

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 03.11.2016
PRONOUNCED ON : 22.11.2016
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.240 of 2011
and
M.P.No.1 of 2011

1.Balakrishnan
2.Sivagnanam

...

Appellants

Vs.

K.N.Venkatachalam

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.09.2010 made in A.S.No.49 of 2010 on the file of the Principal Sub Court, Erode, reversal of the judgment and decree dated 26.02.2010 made in O.S.No.391 of 2008 on the file of the Principal District Munsif Court, Erode.

For Appellants : Mr.A.R.L.Sundaresan,
Senior Counsel
for M/s.N.Manokaran
For Respondent : Mrs.Hemasampath,
Senior Counsel
for M/s.S.Saravanan

JUDGMENT

Impugning the judgment and decree dated 21.09.2010 made in A.S.No.49 of 2010 on the file of the Principal Sub Court, Erode, reversing the judgment and decree dated 26.02.2010 made in O.S.No.391 of 2008 on the file of the Principal District Munsif Court, Erode, the defendants have preferred this second appeal.

2. The suit has been laid for permanent injunction.

3. The averments contained in the plaint, in brief, are as follows:

The suit property has been obtained by the plaintiff under the partition deed dated 15.10.1990 effected between the plaintiff and his father's brothers and the suit property is an agricultural land. The defendants are running automatic power loom factory in the name of R.B. International Private Ltd., to

the West of the suit property. The defendants have put up quarters in their land for stay of the employees of their power loom factory and there is no connection whatsoever between the suit property and the property, where, the defendants are running the power loom factory. While so, the defendants, without any authority and unlawfully, had taken steps to drain sewage water coming out of the quarters put up for the stay of their employees of the Power Loom Factory from 22.06.2008 onwards. Accordingly, they are, in particular, draining sewage water through the North-East portion of the compound wall in their property and the plaintiff objected to the same and also, tried to mediate with the elders of the Village and requested the defendants to drain the sewage water through the North-South road situated on the western side of their property. On the other hand, the defendants, on account of their influence, without making any effort to drain sewage water coming out of the quarters put up for their employees in their factory through the North-South road running on the Western side of their property are determined in draining sewage water into the plaintiff's property, so as to cause irreparable loss and hardship to the plaintiff. The defendants attempted to purchase the property of the plaintiff, but, as the plaintiff refused to accede to their request, with an ulterior motive, they are taking steps to drain the sewage water into the plaintiff's property. Hence, the suit has been laid.

4. The averments contained in the written statement filed by the defendants, in brief, are as follows;

The suit is not maintainable either in law or on facts. The ownership of the suit property is not admitted. It is true that the defendants company R.B.International (P) Ltd., is situated on the west of the suit property and that, it is true that the defendants have put up houses for the stay of their labourers inside their factory. But, it is false to state that there is no connection whatsoever between the suit property and the defendants' property. The allegation that the defendants attempted to drain the gutter water from the labourer quarters into the suit property is utterly false invented for the purpose of this case. It is false to state that the plaintiff objected the act of the defendants in running sewage water from their servant quarters to the suit property.

5. The suit is misconceived. The waste water from the servant quarters is being drained on the west of the defendants' property. The lands of the plaintiff and the defendants are slopping from West to East. Hence, the rain water from the defendants land is being drained from West to East to the plaintiff's land. The above right of easement fitted with the defendants property to drain the rain water to the suit property

cannot be objected by the plaintiff. It is only, the plaintiff with an ulterior motive has laid the suit with false allegations. It is only, the plaintiff, who had made the request to the defendants to buy his property and as the defendants had no inclination to buy the suit property, enraged over the same, the plaintiff, without any cause of action, has instituted the suit. Hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to 4 were marked. On the side of the defendants, DW1 has been examined and No document has been marked. Exs.C1 to C4 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. The plaintiff preferred the first appeal and the first appellate Court, on a reappraisal of the evidence let in by the parties concerned, set aside the judgment and decree of the trial Court and decreed the suit as prayed for. Hence, the present second appeal by the defendants.

8. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

(i) Whether the First Appellate erred in law and misdirected in granting the relief of injunction on the basis of the Commissioner's report and plan marked as Ex.C.1 to Ex.C.4 in the absence of any other legal evidence to prove the cause of action in the suit?

(ii) Whether the First Appellate Court erred in law in not adverting to the reasonings given by the trial court before reversing the well considered findings of the trial court which had an opportunity to see the demeanor of the witnesses?

