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SA Nos. 371 and 372 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10-02-2026

CORAM

THE HON'BLE MR.JUSTICE P. DHANABAL

**SA No. 371 of 2015 &
S.A.No.372 of 2015 and M.P.No.1 of 2015**

1.Mohideen Pitchai
2.Sipagatullah

..Appellants in both the
Appeals

Vs

1.M.H.Mohideen Bhava
Rep By His Power of Attorney M.Mohamed Haneef
2.M.A.Shahul Hameed
3.M.A.Syed Ali
Rep By His Poa M.A.Shahul Hameed

...Respondents in
both the appeals

Prayer in S.A.No.371 of 2015: The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree dated 08.10.2014 passed in Appeal Suit No.250 of 2013 on the file of the learned VII Additional City Civil Court, Chennai confirming the judgment and decree dated 06.04.2013 passed in O.S.No.13164 of 2009 on the file of the learned II Assistant City Civil Court, Chennai by allowing the Second Appeal.

Prayer in S.A.No.372 of 2015: The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree dated 08.10.2014 passed in Cross Appeal No.182 of 2014 on the file of the learned VII Additional City Civil Court, Chennai confirming the judgment and decree dated 06.04.2013 passed in O.S.No.13164 of 2009 on the file of the learned II Assistant City Civil Court, Chennai by allowing the Second Appeal.



SA Nos. 371 and 372 of 2015

WEB COPY

For Appellant(s):

Mr.V.Manohar

For Respondent(s):

R2 - No appearance

R1 & R3 – Served – No appearance

JUDGMENT

The Second Appeals are arising out of the Common Decree and Judgment passed by the learned VII Additional, City Civil Court, Chennai in Appeal Suit No.250 of 2013 and Cross Appeal No.182 of 2014 dated 08.10.2014.

2. The appellants are the defendants and the respondents are the plaintiffs, who filed the suit for the relief of permanent injunction and mandatory injunction and the trial court partly decreed the suit and granted permanent injunction from interfering with the plaintiffs possession and enjoyment of the common path way and dismissed the suit in respect of permanent injunction and mandatory injunction regarding 'D' schedule property and directed to remove the Slab-I. Aggrieved by the said Decree and Judgment, the plaintiffs have preferred the Appeal Suit in A.S.No.250 of 2013 and the defendants have preferred Cross appeal in respect of granting permanent injunction and the mandatory injunction to remove the Slab-I. The First Appellate Court confirmed the relief of mandatory injunction and dismissed the appeal filed by the plaintiffs and also dismissed the Cross



Appeal filed by the defendants. Aggrieved by the said Decree and Judgment of the First Appellate Court in Appeal Suit and Cross appeal, the defendants have preferred these Second Appeals.

3. For the sake of convenience and brevity, the parties herein are referred as plaintiffs and defendants, as referred before the trial court.

4. The brief averments of the plaint are as follows:-

4.1. Originally, the property bearing Door No.78-80, Soorappa Mudali Street, Triplicane, Chennai-5 was allotted to one Zainab Bee and Kathija Bee through partition deed dated 22.06.1972. As per the said partition deed, the said Zainab Bee and Kathija Bee were conferred with rights of user and enjoyment of common passage measuring 3'6" feet width and 73'6" length leading to Soorappa Mudali Street from their allotted portion. Subsequently, another partition deed was executed on 20.07.1989 between the said Zainab Bee and her daughter-in-law Habithuneesa Bee, her son, Mohammed Haneef, who is the father of the 1st plaintiff, her son, M.Abdul Rahim, who is the father of plaintiffs 2 and 3 and her daughter Zohara Bee and Thamim Anzari, who is the son of Kathija Bee. Subsequently, the said Zohara Bee died leaving behind her only son Noor Mohamed, as her only legal heir. Thereafter, Zainab Bee died on 06.03.1996 leaving behind Habithuneesa Bee,



SA Nos. 371 and 372 of 2015

WEB COPY
Mohammed Haneef and Abdul Rahim as her legal heirs. While so, the said Noor Mohamed executed the release deed dated 07.10.1996 relinquishing his 1/5th share in favour of Habithuneesa Bee, Mohamed Haneef and Abdul Rahim, therefore, Habithuneesa bee, Mohammed Hanef and Abdul Rahim became entitled to absolute rights in respect of the properties.

