

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.08.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.964 of 1999

&

C.M.P.No.381 of 2015

1. Manoharan
2. K.Ramanathan ... Appellants/Plantiffs

(the second appellant is impleaded as per order of this Court dated 19.08.2015 made in C.M.P.No.381 of 2015)

-Vs-

1.Panneerselvam
2.Balarama Pillai
3. Vasantha ... Respondents/Defendants

Second Appeal filed under section 100 of C.P.C against the judgment and decree dated 8th February 1999 made in A.S.No.206 of 1996 on the file of the Sub Judge Civil ,Judge's (Senior Division) Kallakurichi confirming the judgment and decree dated 29.09.1994 made in O.S.No.954 of 1988 on the file of the Additional District Munsif Court, Kallakurichi.

For Appellant : Mrs.Mythili Suresh for
M/s.Sarvabhauman Associates

For Respondents : M/s.V.Raghavachari Associates

JUDGMENT

The above said second appeal came to be filed by N.Manoharan, the plaintiff in the original suit O.S.No.945 of 1988 on the file of Additional District Munsif, Kallakurichi, who suffered a decree dismissing the said suit in the hands of the trail Court, which decree was also confirmed by the lower appellate Court in A.S.No.206 of 1996 by a judgment and decree dated 08.02.1999.

2. Pending second appeal, K.Ramanathan seems to have got a sale deed dated 16.06.2008 registered as Document No.1692 of 2008 on the file of the Sub-Registrar, Thiyyagadurgam, in respect of the suit property claimed by the original appellant N.Manoharan to be his absolute property. Based on the purchase, the purchaser under the said document, namely K.Ramanathan along with the original appellant N.Manoharan has filed C.M.P.No.381 of 2015 for impleading K.Ramanathan as a co-appellant. As K.Ramanathan is a purchaser pendente lite, his purchase shall be subject to the result of the second appeal. However, the apprehension of the purchaser K.Ramanathan was sought to be allayed by the vendor by co-opting the purchaser as a petitioner for being impleaded as a co-appellant so that he can pursue the appeal to his satisfaction without any grievance that the vendor, after sale, lost interest and enthusiasm in conducting the second appeal. Under the said circumstances, though the purchaser is a not a necessary party, he can be impleaded as a proper party. The learned counsel appearing for the respondents also submits that the respondents are not going to be prejudiced and they do have no objection for impleading K.Ramanathan, the alleged purchaser from Manoharan, the original appellant, as a co-appellant. Hence, C.M.P.No.381 of 2015 is allowed and the first petitioner therein namely K.Ramanathan is impleaded as Appellant No.2 in the second appeal.

3. The Appellants 1 and 2 are represented by one and the same counsel. All the three respondents are also represented by one and the same counsel.

4. The arguments advanced by Ms.Mythili Suresh, learned counsel for the appellants 1 and 2 and by Mr.V.Raghavachari, learned counsel for respondents 1 to 3 are heard. The judgments of the Courts below, the grounds of second appeal and other materials available on record sent for from the courts below are perused and taken into consideration.

5. In order to avoid confusion and for achieving clarity, the parties are referred to in accordance with their ranks in the original suit. At appropriate places their ranks in the second appeal are also furnished.

6. The unsuccessful plaintiff, who failed in his attempt to get a decree for bare injunction as claimed by him against the defendants in both the Courts, has come forward with the present second appeal. The second appeal was admitted on 31.10.2003 identifying the following questions to be the substantial questions of law involved in the second appeal:

1. Whether the Courts below are right in law in rejecting the claim of the appellant to a portion of the suit

property by discarding Exs.A1 to A3 and by misreading Exs.B1 to B5?

2. Whether Ex.B1 - title deed of the respondents confirms the title of the appellant to the vacant site north of their property which is the suit property and the same was admitted by DW1? Whether the Courts below are right in law in brushing side Ex.B1 and admission of DW1?

7. Though two questions were formulated at the time of admission, in fact, the same can be condensed into a single question. The learned counsel for the appellants also, during her arguments, contends that the only contention raised by the appellants is that the finding of the Courts below holding the defendants to be entitled to half of the vacant site and well forming part of the suit property is perverse. Hence, the substantial questions are condensed into a single substantial question and is formulated as follows:

"Whether the findings of the Courts below that the defendants (respondents in the second appeal) are entitled to half of the vacant site and well forming part of the suit property is perverse?"

8. It is the contention of the learned counsel for the appellants that as against clear documentary evidence dating back to 12.12.1939, which show that the disputed portion was also the property of the predecessors-in-title of the plaintiff, there is no reliable evidence, either documentary or oral, adduced on the side of the defendants to show that they do have title to $\frac{1}{2}$ share in the vacant site measuring 16 x 15 feet and the well situated therein. The learned counsel for the appellants also contends that even in the documents produced on the side of the defendants, the suit property was shown as the northern boundary of the defendants' property and the same would go to show that the claim of title by the defendants to half portion in the disputed vacant side and well could not be sustained. The learned counsel for the appellants also pointed out the admission made by DW1 that the staircase leading to the terrace portion of the building of the plaintiff begins at the southern part of the disputed portion and contends that if at all the southern portion of the vacant site was owned by the defendants, they would not have allowed the plaintiff or his predecessors-in-title to put up the staircase so as to have an access to it through the southern portion.

