

(2012) 02 MAD CK 0343

In the Madras High Court

Case No : Second Appeal No. 885 of 1999

Thirugnanasambandam

APPELLANT

Vs

Lalitha

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : (2012) 02 MAD CK 0343

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : M.V. Venkataseshan, for the Appellant; T. Girish For Mr. Srinath Sridevan, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice M. Venugopal

1. The Appellant/Second Defendant has projected this instant Second Appeal as against the Judgment and Decree dated 04.11.1998 in A.S.No. 26 of 1998 passed by the Learned Principal Sub Judge, Nagapattinam in confirming the Judgment and Decree dated 25.09.1997 in O.S. No. 751 of 1994 passed by the Learned District Munsif, Tiruvarur. The First Appellate Court viz., the Learned Principal Sub Judge, Nagapattinam, while delivering the Judgment in A.S.No. 26 of 1998 dated 04.11.1998 has among other things observed that the Respondent/Plaintiff as per Ex.A1-Sale deed dated 21.09.1979 has used the lane as suit lane, measuring an extent of East West 2 1/2 feet and South North 64 feet and in all has enjoyed 160 sq.ft. of lane and therefore, the lane portion belongs to the Respondent/Plaintiff and as such, the Respondent/Plaintiff is entitled to get the relief of declaration and in this regard a conclusion arrived at by the trial Court is a correct one and further during December 93 itself in the lane the Appellants have extended the "Eaves Dropping" and accordingly, the relief of Mandatory Injunction granted by the trial Court in favour of the Respondent/Plaintiff is a correct one and consequently, dismissed the first appeal with costs, thereby

confirming the Judgment and Decree passed by the trial Court in O.S.No. 751 of 1994 dated 25.09.1997.

2. In the main suit, before the trial Court 1 to 5 issues have been framed for determination. On the side of the Respondent/Plaintiff, the witnesses PW1 to PW3 have been examined and Exs.A1 to A10 have been marked. On the side of the Appellant/Second Defendant and other Defendants, the Witnesses DW1 to DW4 have been examined and Exs.B1 to B3 have been marked.

3. The trial Court, on an appreciation of oral and documentary evidence available on record has come to a clear conclusion that the lane, which is situated on the western side of the Respondent/Plaintiff's house measuring east-west 21/2 feet and south north 64 feet, total measuring 160 sq.ft. belongs to the Respondent/Plaintiff and accordingly granted the relief of declaration and further directed the second and third Defendants to remove the "Eaves Dropping" measuring 50 feet length and 1 1/2 feet breadth which have been extended by the Defendants are to be removed by them within a period of two months, failing which the Respondent/Plaintiff is to take necessary steps through Court to remove the same and granted the relief of Mandatory Injunction. Furthermore, it has also granted a compensation of Rs. 1000/- to the Respondent/Plaintiff to be paid by Defendants 2 and 3 within a period of two months from the date of Judgment and also the suit costs will have to be paid by Defendant 2 and 3.

4. At the time of admission of the Second Appeal, this Court has framed the following Substantial Question of Law for determination:

1. Whether the Courts below are right in granting a Decree for declaration and mandatory injunction for the lane, when the Plaintiff had not proved the title nor the alleged construction within 3 years preceding the date of filing the suit?

5. The Contentions, Discussions and Findings on Substantial Question of Law:-

The Learned Counsel for the Appellant/Second Defendant submits that both the Courts below have failed to take note of Exs.A1 to A10 filed by the Respondent/Plaintiff except Ex.A7 and the Defendants are not parties even as witnesses and therefore the mentioning of lane in these documents are not binding on the Defendants.

6. The Learned Counsel for the Appellant/Second Defendant contends that for a long time existence of lane between the house of the Respondent/Plaintiff and the Defendants is accepted and that in a case of relief of mandatory injunction, it is to be established that the alleged encroachment is within 3 years from the date of filing of the suit and even in Ex.C1 Commissioner's Report and C2-Plan projected by the Advocate Commissioner, there is no mention about any new construction. Though the Respondent/Plaintiff has contended that new construction is of the year 1993, the suit has been filed during November 1994.

7. The plea of the Appellant/Second Defendant is that the total extent purchased as per Ex.A1 sale deed dated 21.09.1979 and A2-sale deed dated 15.09.1974

are only 15 cents and the measurement of the building mentioned in the document is found to be a wrong and as such, it is open to the Respondent/Plaintiff to measure the entire land as per Ex.A1 sale deed and locate the lane.

8. According to the Learned Counsel for the Appellant/Second Defendant, the sloping roof of Respondent/Plaintiff's house is above the sloping roof of the Defendant's house and hence during rainy season, the water from the Respondent/Plaintiff's roof falls on the roof of the Defendant's and then only it is drained in the lane. When this nature of construction has been admittedly not disturbed, it would clearly go to show that the purported due construction is a false statement.

