff had purchased the property in Door.No.8A, Gandhi Road, through Sale Deed dated 11.02.1978 in Ex.A2. The perusal of the sale deed shows that the property is bounded by 20 feet passage on the Western side and also the 12 feet passage on the Northern side, over which the plaintiff is having a right to have access. Though the property purchased by the plaintiff lies on the Gandhi Road and the plaintiff has access to her property from the Gandhi road, she is still entitled to use the pathway on the Western and Northern side of the property as it is found to be a common way in which a right has been given to her. It is the case of the plaintiff that the defendant after purchasing the property had demolished the Kalyana Mandapam and after constructing a house all of a sudden started to dig the pathway on the Northern side and constructed a septic tank which is illegal and the defendant cannot be permitted to encroach upon the common pathway.

14. The defendant had purchased the property on 25.03.1992 through Ex.A3. It is also marked as Ex. B5. A perusal of the sale deed shows that the property purchased by the defendant is bounded on the Southern side by a 12



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feet passage. Therefore, even according to the sale deed executed in favour of the defendant, the existence of the 12 feet passage is mentioned in the document and therefore, both the plaintiff and defendant have the right to use the common passage that is 12 feet passage on the Northern side of the plaintiff property and the 20 feet passage on the Western side of the plaintiff's property.

15. The defendant in the written statement filed had also categorically admitted that since, he had put up the septic tank below the ground level, it will not be a hindrance to the users. Further the defendant had admitted that they have not limited the plaintiff from using the pathway either on the Western side or the Northern side of the property till 32 feet but had only pleaded that there is no necessity for using the same. For better appreciation, the relevant portion of the written statement is extracted hereunder:-

*“...The septic tank is below the ground level and it is not in any way a hindrance to the user of the alleged pathway which does not exist there. The defendant has not prevented the plaintiff for using the pathway on the West of her property or the pathway 12 feet * 32 feet on the North of her property. As already stated she has no necessity to use them and she is not at all using the pathways.”*

16. From the admission of the defendant, it is clear that the plaintiff is

having right to use the pathway on the Western side of her property in the 20



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feet passage and also the passage in the Northern side of her property which is 12 feet passage. The defendant only claims that since the plaintiff is not using them, there is no necessity for her to sustain the relief and further the septic tank is below the ground level and not a hindrance. The defendant admits the right of the plaintiff that she has the right to use the pathway both on the 20 feet and 12 feet passage on the Northern and Western side. Her claim is that since, the plaintiff is not using the same, she had lost the right given to the plaintiff from the very document purchased by her in the sale deed executed dated 11.02.1978 and further it is only to the extent of 32 feet. But, the length of the rights in the 12 feet passage has not been restricted in the documents and further the right available in document will never get extinguished.

17. As it was found that already the construction for the septic tank has been made in the 12 feet passage on the Northern side, which is lying beneath the ground which is not a hindrance to both the parties, the lower Appellate Court had granted decree and injunction in favour of the plaintiff in respect of the 20 feet passage on the West and 12 feet passage on the North and had dismissed the suit in so far as the mandatory injunction is concerned. When admittedly in the pathway both the parties are having right and are entitled to use the same and further the septic tank has already been constructed and is not a hindrance for the parties in exercising their rights, the judgment and



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decree of the lower Appellate Court cannot be found fault with.

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18. In such circumstances, in view of the above findings, the substantial question of law is answered against the appellant. Since the findings of fact arrived at by the lower Appellate Court is based on the materials available on record and there is no illegality or perversity.

19. In such circumstance, both the Second Appeal and the Cross Objection are dismissed. However, there shall be no order as to costs.

14.03.2024

Index: Yes/No
Speaking Order/Non Speaking Order
Neutral Citation: Yes/No
gba

To

- 1.The Principal subordinate Court, Salem.
- 2.The Principal District Musif Court, Salem
- 3.The Section Officer,
V.R Section, High Court Madras.



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G. ARUL MURUGAN,J.

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