9. Per contra, it is the contention of the learned counsel for the defendants (respondents) that ancient documents produced by the defendants contain clear recitals to the effect that the vacant site and the well situated therein were used by the plaintiff's predecessor and the defendants as common properties and that the same was the reason why a doorway has been provided in the northern wall of the defendants' house. It is the definite case of the defendants that the vacant site lying on the south-east of the buildings

of the plaintiff and lying on the north of the building of the defendants jointly belongs to the plaintiff and the defendants and that for more than 50 years prior to the filing of the suit, the defendants had been using the doorway in the northern wall of their house to reach the vacant site and enjoy their half share in the well. It is also their contention that the vacant site and well jointly owned by the plaintiffs and the defendants was orally divided into the northern half and the southern half and the boundary line runs cutting the well in the middle. It is the further case of the defendants that the very fact that the northern portion is made of floor constructed with brick and cement, whereas the southern half portion is found with granite stones will make it clear that the plaintiffs and the defendants are enjoying the northern and the southern half respectively, even though no formal partition was effected.

10. In support of their contention, the defendants also refer to the fact that the plaintiff located his lavatory on the northern part of the disputed vacant site and contend that if at all the plaintiff was entitled to the entire vacant site, he would have located it on the southern extremity. However, the learned counsel for the appellants relies on a statement made by DW1 in his evidence to the effect that they had permitted the plaintiff to put up the staircase on the southern side of the disputed property and contends that if at all the disputed vacant site was a common property and the same was enjoyed in the manner stated by the defendants, either oral partition or for the sake of convenience (northern portion was enjoyed by the plaintiff and the southern portion was enjoyed by the defendants), the defendants would not have permitted the plaintiff to have the staircase on the southern side in case there was no partition or in case the southern half fell to the share of the defendants.

11. The said contention of the learned counsel for the appellants is countered by the learned counsel for the respondents (defendants) by drawing the attention of the Court to the further answer given by DW1 in the re-examination clarifying his earlier statement. In the re-examination, DW1 has made it clear that no part of the staircase occupies any portion of the vacant site which is the disputed portion and on the other hand, only an access to the staircase which begins within the property of the plaintiff on the west of the disputed portion has been provided on the southern portion of the vacant site. The said assertion has not been challenged by the plaintiff by cross-examining DW1 with a suggestion that the staircase itself has been provided in the disputed portion. The fact that the landing portion of the staircase ends within the property of the plaintiff and only an access has been provided in the disputed portion will indicate that the vacant site being a common property, one of the co-owners was allowed to use it as an access to the staircase. In case the property was divided into northern half and southern half,

as contended by the defendants, providing such access and the use of it as an access to the staircase, at the best, would prove to be an easement by grant or by sufferance and the same will not be enough to prove that the plaintiff is the absolute owner of the vacant site which is the disputed portion. No doubt, the plaintiff would have claimed that the doorway in the northern wall of the building of the defendants facing the disputed vacant site came to be provided during the pendency of the suit and in defiance of an order of interim injunction passed by the trial Court. However, as rightly contended by the learned counsel for the defendants/respondents, the plaintiff has not chosen to file any petition for violation of the order of injunction. The said fact has been admitted by PW1, the only witness examined on the side of the plaintiff. It is also a fact admitted that the plaintiff did not even apply for appointment of a commissioner to show that doorway was provided during the pendency of the suit.

12. In addition to that, the plaintiff did not seek the amendment of the plaint to include a prayer for mandatory injunction directing the defendants to close the opening in the northern wall of the building of the defendants that was allegedly made during the pendency of the suit. On the other hand, a clear assertion was made by the defendants that the doorway was in existence for over a period of 50 years prior to the filing of the suit; that the same was used as an access to reach the vacant site and to enjoy half share in the well and that such a right was enjoyed using the vacant site for cleaning utensils, taking water from the well etc. Apart from the oral evidence, parallel documents were produced on the side of the plaintiff as well as the defendants. The documents produced by the plaintiff did not refer to the existence of the vacant site and wherever the vacant site was referred to, the fact that the vacant site was jointly owned by plaintiff and the defendants was not mentioned. On the other hand, the defendants have produced documents right from 03.09.1940 to show that there was a vacant site on the north of the building of the defendants and the defendants, and before them their predecessors-in-title did have half share in the well which admittedly situates in the vacant site which is the subject matter of dispute. If at all the well referred to in Exs.B1 to B5 is another well rather than the well shown to be in the disputed vacant site, the plaintiff could have very well sought for an appointment of a Commissioner to show the existence of such a well which is different from the well in the disputed vacant site. Moreover, it is not the case of the plaintiff that the well referred to in Exs.B1 to B5 is not the well which situates in the disputed vacant site lying on the north of the building of the defendants. On the other hand, the contention of the plaintiff is that Exs.B1 to B5 are self-serving documents and by hook and by crook they wanted to grab the property of the plaintiff and the same was done as early as in 1940. Such a contention is a far fetched one and

the same cannot be countenanced. Therefore, this Court does not find any defect or infirmity, much less perversity in the finding of the Courts below that the doorway in the northern wall of the defendants' property was in existence for more than 50 years and the defendants were using the vacant site claiming to be having half share in the vacant site and also the well. None of the findings of the courts below in this regard can be termed perverse warranting interference by this Court in the second appeal.