9. Lastly, it is submitted by the Learned Counsel for the Appellant/Second Defendant that Defendants 2 and 3, who are the brothers of the first Defendant have been impleaded in the suit only during the year 1997 and as such the suit is barred by limitation against them.

10. Moreover, the existence of lane in between the house of the Respondent/Plaintiff and the Defendants is for draining rain water from the roof and also for taking cattle to the backyard and as such it is an easement of necessity and also that his enjoyment is more than 50 years and as such it cannot be denied by means of a mandatory injunction.

11. It is the evidence of PW1(Respondent/Plaintiff's husband) that in between his house and the house of the Defendant there is a lane measuring east west 2 1/2 breadth and measuring south north 64 feet and the extent of backyard 15 cents and the house and lane are of an extent of 1984 sq.ft. and his wife has purchased both the house and lane as per Ex.A1 sale deed dated 21.09.1979. Moreover, one P.N.Krishnamoorthy (Predecessor) has purchased the suit property as per Ex.A2 sale deed dated 15.09.1974 and even in that document on western side, it is mentioned as inclusive of lane and R.Govindan has received a loan from one Rajagopal on 08.12.1965 and has executed Ex.A3 mortgage deed, dated 08.12.1965 and even in that document it is written as lane on the western side.

12. PW1 in his evidence also proceeds to the effect that as per the Ex.A4 sale deed dated 19.10.1932 one Rangaiya Naidu has purchased the property from Rangaiya Naidu, S/o Naina Naidu and even in the sale deed there is a reference to the lane and even in Ex.A5 sale deed dated 21.4.1923 by Lakshmana Chettiar in favour of Rangaiya Naidu. It is mentioned as lane on the western side and in Ex.A7 sale deed dated 28.05.1944 (Kathiresa Nainar purchasing from Kasthurai Rangan Chettiar and others). The suit lane has not been made mentioned of and that during the year 1993 December, when he has not been in the village, at that time, the wall on the eastern side has been heightened by 1 1/2 feet by the Defendants and the Eaves has been extended by 1 1/2 feet at a length of approximately 50 feet and for removing the Eaves measuring 1 1/2 feet breadth and 50 feet length, the present suit has been filed and because of the Dropping

of Eaves water an expense of Rs. 1000/- has been incurred and for that sum also the suit has been filed.

13. PW1 (in his cross examination) has deposed that in his documents the measurement of the house is described as 31 feet x 64 feet. But actually the extent of the house is 28 1/2 feet breadth and that he does not know in which year a house has been constructed and from the beginning the said house is only like that and there is no controversy as regards the usage of Lane.

14. PW2 in his evidence has deposed that he has sold the suit property as per the Ex.A2 sale deed dated 15.09.1974 and the lane situated on the western side of the house has been enjoyed by them and initially, the lane belonged to him and the same has been used for tethering the cattle and for carrying the haystack and till the date of his sale, he has been in enjoyment of the lane by himself and no one has got a right in the said lane.

15. PW2 (in his cross examination) has deposed that it is not correct to state that he has no enjoyment right in respect of the lane and if one passes through the lane, one cannot go to the backyard of the Defendants and only one can go to their house.

16. The evidence of PW3 is to the effect that the lane has been in their enjoyment and the lane measures an extent of 64 feet length and 2 1/2 feet breadth and that his brother is Krishnamoorthy and his younger brother is Balakrishnan and he along with two brothers have sold the property to the Respondent/Defendant as per Ex.A2 and he has sold the house during the year 1979 and the western side of the house, there is a lane and the lane has been purchased only after measuring the same.

17. DW1 in his evidence has deposed that he has not seen any document of the Respondent/Plaintiff prior to the suit and that he has not measured the house of the Respondent/Plaintiff and the land and from the lane one cannot go to the house of the Respondent/Plaintiff and to her backyard. There is a fence on the western side of the house of the Respondent/Plaintiff situated on the northern side of the mother wall.

18. DW1 (in his cross examination) has tacitly admitted that he has read the document in which there is no mention about the lane.

19. DW2 (in his cross examination) has deposed that in the document it is seen that the western side of the lane belongs to Govindan and others and he has been called for Panchayat by Govindan and he has seen one Rangaiya Naidu selling the property to another person by name Ragaiya Naidu.

20. DW3 in his evidence has deposed that in Ex.A4 sale deed dated 9.10.1932 his father Purusothuma Naidu has signed and in Ex.A3 mortgage deed dated 08.12.1965 his signature is found and that 30 or 35 years before as regards the lane a problem has arisen and the Panchayat has taken place and as per the Panchayat agreement, it has been decided that both of them will have to use the

lane.

21. As seen from Ex.A1 to A5 sale deeds, the house has been purchased along with the lane by the Respondent/Plaintiff. From Ex.A7 sale deed dated 28.05.1944 executed by Kasthuri Rangaiya Chettiar and Padmanavathy Ammal in favour of Katheresa Nainar. It is seen that there is no reference about the eastern side lane. Therefore, it is candidly clear that the Defendants have no manner of right in the suit lane as opined by this Court. Even the Advocate Commissioner in his Ex.C1 Report dated 28.08.1995 has clearly stated about the existence of 21/2 feet breadth lane and further he has mentioned that at the end of the Respondent/Plaintiff's house, there is a wall proceeding on the northern direction joining the eastern wall.