9. That the suit property belongs to the plaintiff is not seriously controverted. This could also be seen from the copy of the partition deed dated 15.10.1990 marked on the side of the plaintiff as Ex.A1. That apart, to show that the suit property has been in possession and enjoyment of the plaintiff, Exs.A2 & 3, patta and kist receipt are also pressed into service by the plaintiff. It is also not disputed that to the west of the suit property, the defendants are running automatic power loom factory and further, it is also not in dispute that the properties of the defendants and the plaintiff are slopping from West to East. It has been admitted that the property of the

defendants is comparatively at higher level than the plaintiff's suit property. Therefore, it could be seen that as put forth by the defendants the rain water in the normal course would flow from the defendants property to the plaintiff's property.

10. The suit has been instituted by the plaintiff alleging that the defendants are attempting to drain the sewage water coming out of the employees quarters put up by them in their property into the suit property and thereby causing irreparable loss and hardship to the plaintiff. Therefore, according to the plaintiff, the defendants should be enjoined from letting out the sewage water into his property in any manner. The above lis of the plaintiff has been seriously resisted by the defendants and according to the defendants, at no point of time they had let out the sewage water from the employees quarters into the suit property and on the other hand, the defendants have been all along letting out the sewage water only through the North-South road situated on the west of their property and therefore, it is alleged that sans any cause of action, the plaintiff has preferred the suit.

11. The plaintiff examined as PW1, during cross-examination has admitted that the defendants property are at a higher level than the suit property and the lands of the defendants and his property are sloping from west towards east. Therefore, it could be seen that the lands of the defendants are at a higher level than the suit property. Further, the plaintiff has also clearly admitted during his cross-examination that till the date of his tendering evidence, the defendants have not drained any sewage water into his property. Further, he has also admitted that the defendants has put up the compound wall about 4 years back and started their activity, only after the construction of the compound wall. Therefore, it could be seen that from the above evidence of PW1, viz., the plaintiff, the defendants have, so far, not drained or let out any sewage water into the plaintiff's suit property. In such circumstances, it has not been explained by the plaintiff, as to how he could have had a cause of action for instituting the suit against the defendants.

12. It is argued by the plaintiff's counsel that the commissioner's report and plan marked as Exs.C1 & 2 would go to show that the defendants have taken steps to drain the sewage water into the suit property and on that basis alone, it could be inferred that the plaintiff had been under an apprehension that the defendants would at any point of time let out the sewage water into his property and that alone would constitute a sufficient cause of action for the plaintiff to lay the suit and so, the court should hold that the appellate court has correctly appreciated the evidence on record and decreed the suit. However, the above argument of the counsel for the plaintiff cannot be accepted.

13. No doubt, the Advocate commissioner, in his report and plan marked as Exs.C1 and 2, would say that there are five holes in the North-East portion of the compound wall put up by the defendants in their property and there are also tube like structures for draining out the water. However, solely on that report alone, this court cannot conclude that the defendants have in fact made arrangements to drain out the sewage water from their employees' quarters into the suit property. As rightly argued by the defendants' counsel, the advocate commissioner, at the initial stage was appointed to inspect without notice to the defendants and therefore, it could be seen that he had inspected the suit property alone and based on the physical feature pointed out by the plaintiff and had submitted his report marked as Exs.C1 and C2. It is not established by the plaintiff or the advocate commissioner who has been examined as PW2 that, at the time of his first inspection, he had given due notice to the defendants or their counsel. In this connection, even in the first report, the advocate commissioner would only state that he had only given notice to the plaintiff and his advocate regarding his inspection. Therefore, whether the physical features of the five holes found in the north eastern corner compound wall of the defendant abutting the suit property, would be sufficient to hold that the defendants are making arrangements to drain the sewage water has to be seen. In this connection, the evidence of the advocate commissioner assumes importance.

14. The advocate commissioner examined as PW2 in his evidence during the cross examination has clearly admitted that only on the basis of assumption, he had pointed out in Ex.C1 that there are arrangements to drain out the sewage water and further admitted that at the time of his inspection, through that holes or the passage there was no letting out of any drain water or either water into the suit property and also admitted that even during the time of his second inspection of the suit property, there was no symptom of any draining of sewage water and other water from the defendant's property into the plaintiff property and there are no structures or features for draining out any water into the suit property. Further, he has also admitted that at the time of his second inspection, no water was found to be coming out from the defendants structures or the employees quarters or any draining of sewage water into the plaintiff's suit property. Therefore, it could be seen that merely based on the assumption, based on the five holes which were found on the North Eastern corner of the compound wall put up by the defendants, an inference has been taken that attempts are made by the defendants to drain out the sewage water into the plaintiff suit property.