4.2. While so, the said Mohammed Haneef, Habithuneesa bee, Mohammed Hanef jointly purchased the property belonged to Thamim Ansari, therefore, the entire property belongs to the said three persons. Already a Civil Suit was filed by Mohammed Haneef, for partition as against the others, viz., two share holders in O.S.No.4999 of 2024 on the file of the XV Assistant City Civil Court, Chennai and a compromise was arrived at between the parties and the same was recorded by the Court on 21.02.2005. The southern portion having an extent of 391 sq.ft., together with right of common passage was allotted to Abdul Rahim. The middle portion having extent of 392 sq.ft., together with the rights of the common passage was allotted to Mohammed Haneef, and the northern portion having extent 392 sq.ft., together with rights of common passage was allotted to Khaja Nizamuddin, viz., the 2nd defendant herein.



4.3. The said Abdul Rahim, Mohamed Haneef and Khaja Nizamuddin had been in continuous possession and enjoyment of the properties over their respective portions. The said Abdul Rahim died intestate on 01.01.2008 leaving behind his legal heirs, Zeenith Bee, Shahul Hameed, Syed Ali, Rahamathunisa, as his legal heirs. The said Khaja Nizamuddin executed a sale deed in favour of Mohideen Bhava, the 1st plaintiff herein in respect of his northern portion dated 07.08.2008. Thereafter, the rectification deed was executed by Khaja Nizamudin on 24.09.2009 in favour of the 1st plaintiff and the said Zenath Bee and Rahamathunisa relinquished their share in respect of the southern portion in favour of Shahul Hameed and Syed Ali, who are 2nd and 3rd plaintiffs, through release deed dated 18.08.2008. Thereafter, the said Zenith bee and Rahamathunisa executed rectification deed on 05.08.2009. The said Mohamed Haneef settled the middle portion in favour of his son, Mohideen Baba the 1st plaintiff through the settlement deed dated 09.07.2009.

4.4. The plaintiffs are jointly entitled to the common passage having width of 3'6 feet width and 73'6 feet length leading to the Soorapamudali street, from their portion. The said common passage is the only assess for that house from the Soorapamudali street. The defendants recently put up a construction in the ground floor and unauthorisedly put up four ventilators in their northern wall having size of 1 ½' X 1 ½' and the opening jolly type of



size 2'X2', four ventilators in the 1st floor, each having the size of 2'X2', one open jolly type of size 2' X 2' and one window of size 3 ½ X 2 ½' one window with sunshade and in the second floor, one open jolly type of size of 2' X 2'. The defendants have no right to put up the above said ventilators, opening the windows in their northern side facing the said common passage, which exclusively belongs to the plaintiffs. In spite of the protest and strong objections made by the plaintiffs, the defendants have put up the above said sunshades and windows. The defendants have no right to interfere with the plaintiffs' enjoyment of the said common passage. The defendants are threatening to make further opening in the said northern wall as they they would also make use of the common passage for their purpose. Therefore, the plaintiff filed the suit for permanent injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment of the common passage of 'D' schedule property, for permanent injunction, from putting up any opening in the northern wall of the defendant's use set out in the 'D' schedule property; for grant of mandatory injunction directing the defendants to remove the ventilators, opening window in northern wall of the defendants house mentioned in the 'D' schedule property.

