
(2009) 10 MAD CK 0142

Madras High Court

Case No: S.A. No. 839 of 2009 and M.P. No. 1 of 2009

Sagayanathan

APPELLANT

Vs

D. Lingappan

RESPONDENT

Date of Decision: Oct. 7, 2009

Hon'ble Judges: S. Tamilvanan, J

Bench: Single Bench

Advocate: Ramanujam, for A. Bobblie, for the Appellant; M. Jayaraman, for the Respondent

Final Decision: Dismissed

Judgement

S. Tamilvanan, J.

The Second Appeal has been preferred against the Judgment and Decree, dated 26.11.2007 made in A.S. No. 13 of 2007 on the file of the District Judge, Nilgris, reversing the Judgment and Decree, dated 14.08.2007 made in O.S. No. 55 of 2005 on the file of the Subordinate Judge, Nilgris at Udhagamandalam.

2. The defendant before the trial court is the appellant herein. It is seen that the suit was filed by the respondent herein, seeking mandatory injunction to remove the alleged encroachment made in "A" schedule property of the plaintiff and for permanent injunction against the defendant, his men etc., from parking vehicles in the alleged common road of 14 feet width described as "B" schedule of the suit property and also for costs.

3. After the trial, the suit was dismissed by the trial court without costs. Aggrieved by which, the plaintiff preferred an appeal. The appellate court, by its Judgment and Decree, dated 26.11.2007 allowed the appeal, by reversing the Judgment and Decree passed by the trial court and granted mandatory injunction, directing the appellant/defendant to vacate the encroachment caused by him on the common road by erecting gate pillars and sliding gate which are described in the schedule A and delineate in blue colour in Ex.C.2, sketch. Similarly, the appellant/defendant and

his men etc., are restrained by way of permanent injunction from blocking the free user of the 14 feet width road described in "B" schedule of property by the plaintiff and his family members using the same. For removing the encroachment, one month time was granted by the first appellate court. Ex.C.2, sketch prepared by the Advocate-Commissioner, which was made part of the decree.

4. In the Second Appeal, the following questions have been raised as Substantial Questions of Law by the appellant:

1. Whether the suit for mandatory injunction is maintainable in the absence of any document to prove the width of the pathway ?

2. Whether the first appellate court is right in reversing the Judgment and Decree passed by the trial court only relying on the Advocate-Commissioner's Report, Ex.C.1 ?

3. Whether is not burden of proof solely on the plaintiff to prove that there was a common pathway measuring 14 feet width and has not the first appellate court erred in shifting the burden on the defendant ?

4. In the absence of any complaint of encroachment by other land owners, has not the first appellate court erred in holding there is an encroachment ?

5. In the absence of the title deed not mentioned the width of the common pathway is not the burden proving the width of the common pathway on the plaintiff ?

6. Is not the appreciation of evidence both oral and documentary of the appellate court is perverse ?

4. Mr. Ramanujam, learned Counsel appearing for the appellant challenged the impugned Judgment and Decree on the ground that the suit filed by the respondent/plaintiff, seeking mandatory injunction and permanent injunction, without a prayer for declaration of right is not legally sustainable and further contended that the first appellate court has solely relied on Ex.C.1, Advocate-Commissioner's Report for decreeing the suit. Similarly, according to the learned Counsel, the 14 feet width of the common road was not established by the plaintiff and the burden cannot be shifted on the appellant, who was the defendant in the suit.

5. Per contra, Mr. M. Jayaraman, learned Counsel appearing for the respondent/plaintiff placed his arguments that the alleged pathway has been admitted, even in the sale deed, executed in favour of the appellant/defendant by his vendor as well as the appellant, similarly, the measurement in respect of the width of the road has been established and therefore, according to the learned Counsel for the respondent/plaintiff, there is no need for seeking a declaratory prayer in the instant case.

