

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.11 of 2016

and

C.M.P.No.374 of 2016

N.Vittal Rao ... Appellant/1st Defendant

- Vs -

1. Ramanarayanan ...1st Respondent/Plaintiff

2. Nagamaiyan

3. The Commissioner,
Bhavani Municipality,
Bhavani Taluk, Erode District. ... Respondents 2 & 3/
Defendants 2 & 3

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the Decree and Judgment dated 27.03.2007 made in A.S.No.92 of 2006 on the file of the learned Additional District cum Fast Track Court No.IV, Bhavani Erode District confirming the Decree and Judgment dated 02.01.2006, made in O.S.No.202 of 2005, on the file of the learned Principal District Munsif, Bhavani Erode District.

For Appellant : Mr.V.Raghavachari

For Respondent 1 : Mr.T.Murugamanickam

For Respondent 2 : No appearance

For Respondent 3 : Mr.S.T.S.Murthi, G.P.
for Mrs.Bhavani Subbarayan

J U D G M E N T

The first defendant in O.S.No.202 of 2005, on the file of the learned Principal District Munsif, Bhavani is the appellant. The first respondent is the plaintiff and the other respondents are the defendants 2 and 3 in the suit. The first respondent filed the said suit for mandatory injunction to direct the third defendant to remove the encroachment allegedly made by the appellant/first defendant on the suit property. The trial Court

by decree and judgment dated 02.01.2006 decreed the suit as prayed for. As against the same, the appellant filed A.S.No.92 of 2006 on the file of the learned Additional District Judge, Fast Track Court IV, Bhavani. The lower appellate Court by decree and judgment dated 27.03.2007, dismissed the appeal and confirmed the decree and judgment of the trial Court. Challenging the same, the appellant is before this Court with this second appeal.

2. This second appeal today has come up for admission. I have heard the learned counsel appearing for the appellant, learned counsel appearing for the first respondent and the learned Government Pleader appearing for the third respondent. There is no representation for the second respondent. I have also perused the records carefully.

3. The case of the plaintiff in brief is as follows:

(i) The plaintiff owns a property bearing Door No.155 at Jothi Vinayagar Kovil Street, Bhavani. On the east of his house, the suit property which is a lane belonging to Bhavani Municipality is situated. On the further east of the suit lane, the house of the first defendant / appellant is situated. According to the plaintiff, after demolishing the existing building while making fresh construction, the first defendant has encroached upon a portion of the lane i.e. the suit property. With these allegations, the plaintiff filed the present suit for mandatory injunction.

(ii) The appellant / first defendant contended before the trial Court that he had not encroached upon any portion of the lane. He has constructed the house only on his private property. The Commissioner, Bhavani Municipality / third defendant in the suit, however did not choose to file written statement, though he was represented by a counsel.

(iii) Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff, he examined himself as P.W.1 and as many as 6 documents were exhibited. On the side of the defendants, the appellant/first defendant was examined as D.W.1 and no documents were exhibited. The Commissioner, Bhavani Municipality did not choose to lead either oral or documentary evidence in respect of the suit lane.

(iv) Having considered all the above, the trial Court decreed the suit, wherein, the trial Court found that the first defendant / appellant had encroached upon the area measuring east-west 3 ft and north-south 18 ft on the suit property which is the eastern portion of the suit property. Challenging the same, the appellant filed the first appeal and the same was dismissed and that is how the appellant is before this Court with this second appeal.

4. In this second appeal, the learned counsel appearing for the appellant would submit that the trial Court has acted on assumption without ascertaining as to what is the breath and length of the lane. The learned counsel further submitted that even without measuring the suit property and without doing physical verification whether there is any encroachment on the suit lane as per the municipal and revenue records, the Courts below have assumed that the appellant had encroached upon a portion of the lane. These findings are perverse for want of any evidence, the learned counsel contended.