5. The brief averments of the written statement filed by the defendants are as follows:-



5.1. The suit is not maintainable. The land mentioned in the plaint belongs to the plaintiffs and the defendants and other persons, since it is the common path way, all the persons have to be impleaded as parties and without impleading the other right holders, the suit is bad for non joinder of necessary parties. The defendants have raised construction in the year 1988 and they are in possession and enjoyment of the property at the time of construction itself, they provided the windows and ventilators and the said Jollies. The plaintiffs have easement right and already the defendants damaged the ventilators and thereby a police complaint was lodged and thereafter, the 2nd plaintiff replaced the said broken jollies. The other persons, who are residing opposite and adjacent to the house of the defendants also have same type ventilators, shelters sunshades windows, but no steps have been taken as against other persons, therefore, only to harass the defendants, the suit has been filed. The said windows, ventilators, and shelters were fixed 22 years back and those, ventilators are more than 10 feet height and shall no way affect the pathway rights to anybody. There is no cause of action for the suit, therefore, the suit is liable to be dismissed.

6. Based on the above said pleadings and after hearing both sides, the trial court has framed the following issues:-

"1. Is the suit maintainable?"



2. Whether there is any cause of action in the suit?

3. Whether the plaintiffs are entitled to permanent injunction as claimed in their prayer (I) and (ii)?

4. Whether the plaintiffs are entitled to prayer no.(iii), namely, mandatory injunction

5. To what other reliefs?

Before the trial Court, on the side of the plaintiffs, P.W.1 was examined and marked Exhibits A.1 to A.11 and on the side of the defendants, they examined, D.W.1 and no documents were marked and Commissioner report and plan was marked as Ex.C.1. After analysing the evidence adduced on both sides and perusing the records, the trial Court partly decreed the suit and granted permanent injunction in respect of using of pathway by the plaintiffs and dismissed the suit in respect of the relief not to open the windows and to close the windows and ventilators in respect of GF mentioned portions of 'D' schedule property. However, granted Mandatory injunction to remove the Slab I situated in the first floor of the property. Aggrieved by the said Decree and Judgment, the plaintiffs have preferred the Appeal before the learned VII Additional City Civil Court in A.S.No.250 of 2013 and the defendants have preferred Cross appeal in 182 of 2014. The First Appellate Court after hearing both sides, framed the following points for determination in A.S.No.250 of 2013 :-



SA Nos. 371 and 372 of 2015

“1. Whether the appellants / plaintiffs are entitled to get mandatory relief as sought for in the plaint?

2. Whether the judgment and decree of the trial Court regarding the mandatory relief sought by the appellants / plaintiffs is not sustainable and liable to be set aside?

3. To what relief the appellants / plaintiffs are entitled?”

Further, the First Appellate Court after hearing both sides, framed the following points for determination in Cross appeal No.182 of 2014 :-

“1. Whether the Judgment and decree of the trial court regarding the removal of the slab in the northern wall of the cross appellants / defendants property is not sustainable and liable to be set aside?

2. To what relief the cross appellants /defendants are entitled?”

After analysing the evidences adduced on both sides and perusing the judgment of the trial Court, the First Appellate Court, dismissed the Appeal filed by the plaintiffs and also dismissed the Cross Appeal filed by the defendants. Aggrieved by the said decree and judgment of the First Appellate Court, the present Second Appeals have been preferred by the defendants.

7.The learned counsel appearing for the appellants would submit that the appellants are the defendants in the main suit. The plaintiffs have filed the suit for permanent injunction restraining the defendants from interfering with



SA Nos. 371 and 372 of 2015

the plaintiffs' peaceful possession and enjoyment of the property in the common passage mentioned in the 'E' schedule marked as D portion, to grant permanent injunction restraining the defendants from opening the northern side wall windows, GF marked portion in D schedule property and to grant mandatory injunction directing the defendants to remove the GF marked portions in the D schedule property. According to the plaintiffs, the said pathway exclusively belongs to the plaintiffs and the defendants had put up construction by providing windows, ventilators and sunshades and those sunshades and windows are projected in the common pathway and therefore, filed the suit.

