

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.12.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal Nos.324 and 325 of 2007

Kannabiran

..2nd Defendant/2nd Appellant

-Versus-

1.Ramasamy

..Plaintiff/Respondent/1st Respondent

2.Thangavel

..1st Defendant/1st Appellant/
2nd Respondent

This second appeal is filed against the decree and common judgment dated 30.06.2006 made in A.S.No.120 of 2004 on the file of the learned Principal District Judge, Namakkal, confirming the decree and common judgement dated 25.08.2003 made in O.S.No.273 of 1994 on the file of the learned District Munsif, Thiruchengode.

Kannabiran

..2nd Defendant/2nd Appellant/
Appellant

-Versus-

1.Ramasamy

..Plaintiff/Respondent/1st Respondent

2.Thangavel

..1st Defendant/1st Appellant/
2nd Respondents

This second appeal is filed against the decree and common judgement dated 30.06.2006 made in A.S.No.121 of 2004 on the file of the learned Principal District Judge, Namakkal, confirming the decree and common judgement dated 25.08.2003 made in O.S.No.228 of 1996 by the learned District Munsif, Thiruchengode.

For Appellant in both : Mrs.P.T.Asha, for
the Second Appeals M/s.Sarvabhauman Associates

For 1st Respondent in : Mr. P.Mani
both the Second Appeals

For 2nd Respondent both : No Appearance for R2
the Second Appeals

COMMON JUDGMENT

The appellant herein in both the second appeals is the 1st plaintiff in O.S.No.228 of 1996 and the 2nd defendant in O.S.No.273 of 1994 on the file of the learned District Munsif, Tiruchengode. The 1st respondent in S.A.Nos.324 and 325 of 2007 is the sole defendant in O.S.No.228 of 1996 and the sole plaintiff in O.S.No.273 of 1994. The 2nd respondent in both the second appeals is the 2nd plaintiff in O.S.No.228 of 1996 and the 1st defendant in O.S.No.273 of 1994.

2. The suit in O.S.No.273 of 1994 was filed by the 1st respondent herein for permanent injunction restraining the defendants from digging and removing soil and mud just adjacent to the plaintiff's suit property and also restraining the defendants from making any kind of danger or damage to the standing trees and other crops on the suit property belonging to the plaintiff by digging and removing soil or mud just adjacent to the plaintiff's land.

3. Similarly, the 2nd defendant in the suit in O.S.No.273 of 1994 filed a suit in O.S.No.228 of 1996 along with the other defendant - Mr.Thangavel for permanent injunction against the 1st respondent herein-Mr.Ramasamy restraining him from in any way preventing or interfering with their's and their licensee's from taking soil in the suit property for the purpose of manufacturing bricks.

4. The trial court, conducted joint trial in both the suits and by common judgement dated 25.08.2003 decreed both the suits in part thereby granting decree for permanent injunction restraining the defendants in O.S.No.273 of 1994 from digging and removing soil or mud within the distance of 5 feet from the boundaries of the suit property. Aggrieved by the said decree and common judgement, the 2nd defendant therein preferred an appeal in A.S.No.120 of 2004 on the file of the learned Principal District Judge, Namakkal. Similarly, the trial court decreed the suit in O.S.No.228 of 1996 in part thereby granting permanent injunction restraining the sole defendant in suit O.S.No.228 of 1996 from in any manner preventing or interfering with the plaintiffs' and their licensee's act of taking soil in the suit property for manufacturing bricks except within the distance of 5 feet from the property comprised in S.No.185/1C. Aggrieved by the said common judgement and decree, the defendants preferred an appeal in A.S.No.121 of 2004 on the file of the learned Principal District Judge, Namakkal. By common judgement and decrees dated 30.06.2006, the first appellate court dismissed both the appeals thereby confirming the decrees and common judgement of the trial court. That is how, the 2nd defendant in O.S.No.273 of 1994 and the 1st plaintiff in

O.S.No.228 of 1996, who is one and the same, has come forward with the present second appeals.

5. The case of the plaintiff in O.S.No.273 of 1994 in brief is as follows:- The plaintiff is the absolute owner of the suit property comprised in S.No.185/1D at Patlur Village, Tiruchengode Taluk, Namakkal District. On the north of the suit property, the property belonging to the 2nd defendant is situated. According to the plaintiff, the defendant has got no right to dig and remove the soil or mud from his property so as to cause loss or damage to the suit property belonging to the plaintiff.