13. Moreover, when there was a serious contest disputing the claim of the plaintiff that he is the absolute owner of the disputed land, the plaintiff cannot succeed in getting a bare injunction based on the contention that he is in exclusive possession and enjoyment of the entire suit property inclusive of the disputed portion and the well, especially when there are overwhelming evidence to show that the defendants are enjoying the disputed vacant site and the well claiming title to half share in them. A meek attempt has been made by the learned counsel for the appellants by contending that though the suit was filed for bare injunction in respect of the entire suit property, including the disputed portion, on the basis of the plaintiff's contention that he was in exclusive possession and enjoyment of the same, the Courts below ought to have granted a limited relief of injunction not to put up any construction in the vacant site which is claimed to be common by the defendants. The said attempt cannot succeed. The suit is laid on the basis of the claim that the plaintiff is the absolute owner and the plaintiff is in exclusive possession and enjoyment of the suit property. As the same has not been substantiated, the plaintiff and the purchaser from the plaintiff have to go without any relief in the present litigation. If at all they want to prevent the defendants from putting up any construction, either based on the contention that there was no partition in respect of the vacant site or on a contention that they have got an easement, they have to file a separate suit and they cannot try to get such a relief in the suit based on the averments made in the suit. For all the reasons stated above, this Court comes to the conclusion that the condensed substantial question of law deserves to be answered against the appellants and in favour of the respondents and answered accordingly.

14. In the result, the second appeal is dismissed. However, there shall be no order as to costs.

sd/-
ASSISTANT REGISTRAR(CO)

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SUB-ASSISTANT REGISTRAR

gpa

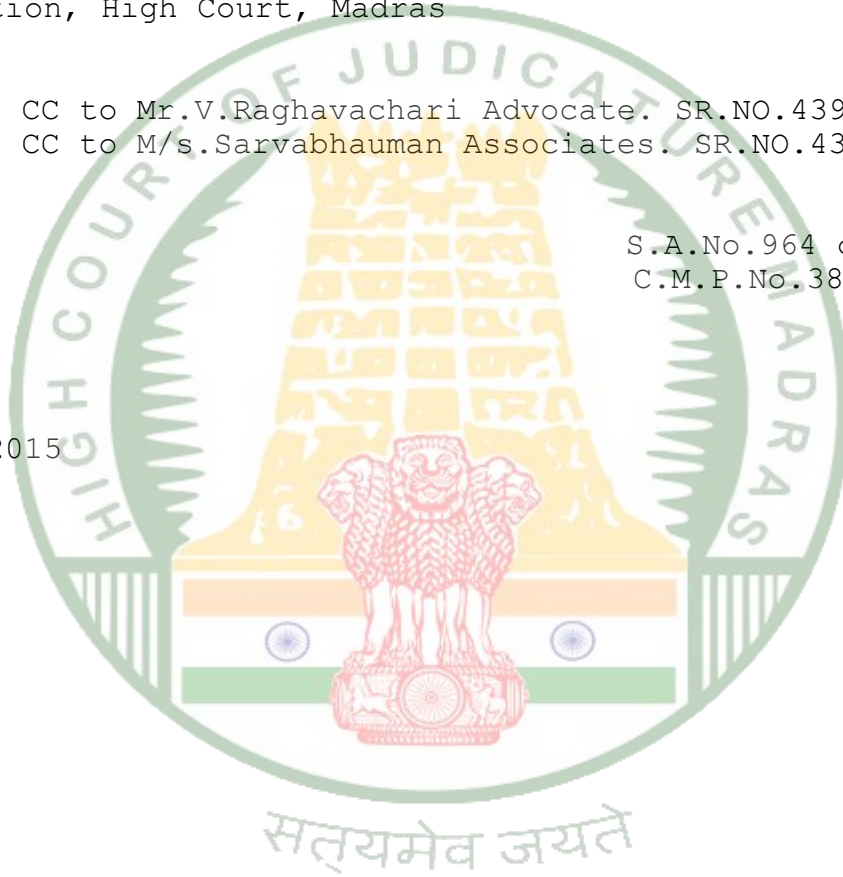
To

1. The Civil Judge(Sr.Division)
Kallakurichi
2. The Additional District Munsif
Kallakurichi
3. The Section Officer,
VR Section, High Court, Madras

+1 CC to Mr.V.Raghavachari Advocate. SR.NO.43959
+1 CC to M/s.Sarvabhauman Associates. SR.NO.43904

S.A.No.964 of 1999 &
C.M.P.No.381 of 2015

CO-TEJ
JD 16/10/2015



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