7.1. In fact, the said pathway is common to all and the defendants also entitled to use that pathway. Apart from that, the plaintiffs, defendants, other persons also entitled to use that path way but without impleading other right holders, over the said pathway, the suit has been filed. The defendants constructed house in the year 1988 by fixing the Doors, Windows and the sunshades and the plaintiffs have not taken any steps, moreover, apart from these defendants, other persons also fixed Windows, sunshades and ventilators, Jolis in their houses situated adjacent to the pathway, but the plaintiffs have not taken any steps as against them and only filed the suit as against these defendants with malafide intention. The trial Court without



SA Nos. 371 and 372 of 2015

considering that the suit property is a common land and the defendants are also entitled to use that pathway, decreed the suit in respect of permanent injunction and also mandatory injunction to remove the sunshade situated in 'I' portion of the 'D' schedule property. In fact, that slab is situated for the long time and no way caused hindrance to the users of the pathway. The said path is 3 ½ feet lane, the plaintiffs have not sought for a relief of declaration in respect of the pathway as it is the exclusive pathway, without any declaration, the plaintiff is not entitled to any relief of either permanent injunction or mandatory injunction. But the trial court granted the relief. Moreover, three plaintiffs have filed the suit but it was verified by two plaintiffs and no signature of the other plaintiff has been obtained in the plaint and the courts below have failed to consider the same. The courts below have failed to consider that the said lane was common pathway to the plaintiffs and the defendants and other persons, therefore, the courts below have failed to appreciate the facts and law in a proper perspective and erroneously decreed the suit, therefore, the Second Appeal is liable to be allowed.

8. This Court heard the learned counsel for the appellants in detail, however, there was no representation for the respondents despite several opportunities were given to the respondents to advance their arguments. Therefore, this Court taking note of the available records and submissions



SA Nos. 371 and 372 of 2015

made by the respondents before the trial Court as well as the First Appellate Court, is inclined to pass the Judgment.

9. Heard the learned counsel for the appellants and perused the documents placed on record. At the time of admitting the Second Appeals on 25.06.2015, this Court has formulated the following substantial questions of Law in both the Appeals:-

“a. Whether the courts below are correct in accepting the plaint as the valid one when the plaint was not signed by all the plaintiff and no permission was sought for presenting the same through the authority by way of Order 3 Rule 2 of CPC?

b. Whether the courts below are correct in accepting the case to render partly decree the mandatory injunction without any comprehensive relief of declaration as contemplated under Section 34 of the Specific Relief Act?

c. Whether the Courts below are right in granting the decree to a person, who played the fraud on the court by filing the case without knowledge of other plaintiff and subscribing the signatures fraudulently and by giving their false address?



d. Whether the court are right in decreeing the mandatory injunctions by rejecting the other relief when there is right of easement already vested with this appellant herein and that of the implied license is in operation in favour of the appellant”

10. In this case, the plaintiffs have filed the suit alleging that the land 3'6" feet width and 73'6" length belong to them and the said land exclusively belong to the plaintiffs, while so, the defendants had put up the construction and they fixed the ventilators, windows, jollies and sunshades by projecting in the said lane, therefore, they are causing disturbances and hence, the plaintiffs filed the suit for permanent injunction not to interfere with the enjoyment of the plaintiffs over the suit land and permanent injunction not to open the windows and mandatory injunction to remove the windows and the sunshades and the jollies. Before the trial court, on the side of the plaintiffs, P.W.1 was examined and marked Exhibits A.1 to A.11 and on the side of the defendants, they examined, D.W.1 and no documents were marked and Commissioner report and plan was marked as Ex.C.1.

11. The trial Court after considering the evidence adduced on both sides, came to a conclusion that as per Commissioner report, the ventilators have not been projected in the street, however, in the first floor, a slab is



projecting 1 Feet width and 4 ½ feet length in the path way, therefore, it is appropriate to remove that slab and other ventilators and jalli are fixed in the second floor. Further, decreed the suit in respect of permanent injunction not to interfere with the plaintiffs' possession and enjoyment of the property and granted mandatory injunction in respect of the slab situated in the first floor.