6. Similarly in O.S.No.228 of 1996, the plaintiffs who are defendants in O.S.No.273 of 1994 contended that they are the absolute owners of the property comprised in S.No.185/1C at Patlur Village, Tiruchengode Taluk, Namakkal District. They contended that the sole defendant who is the plaintiff in O.S.No.273 of 1994 has been making an attempt to prevent them from taking soil or mud from their property. Therefore, they prayed for a decree for permanent injunction restraining the defendant/1st respondent herein from disturbing their possession and from preventing them from taking soil or mud from their property.

7. The averments in the written statement in O.S.No.228 of 1996 are precisely the averments in the plaint in O.S.No.273 of 1994. Similarly, the averments in the written statement in O.S.No.273 of 1994 are the averments in the plaint in O.S.No.228 of 1996.

8. Based on the above pleadings, the trial court framed appropriate issues, conducted joint trial and common evidence was recorded in O.S.No.273 of 1994. On the side of the 1st respondent herein 2 witnesses were examined and as many as 7 documents were exhibited while on the side of the appellant herein 2 witnesses were examined and as many as 10 documents were exhibited. During the course of trial, an Advocate Commissioner was appointed and his report has been marked as Ex.C.1 and his rough sketch has been marked as Ex.C.2. The objection to the Advocate Commissioner's report and sketch has been marked as Ex.C.3.

9. Having considered all the above, by common judgement and decrees, the trial court decreed both the suits in part which were subsequently confirmed by the first appellate court that is how, the 2nd defendant in O.S.No.273 of 1994 and the 1st plaintiff in O.S.No.228 of 1996 is now before this court with the present second appeals.

10. In these second appeals, this court at the time of admission framed the following substantial questions of law:-

(1) Whether the courts below were right in law in granting an injunction against the co-owner especially when the first respondent has not proved his exclusive right to the suit property as he is having only an undivided 1/3rd share in the suit property?

(2) Whether the courts below were right in granting injunction against the petitioner to leave a space of 5 feet in the absence of an expert evidence to substantiate the plea of the first respondent and without there being a proof to substantiate the alleged damages?

11. I have heard the learned counsel for the appellant in both the appeals and the learned counsel for the 1st respondent in both the second appeals and I have also perused the available records carefully. In both the second appeals, despite notice, the 2nd respondent did not choose to appear either in person or through a counsel. Therefore, he is set ex parte.

12. As of now, there is a clear factual finding that the suit property in O.S.No.273 of 1994 belongs to the 1st respondent and the suit property in O.S.No.228 of 1996 belongs to the appellant and the 2nd respondent. There is also no dispute that they are adjoining lands. The appellant and the 2nd respondent can very well enjoy the suit property in O.S.No.228 of 1996. But, at the same time, while enjoying the same, they have got a bounden duty not to cause any damage or danger to the adjoining land and the trees and crops raised thereon. The 1st respondent herein has got easement right to have support to his property in O.S.No.273 of 1994 from the property of the appellant and the 2nd respondent which is the suit property in O.S.No.228 of 1996. Having considered all the above, the courts below have held that within a distance of five feet from the boundary between these two properties, the appellant and the 2nd respondent should not dig or remove the soil or mud. I do not find any reason to interfere with the same.

13. So far as the first substantial question of law is concerned, the appellant and the 2nd respondent have got no right over the suit property in O.S.No.273 of 1994. The question as to Whether the 1st respondent has got absolute title for the suit property in O.S.No.273 of 1994 or he has got only 1/3 undivided share is irrelevant. Therefore, this substantial question of law need not be answered.

14. So far as the second question of law is concerned, the courts below have given cogent reasons as to why the appellant and the 2nd respondent have been injuncted from digging or removing soil or mud within the distance of five feet from the boundary of the suit property in O.S.No.273 of 1994 in which I do not find any perversity in the same. Therefore, this question of law is answered against the appellant. In nutshell, I do not find any merit at all in these second appeals and they must fail.

15. In the result, the second appeals are dismissed. The decrees and common judgement of the trial court and as confirmed by the first appellate court are confirmed. However, there shall be no costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

kmk

To

- 1.The Principal District Judge, Namakkal, Namakkal District.
- 2.The District Munsif, Thiruchengode, Namakkal District.

+lcc to Mr.P. Mani, Advocate, S.R.No.66701

+lcc to Mr.Sarvabhauman Associates, Advocate, S.R.No.66815

CNR(CO)
EU(05/04/2016)

सत्यमेव जयते

Second Appeal
Nos.324 & 325 of 2007

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