15. On the other hand, it could be seen that admittedly, the quarters of the employees of the defendants company are situated

only in the south western portion of the defendants property. In such circumstances, when nothing has been noted by the advocate commissioner that any channel or gutter structure or frame has been made from the quarters for draining the sewage water coming out of the same into the plaintiff's property through the alleged five holes situated on the north eastern compound wall, it could be seen that the presence of five holes on its own would not lead to the conclusion that the defendants are taking steps to drain out the sewage water from their employee quarters into the plaintiff property. On the other hand, it could be seen that as noted by the trial court as well as the first appellate court, the advocate commissioner in his second report and plan marked as Exs.C3 and C4 had clearly found and noted the features of letting out of the sewage water from the defendants property through the Kathirampatti main road situated on the western side of the defendants property and the sewage water is being drained out through the pipelines laid under the above said road. Therefore, it could be seen that at the time of the second inspection by the advocate commissioner, nothing has been noted by him as also admitted by him in his evidence, about the alleged attempt made by the defendants to drain out any sewage water through the 5 holes into the plaintiff suit property. The commission was reissued for the second time only for the purpose that inasmuch he has filed his report and plan Exs.C1 & 2 without giving due notice to the defendants and also without noting the physical features in the defendants property and accordingly, at the time of second inspection, the advocate commissioner has visited and inspected the defendants property also in detail and on a consideration of the structures found in the defendants property and also other physical features both in respect of the plaintiff property and the defendants property, it could be seen that nothing has been noted by the advocate commissioner to lead to a conclusion that the defendants are draining or making attempt to drain any sewage water from their property particularly from their employees quarters into the suit property. When it is not in dispute that the employees quarters of the defendants are situated in the south western corner and when the defendants have, as seen from Exs.C3 and C4 draining the sewage water coming out of the same only through the pipelines laid underneath Kathirampatti main road situated on the western side of the property, the apprehension of the plaintiff that the defendant s may drain the sewage water through the 5 holes found on the north eastern side of the compound wall is nothing but a far fetched imagination which do not have any legs to stand in the eyes of law.

16. The advocate commissioner examined as PW2 has also admitted that during the second inspection he has given due notice both to the plaintiff and the defendants' advocate and inspected the properties of the plaintiff and the defendants and

marked his report and plan as Exs.C3 and C4. Therefore, as rightly argued by the defendants' counsel, the appellate court has considered only Exs.C1 and C2 to sustain the plaintiff's case, completely ignoring the evidence adduced by the parties, as adverted to earlier. Equally, the contention of the defendant's counsel that the findings of the lower appellate that the features noted by the advocate commissioner during the second inspection in the defendants property are made subsequent to the institution of suit only for the purpose of the case so as to defeat the plaintiff's claim cannot at all be accepted when there is no evidence to show that such structures have been put up by the defendants only after the filing of the suit.

17. Adverting to the evidence of PW3, it is found that he has also during cross examination admitted that at no point of time the sewage water has been sent through the holes found in the compound wall of the defendants and that the defendants lands are at a higher level than the plaintiffs land. Such being the evidence of PW3 also, it could be seen that at no point of time, the defendant has made arrangement to let out the sewage water into the plaintiffs property. It could thereafter be seen that no evidence could be adduced on the side of the plaintiff that the defendant had drained the sewage water into their property. As found earlier, even the plaintiff himself has admitted that till the date of his deposition, the sewage water did not flow into his property from the defendants property. Therefore, it could be seen that the plaintiff has without any cause of action instituted the present suit on the mere baseless apprehension that the defendants are attempting to let out sewage water into his property.

18. The only material that could be shown by the plaintiff in support of his case, is the five holes found by the advocate commissioner during the first inspection of the compound wall of the defendants at the north eastern corner. Even, according to the advocate commissioner examined as PW2, the above aspect mentioned in the report is only based upon the assumption and at no point of time he had found the sewage water drained from the defendants land to the plaintiffs property.

19. It is also found that the trial Court has recorded that the defendant has specifically assured in his evidence that he would not drain sewage water into the plaintiff's property.