12. The First Appellant Court also in the judgment, discussed that as per the commissioner report, Ex.C1, property of the defendants has three floors and in the northern wall of the ground floor, there are four ventilators without any projection on the side of the common passage but each ventilators are having glass doors and they have not projected on the common passage, but the window has projected on the side of the common passage, 1 feet width, 4 ½ feet length and therefore, granted mandatory injunction. Further, the First Appellate Court observed that admittedly the suit passage is the common passage and the defendants have not raised any objection to use the common passage by the plaintiffs to reach Soorapamudali street from plaintiffs' property, therefore, confirmed the judgment of the trial court. But the courts below failed to consider that the plaintiffs have filed the suit alleging that suit lane exclusively belongs to the plaintiffs and the 1st plaintiff is entitled to 2/3rd share and 2nd and 3rd plaintiffs are jointly entitled to 1/3 share. When the defendants denied the exclusive right of the plaintiffs over the suit lane,



the plaintiffs, ought to have filed the suit for declaration in respect of suit lane, but the plaintiffs have not filed the suit for declaration in respect of common pathway suit lane and without seeking relief of declaration, the consequential relief of permanent injunction and mandatory injunction cannot be granted. The above said aspects have not been considered by the trial court and moreover, three plaintiffs have filed the suit, but the pleadings were verified only by two plaintiffs and one of the plaintiffs has not signed in the plaint. In the plaint, it has been mentioned that one plaintiff is represented by another plaintiff, but no any power was granted by the plaintiff, who has not signed in the plaint in favour of other plaintiff, who signed in the plaint. Therefore, the plaint is not in consonance with order 3 Rule 2 of CPC. Moreover the prayer in the plaint for mandatory injunction is to remove the ventilators, openings and windows in the northern wall of the defendant's house mentioned in 'D' schedule and marked as GF in the sketch which is allegedly projecting in the street. Therefore without any pleadings and prayer in respect of the sunshade the Court cannot grant relief with regard to the sunshade. Therefore, the courts below have failed to consider the material aspects and erroneously decreed the suit by granting permanent injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment of the property and mandatory injunction directing the defendants to remove sunshade projecting in the common pathway, which is not a subsequent matter of the suit.



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13. As far as the Substantial Questions of Law a. *Whether the courts below are correct in accepting the plaint as the valid one when the plaint was not signed by all the plaintiff and no permission was sought for presenting the same through the authority by way of Order 3 Rule 2 of CPC* is concerned, the courts below have not discussed about the verification of the plaint by the plaintiffs. It is admitted fact that plaint has been signed only by the two plaintiffs and as per the pleadings, the 1st plaintiff, viz., M.H.Mohideen Bhava was represented by his Power of Attorney, M.Mohameed Haneef and the 2nd plaintiff, viz., M.A.Shahul Hameed and 3rd plaintiff, viz., M.A.Syed Ali represented by Power of Attorney Zahul Hameed, but the courts below accepted the plaint without any power deed and without granting possession under order 3 Rule 2 of C.P.C. Though three plaintiffs filed the suit, the plaint was only signed by two persons and thereby have not followed mandatory proceedings contemplated under Order 3 Rule 2 of C.P.C., and no permission was granted by the Court to present the suit, through Power of Attorney and therefore, accepting the plaint itself is not in consonance with the order 3 Rule 2 of CPC. As per Order 3 Rule 2 of C.P.C., *defines 'recognized agents' authorized to make appearances, applications and acts in court on behalf of parties. This includes holders of Powers of Attorney and authorized business agents for parties residing outside the jurisdiction. These agents can perform*



procedural acts, but cannot plead or act as pleader' The courts below are not correct in accepting the plaint as the valid one when the plaint was not been signed by all the plaintiffs and no permission was sought for representing the same by the Power of Attorney as per Order 3 Rule 2 of CPC.