6. It is seen that an Advocate-Commissioner was appointed to inspect the suit property and to file his report. As per the order of the court, he inspected the suit property to find out the alleged encroachment in the common road of 14 feet width. The Advocate-Commissioner's report was marked as Ex.C.1 and the sketch prepared by the Govt. Surveyor has been marked as Ex.C.2. As per the Advocate-Commissioner's Report, 14 feet width common road is passing through R.S. Nos. 939/1 and 513/1A3 of Kothagiti Town. In the sketch, Ex.C.2, it is seen that the properties on the west of the 14 feet common road are house sites (plots) belonging to various persons. It is not in dispute that the entire property originally belonged to one common vendor.

7. Learned Counsel appearing for the respondent drew the attention of this Court to the sketch, Ex.C.2 and pointed out that the width of the road is 14 feet and the road runs approximately from south to north, only nearby the appellant's/defendant's property, the width of the road has been reduced. It has been established by Exs.C.1 and C.2 that everywhere the width of the road is 14 feet, only nearby the appellant's/defendant's property, the width was found only 11.5 feet and 12.6 feet, therefore, there is an encroachment in the road, as shown in the sketch.

8. Learned Counsel appearing for the appellant/defendant argued that the Advocate-Commissioner has stated that there is an encroachment by the appellant/defendant, which cannot be decided by the Advocate-Commissioner and he also disputed the Advocate-Commissioner's Report and sketch. The main contention raised by the learned Counsel appearing for the appellant is that the Advocate-Commissioner has not measured the property belongs to the defendant, though he measured only the alleged 14 feet road.

9. However, learned Counsel appearing for the appellant has not disputed the fact that the appellant/defendant had not filed any objection to the Advocate-Commissioner's Report, Ex.C.1 and the sketch Ex.C.2. It is not in dispute that the Advocate-Commissioner had inspected the property and prepared the sketch with the help of Government Surveyor, Kothagiri and therefore, it is not open to the appellant now to dispute the measurement taken by the Surveyor and the physical features found by the Advocate-Commissioner.

10. The next question raised by the learned Counsel appearing for the appellant is that the defendant's property was not measured by the Advocate-Commissioner with the help of surveyor. But, admittedly the court below had directed the Advocate-Commissioner to inspect the suit property and to file a report with measurements. As per the Advocate-Commissioner's Report and the sketch, Ex.C.2, prepared by Government shows that the Surveyor has measured the suit property. It is seen that on the southern extremity, club road is described, nearby the club road, the common road is abutting one tea land, measuring 43.6 feet on the west, 30 feet on the east, wherein the width of the road at the said place is stated as 14 feet. Similarly, the road in front of the next plot on the north is also shown as 14 feet

width. Subsequently, the vacant site of the defendant's property was shown wherein the width is stated as 12.6 and 11.5 feet. Except nearby the appellant's/defendant's property, in all other parts of the common road, the width is 14 feet.

11. Beyond the suit property, there are 3 other plots, including the appellant's property, where the width of the common road is 14 feet and therefore, it is clear that only nearby the defendant's property the width of the road is shown as 12.6 feet and 11.5 feet. Ex.A.9 is the copy of the registered sale deed, dated 27.06.1997 executed in favour of one R. Shankar by E. Franklin, wherein the eastern boundary is shown as 14 feet cart-track. The sale deed, dated 19.01.1999 executed by Dr. R. Shankar in favour of D. Lingappa, the respondent herein was marked as Ex.A.1, wherein the eastern boundary is stated as 14 feet width motorable common road. The reply notice, dated 10.02.2005 issued by the appellant to the respondent is marked as Ex.A.7, wherein it is clearly stated as follows:

The access to this property is mentioned in your notice is through the 14 feet width common private road. The fact that this access is common has also been conceded to by your client. That being so your client cannot claim to have any special right to the usage of the said road, in derogation of the right granted to all the purchasers, under the documents of purchase.

In the reply notice, the appellant herein has admitted that the width of the common private road is 14 feet and further, in the cross-examination of the appellant, who was examined as D.W.1 has admitted that as per Ex.A.7, the width of the common road is 14 feet. Similarly, he has admitted the fact that one Franklin was the original owner of the entire property, that was purchased by the appellant, respondent and others. There is no dispute that the suit private common road is on the eastern side of the property purchased by the parties to the suit/appeal and its width is 14 feet.