22. Moreover, the Advocate Commissioner has also mentioned about the presence of fence on the western side of the Respondent/Plaintiff's northern side of the house. Even in the Ex.C2 Advocate Commissioner's Report, the measurement of the suit lane has been mentioned as 2 feet 6 inches by breadth and 64 feet by length. The extent of suit lane is 160 sq.ft. and the extent of house is 1824 sq.ft. and the house and the suit lane are 1984 sq.ft. has made by the Advocate Commissioner in his report. EX.A4 and A5 sale deeds dated 19.10.1932 and 21.04.1923 are ancient documents or have been existence well over 30 years. Ancient 30 years document can be marked even without requirement of proof has envisaged u/s 90 of Indian Evidence Act. No formal proof for evidence is required to let him the parties to prove the said sale deed.

23. In the considered opinion of this Court that in the present case on hand a plea has been taken on behalf of the Appellant/Second Defendant that the suit lane is to be enjoyed in common by the Respondent/Plaintiff and the Defendants. It is to be pointed out that Ex.A10 approximates patta dated 25.01.1996 and Ex.B3 dated 25.01.1996 land tax approximate patta all are come into existence of after filing of the suit and the factum of enjoyment of the suit property by the Respondent/Plaintiff has not been repudiated or denied by the Appellant/Second Defendant and the other Defendants before the trial Court. In as much as the Defendants have extended eastern side of the "Eaves Dropping" in the suit lane, he has spoken to PW1 in his evidence and in case of rain there is a possibility of the rain water falling on the western side wall of the Respondent/Plaintiff and the wall will get damage. If the wall of the Respondent/Plaintiff gets damaged then undoubtedly hardship and loss will occur to the Respondent/Plaintiff.

24. The trial Court has weighed the oral evidence of PW1 to PW3 and DW1 to DW4 and also looked into the documentary evidence adduced by the parties and also made a specific reference to Exs.C1 and C2 Commissioner Report and Plan wherever necessary has clearly come to the conclusion that the Respondent/Plaintiff is entitled to get the relief of declaration in respect of the suit lane measuring east west 2 1/2 feet, south north 64 feet, aggregating in all 160 sq.ft. and also granted the relief of "mandatory injunction" in directing the second and third Defendants to remove the construction of Eaves at a length of 50 feet by

extending 1 1/2 feet in the suit lane, within a period of two months and also awarded a compensation of Rs. 1000/- to the Respondent/Plaintiff, to be paid by Defendants 2 and 3.

25. The First Appellate Court also has looked into the matter in a conspectus manner and while dealing with the First Appeal has opined during the December 1993, the Defendants have extended the Eaves and through the suit has been filed by the Respondent/Plaintiff during the year 1994 and the Defendants have also not established that the suit lane is a common lane and accordingly granted the relief of declaration in respect of the suit lane in favour of the Respondent/Plaintiff and also granted the relief of Mandatory Injunction in favour of the Respondent/Plaintiff, besides awarding a sum of Rs. 1000/- as damages in favour of the Respondent/plaintiff, to be paid by Defendants 2 and 3 (since the first Defendant has expired pending trial of the suit) and infact the First Appellate Court has concurred with the findings rendered by the trial Court in the main suit. As a matter of fact, this Court does not find any material irregularity or patent illegality as regards the Judgment and Decree of the trial Court passed in the main suit and also in regard to the Judgment and Decree in A.S.No. 26 of 1998 dated 04.11.1998 passed by the First Appellate Court and there is no perversity of approach by them in regard to the subject matter of disputes in issue. In fact, there are sufficient available materials on record for the trial Court as well as the First Appellate Court to grant the decree for declaration and Mandatory Injunction as prayed for by the Respondent/Plaintiff in the suit.

26. In fact the Respondent/Plaintiff has very much established her title not only in respect of the plaint schedule property coupled with a lane and that the extension of "Eaves Dropping" has been made by the Defendants during the year 1993 and the Respondent/Plaintiff has filed the suit during the year 1994 and as such the suit filed by the Respondent/Plaintiff before the trial Court on 16.04.1994 is well within the period of limitation and also well within the period of proceeding the construction and as such this Court is answered the Substantial Question of Law against the Appellant/second Defendant. In the result, the Second Appeal is dismissed leaving the parties to bear their own costs. Consequently, the Judgment and Decree of the First Appellate Court viz., the Principal Sub Judge, Nagapattinam in A.S.26 of 1998 dated 04.11.1998 and the Judgment and Decree of the trial Court in O.S.No. 751 of 1994 dated 25.09.1997 are confirmed by this Court for the reasons mentioned in this Second Appeal.