14. As far as the Substantial Question of Law *b. Whether the courts below are correct in accepting the case to render partly decree the mandatory injunction without any comprehensive relief of declaration as contemplated under Section 34 of the Specific Relief Act?* is concerned, in this case, according to the plaintiffs, the suit lane measurement is 3'6" feet width and 73'6" feet length, exclusively belong to the plaintiffs and 1st plaintiff is entitled to 2/3 share and 2 and 3 jointly entitled to 1/3 share over the suit land, the relief sought for in this suit is for permanent injunction and mandatory injunction, when the defendants had taken a specific plea that the suit is a common pathway and the plaintiffs have no exclusive right over the property, it is the duty of plaintiffs to seek for declaratory relief and consequential relief of permanent injunction and mandatory injunction. The plaintiff has not sought for main relief of declaration. Therefore, without seeking main relief of declaration consequential relief of permanent injunction and the mandatory injunction cannot be granted, but the courts below failed to consider the same and thereby the courts below are not correct in accepting the case in partly



decreeing the suit for relief of mandatory injunction without seeking relief of declaration.

15. As far as the Substantial Question of Law *c. Whether the Courts below are right in granting the decree to a person, who played the fraud on the court by filing the case without knowledge of other plaintiff and subscribing the signatures fraudulently and by giving their false address?* is concerned, already this Court has decided that the suit is not maintainable without complying Order 3 Rule 2 of CPC and the plaint has not been verified by all the plaintiffs, the suit has been filed without knowledge of the other plaintiffs and thereby played fraud, however, the courts below have failed to consider the said aspects and both the courts below are not right in granting decree to the person, who played fraud on the Court without knowledge of other plaintiff and subscribing the signatures fraudulently by giving false address.

16. As far as the Substantial Question of Law *d. "Whether the court are right in decreeing the mandatory injunctions by rejecting the other relief when there is right of easement already vested with this appellant herein and that of the implied license is in operation in favour of the appellant"* is concerned, the courts below have decreed the suit alleging that the first floor sunshade is



SA Nos. 371 and 372 of 2015

projecting towards the common land, but the said building was constructed in the year 1988, the plaintiffs have not raised any objection for a long period of time and filed this suit after 38 years. Further according to the defendants the other land owners had also constructed building with windows, jollis and sunshade, but no any action was taken as against those persons. This Court also perused the records and particularly as the per plaint plan, there are no projections in the suit lane. As per the Plan, the plaintiffs house is situated on the western side of the north-south lane, thereafter, the said lane turns towards east and the defendants lands are situated in the southern side of east west lane and there is no projection within the lane and the alleged windows are far away from the suit land and no way hindrance caused to the plaintiffs. Therefore, the plaintiffs themselves have not provided the correct particulars and sought for relief of mandatory injunction. Though the courts below relied on the commissioner report and indicated that there is a projection in the first floor, when the plaintiffs themselves admitted that there is no projection in the common pathway through plan filed by them and the advocate commissioner also has not measured the property through surveyor, it is not appropriate to grant mandatory injunction holding that sunshade is projecting in the common lane. Moreover, this Court in the previous paragraphs decided that the plaintiff has not sought for relief of declaration and without seeking relief of declaration, the relief of permanent and



SA Nos. 371 and 372 of 2015

mandatory injunction cannot be granted. Therefore, the courts below have not correctly appreciated the facts of the case in a proper perspective and the judgments and decrees passed by the courts below are unsustainable.

17. In view of the above said discussions and answers to the substantial questions of law, this Court is of the opinion that these Second Appeal are liable to be allowed and the judgment and decree passed by the trial Court as well as the First Appellate Court in both the appeal suit and cross appeal are liable to be set aside.

In the result, the Second Appeals are Allowed and the judgment and decree passed by the trial Court in O.S.No.13164 of 2009 dated 06.04.2013 and the decree and judgment of the appellate Court confirmed in A.S.No.250 of 2013 and dismissed in cross appeal No. 182 of 20214 dated 08.10.2014 are set aside and the suit in O.S.No.13164 of 2009 is dismissed. No costs.

10-02-2026

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

ssd



SA Nos. 371 and 372 of 2015

To

1. The VII Additional City Civil Court, Chennai
2. The II Assistant City Civil Court, Chenani



WEB COPY



SA Nos. 371 and 372 of 2015

P.DHANABAL, J.

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SA Nos. 371 and 372 of 2015

10-02-2026

Page22 of 22