5. The learned counsel appearing for the first respondent / plaintiff would oppose this appeal. According to him, there is no dispute regarding the existence of a lane, which belongs to the municipality. He would point out that during cross examination, the first defendant / appellant has admitted that construction made by him after demolishing the old construction, he has made construction on the drainage. From out of this, the Courts below have come to the conclusion that there is encroachment in which there is no perversity.

6. The learned Government Pleader Mr.S.T.S.Murthi appearing for the Commissioner, Bhavani Municipality, on instructions from Ms.S.Amirtha Jothi, Joint Commissioner (Admin) of Municipal Administration, Chepauk, Chennai would submit that it is true that the then Commissioner, Bhavani Municipality had failed to file a written statement stating the true statement of facts in respect of the suit lane and he had also failed to let in any evidence in respect of the suit lane such as the survey map and other municipal records as well as the revenue records. The learned Government Pleader would submit that as per the survey map which is now available, the extent of the lane needs to be proved. Similarly, he would submit that the breath and length of the lane can also be proved from these records. He would further submit that by making measurement, it can be surely found out whether the appellant has made any encroachment or not in the suit lane. When a specific query was made to him as to why the then Commissioner, Bhavani Municipality did not take any steps to place the facts before the trial Court by filing appropriate written statement and by adducing any evidence, he submitted that it was dereliction of duty on his part, however, he would submit that if opportunity is offered, written statement would be filed and the lis can be resolved after allowing the municipality to produce the relevant records pertaining to the suit lane.

7. Having heard the learned counsel on either side and after perusing the records, I find the following substantial questions of law involved in this second appeal :

(i) Whether the Courts below were right in holding that the appellant has encroached upon a portion of the suit lane when the suit lane has not been described properly in the plaint by giving the breadth and length of the said lane and also the extent ?

(ii) Whether the Courts below were right in simply assuming that there is encroachment on the suit lane based on the fact that a portion of the house of the appellant is on the drainage ?

8. A perusal of the plaint would go to show that the suit property has been described as a lane measuring north-south 18' and east-west 3'5''. According to the plaint plan the lane is mentioned as measuring east-west 8'9'' and north-south 24'. But absolutely there is no evidence to show the actual measurement of the suit lane.

9. As pointed out earlier, the municipality did not file any written statement describing the measurement of the lane which belonged to the municipality. Similarly, no document whatsoever has been produced either by the plaintiff or by the municipality to show the actual measurement of the suit lane. In the absence of the actual measurement of the suit lane and in the absence of any evidence as to whether the appellant has encroached upon any portion of the suit lane, in my considered view, the Courts below were not right in decreeing the suit. It is worthwhile to note that not even an Advocate Commissioner was appointed to measure the suit property and to ascertain whether there is any encroachment on the suit lane or not ? The Courts below have assumed that there is encroachment based on the admission made during the cross examination by the appellant that the new construction is on the drainage. Whether the drainage is in the lane belonging to the municipality or it is in the patta land is also a matter to be gone into. Without ascertaining these essential facts, the trial Court has granted the decree and therefore the decree of the trial Court and confirmed by the lower appellate Court deserves to be set aside and the matter has to be remanded back to the trial Court for fresh disposal in accordance with law.

10. The learned Government Pleader would submit that the Commissioner / Director of Municipal Administration, Government of Tamil Nadu will forthwith issue an order to all the authorities under his control to the effect that no officer shall hereinafter either remain ex parte and allow any suit or legal proceedings to be decided without there being a statement or counter filed by the officer or authority concerned and if any officer or authority commits any breach in this regard, he

will be dealt with departmentally by initiating disciplinary proceedings against him.

11. This is not a first occasion for this Court to come across a case where a responsible public officer has not made appearance before the Court to defend the property of the Municipality / Corporation. There are several instances of this kind wherein, the officers do not respond to the summons or notices received from the Courts and either they remain ex parte or do not place the facts before the Court by means of oral or documentary evidence. This is really deplorable. I am sure that the Commissioner / Director of Municipal Administration, Government of Tamil Nadu will issue orders as undertaken before this Court and such order will put things in order at least in future.