20. In the light of the above discussion, it could be seen that the first appellate court has erred in law and mis directed itself in granting the relief of permanent injunction on the basis of the commissioner report and plan marked as Exs.C1 and C2 only sans any other sustainable legal evidence and also completely brushing aside the other evidence projected in the matter, as discussed supra, as adverted to earlier, a perusal of

Ex.C1 to 4 and the evidence of PW2, the advocate commissioner cumulatively would only lead to the conclusion that the defendants had no inclination and not made any attempt to let out sewage water into the plaintiff's property from their property at any point of time and on the other hand, the defendants have been letting out the sewage water from their property particularly from the employees quarters only through the road situated on the western side of their property and in such circumstances, as rightly argued by the defendants' counsel, the first appellate court without assigning proper reasonings acceptable in law, reversed the well considered findings of the trial Court.

21. Such being the facts and circumstances of the present case, the authorities relied on by the counsel appearing for the plaintiff reported in 1962 SCC On Line Pat 106 : AIR 1963 Pat 76 (Rachhaya Pandey and others V. Sheodhari Pandey and others), 1948 SCC OnLine All 81 : AIR 1949 All 184 (Tej Kishan V. Akhlaq Husain and others), Indian Law Reports (Vol.III) page 494 (Maung Bya and one V. Maung Kyi NYo and others), 1915 SCC OnLine PC 12: AIR 1915 PC 165 (Gibbons V. Lenfestey and another) and XXIV L.W. 641 (Sheik Hussain Sahib V. Pachipulusu Subbayya and another), as rightly argued by the defendants counsel would not be applicable to the facts and circumstances of the present case. In any event, the principles of law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

In fine, the judgment and decree dated 21.09.2010 made in A.S.No.49 of 2010 on the file of the Principal Sub-Court, Erode, are set aside and the judgment and decree dated 26.02.2010 made in O.S.No.391 of 2008 on the file of the Principal District Munsif court, Erode, are restored and accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

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Sub Asst. Registrar

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To

1. The Principal Sub Court,
Erode.

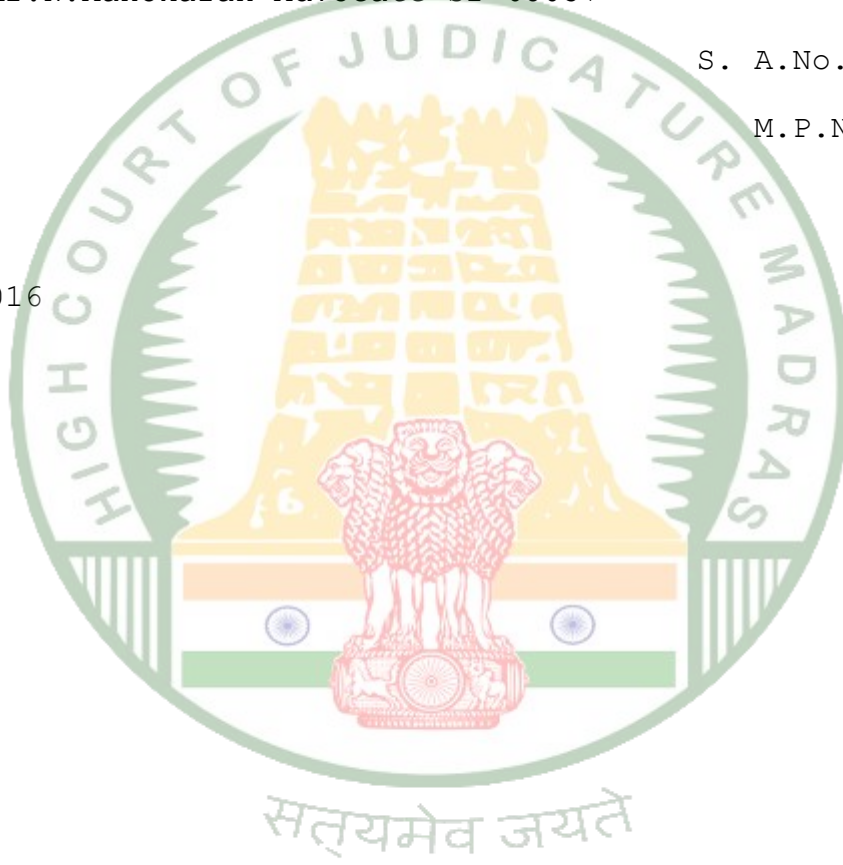
2.The Principal District Munsif Court,
Erode.

+1 cc to Mr.S.Saravanan Advocate sr 68145

+1 cc to Mr.N.Manokaran Advocate sr 68057

S. A.No.240 of 2011
and
M.P.No.1 of 2011

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