12. It is a settled proposition of law that admission need no proof. In the instant case, the appellant/defendant has admitted that he purchased his land from the said common vendor, Franklin as that of the respondent herein. In Exs.A.1 and A.9, eastern boundary is stated as 14 feet cart-track. The appellant/defendant has categorically admitted in his reply notice and in his cross-examination that the width of the common road is stated in the documents as 14 feet. He has not filed any objection to the Advocate-Commissioner's Report and the sketch prepared by the Government Surveyor and marked as Ex.C.2.

13. When there is a clear admission and clinching evidence, to support the findings of the courts below with regard to the right of the plaintiff, who is the respondent herein, I am of the view that declaratory prayer is not mandatory. In otherwise, when the right of the claimant is established, without any cloudy circumstances, seeking relief of mandatory injunction or prohibitory injunction, based on the admitted right is legally maintainable. Only if there is any cloudy or suspicious

circumstances with regard to the right of a person claiming mandatory injunction or prohibitory injunction, declaration of such right would be a pre-requisite. As admission needs no proof, I am of the view that the declaratory prayer is not mandatory, though the present suit is for mandatory injunction, hence, the suit is legally maintainable, accordingly, the alleged substantial questions of law 1, 2 and 3 are answered against the appellant and in favour of the respondent.

14. Learned Counsel appearing for the appellant cited the decision, *Lakshmipathy v. Madras Gymkhana Club*, reported in 1996 2 MLJ 573, wherein this Court has held as follows:

To get mandatory injunction, whether permanent or temporary, plaintiff should be specific that there was a breach of obligation, and certain acts are necessary to restore the status quo. Learned Counsel for the appellant was at pains to substantiate his case that there was an obligation on the part of the defendant-Club, towards the plaintiff. If there is no obligation, the question of granting any mandatory injunction does not arise.

As per this decision, it is clear that to get mandatory injunction, whether permanent or temporary, plaintiff should be specific that there was a breach of obligation. In the instant case, it is not in dispute that the appellant, respondent and others purchased the properties from a common vendor, Franklin. In the sale deeds, admittedly, the eastern boundary is stated as 14 feet width common road and therefore, there is a clear implied obligation on the part of the appellant, respondent and other persons having right in the road in maintaining the road without any encroachment. The encroachment made by the appellant clearly established that there is a breach of obligation by the appellant herein.

15. In the instant case, it cannot be decided that the first appellate court has shifted the burden on the appellant/defendant, since the finding of the court below is supported by evidence, which cannot be construed as a perverse finding.

16. The respondent/plaintiff has averred in the plaint that the cause of action for filing the suit arose at Kothagiri in the first week of April 2004, when the defendant erected gate pillars and sliding gate by encroaching into the common road and subsequently when the defendant failed to vacate the said encroachment, despite the police complaint, dated 13.04.2004 and the legal notice, dated 17.01.2005 and therefore, the appellant cannot raise any substantial question of law that in the absence of any complaint of encroachment by the other land owners, the court below has held that there is an encroachment. The respondent/plaintiff being an aggrieved party on account of the breach of obligation by the appellant/defendant, he has caused of action to file the suit. It is not mandatory on the part of the plaintiff to file the suit by impleading other persons, having similar rights to use the common road, since he has independent right, as per his sale deed.

17. On the aforesaid circumstances, I answer the alleged substantial questions of law 4, 5 and 6 against the appellant and in favour of the respondent and hold that there is no real substantial question of law to be decided in the Second Appeal, since the Court below has reversed the Judgment of the trial court, only based on the evidence, as per law and decreed the suit as prayed for. Hence, the Second Appeal is liable to be dismissed.

18. In the result, the Second Appeal is dismissed with costs. Consequently, connected M.P. No. 1 of 2009 is also dismissed.