12. In the result, the appeal is allowed and the decree and judgment of the trial Court and confirmed by the lower appellate Court is set aside and the suit is remanded back to the trial Court and the trial Court shall permit the parties to either amend the pleadings or file additional pleadings and also to lead additional evidence, if any and then dispose of the suit in accordance with law, within a period of six months from the date of receipt of a copy of this judgment. The Commissioner of Municipality, Bhavani shall file a written statement and also let in additional evidence and assist the Court in the disposal of the suit within the time stipulated. Consequently, the connected miscellaneous petition is closed. There shall be no order as to cost.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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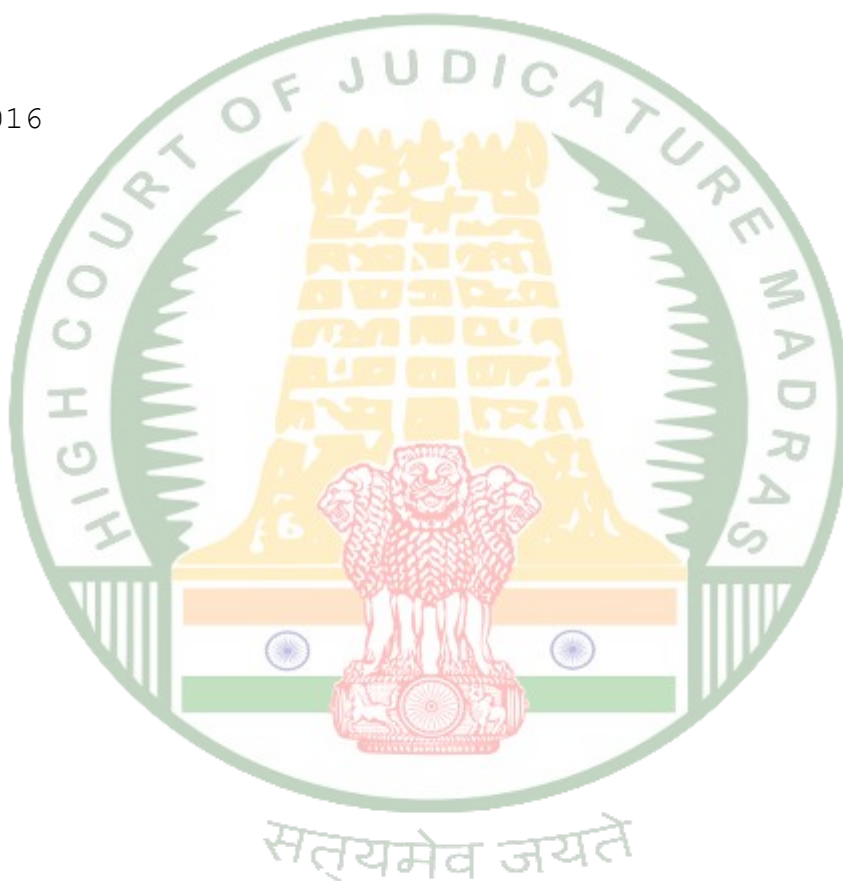
1. The Additional District cum Fast Track Court No.IV,
Bhavani,Erode District
2. The Principal District Munsif,
Bhavani,Erode District
3. The Commissioner/Director of Municipal Administration
Government of TamilNadu Chepauk Chennai-5
4. The Commissioner of Municipality,
Bhavani Taluk, Eroder.

5. The Section Officer,
VR Section High Court,
Madras

+1 cc to Mr.Bhavani Subbarayan Advocate sr.3498
+1 cc to Mr.T.Murugamanickkam Advocate sr.3391
+1 cc to Mr.V.Raghavachari Advocate sr.3243

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