

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2017  
PRONOUNCED ON : 30.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1128 of 2001

1. A.P.Muthuswamy
2. Gopalakrishnan
3. Senthil

.... Appellants/Defendants 1, 7 & 8

Vs.

1. G.R.Silambu
2. Parvathi
3. Yesotha
4. Gomathi
5. Dhansekar
6. G.R.Muthusamy
7. Govindasamy
8. Rajasekaran
9. Saravanan

.... Respondents/Plaintiff/  
Defendants 2 to 5, 9 to 12

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 09.10.2000 made in A.S.No.1 of 2000 on the file of the Principal District Court, Erode, confirming the judgment and decree dated 06.10.1999 made in O.S.No.404/1997 on the file of the First Additional District Munsif Court, Erode.

For Appellants : Mr.P.V.S.Giridher

For Respondents : No appearance

JUDGMENT

Challenge in this second appeal is made to the Judgment and decree dated 09.10.2000 made in A.S.No.1 of 2000 on the file of the Principal District Court, Erode, confirming the judgment and decree dated 06.10.1999 made in O.S.No.404/1997 on the file of the First Additional District Munsif Court, Erode.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and mandatory injunction.

4. The case of the plaintiff, in brief, is that old S.F.No.650 in Punjai Kalamangalam Village admeasuring 5.03 acres and S.F.No.651 admeasuring 2.84 acres form one block and under a registered partition deed dated 17.01.1966, the plaintiff and the first defendant became entitled to 2.72 acres in S.F.No.650 and 2.14 acres in S.F.No.651 and S.F.No.650 is on the northern side and S.F.No.651 is on the southern side and there exist a Vani Well in R.S.No.77/4 and Kalingarayan canal water is let into the said Well and pumped out. The plaintiff and the 9<sup>th</sup> defendant are entitled to  $\frac{1}{2}$  share in the said Well while the remaining  $\frac{1}{2}$  share belongs to the defendants 1 to 8. The land is slopping from North to South and therefore, to take the Well water and to reach the Well, there existed a north-south bund, which is the suit property and the length of the bund is nearly 300 feet and the breadth is 10 feet, shown as ABCDEF in the plaint plan and the suit bund is common to the family of the plaintiff as well as family of the defendant 1 to 8 and they have laid underground pipeline beneath the suit bund separately and no one is entitled to obliterate the same or reduced its width. The plaintiff's lands are on the west of the suit bund and the defendants 1 to 8 are owning their lands to the east of the suit bund and on account of the long standing enmity between the parties, various Civil suits and criminal cases are pending and in this connection, the first defendant has laid a suit before this Court in O.S.No.399/88 against the plaintiff for the relief of permanent injunction as regards the suit property and in the said suit, the first defendant had contended that the width of the suit bund is only about 4 to 5 feet and averred that as if the plaintiff is attempting to encroach into the bund. However, the plaintiff has not obliterated as claimed by the first defendant and there were stony embankments on the eastern as well as western side of the suit bund and a suit in O.S.No.701/88 is also pending between the parties as regards the strip of land on the south of the suit property. The defendants 1 to 8 have removed the eastern stony embankment of the suit bund in the year 1988 itself and gradually, they have encroached into the suit bund every year and almost reduced the width of the suit bund to half the size and despite the protests made by the plaintiff, the defendants 1 to 8 failed to restore to its original position and encroached the portion shown as BCDE in the plaint plan and further, the defendants 1 to 8 also refused to restore the suit bund to its original position in the last week of August, 1997 and hence, left with no other alternative, the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is the suit is not maintainable either in law or on facts. It is false to state that the suit bund is 300 feet in length but, it is only 259 feet in length and it is false to state that the breath is 10

feet, it is only 4 to 5 feet in the northern portion and less than 2 feet in the southern most portion and it is not correct to state that the suit land is sloping from north to south and on the other hand, the land is actually sloping from south to north. It is true that the first defendant has laid the suit against the plaintiff in O.S.No.399 of 1988 as the plaintiff had attempted to obliterate the suit bund and caused damages to the same by removing some of the stones on the western edge and the plaintiff and his brother have filed a false suit in O.S.No.701 /1988 against the defendants and others and while the above suits were pending, the plaintiff has filed the present suit on the same subject matter involved in O.S.No.399/88 and the suit property has been described as B schedule property in O.S.No.399/88 and it is false to state that the defendants had been removing the eastern stone embankment of the suit bund from the year 1988 onwards and almost have reduced the size of the bund to half its size and the plaintiff protested to the same and it is false to state that the defendants agreed to restore the bund to its original position and later refused to accept the same as put forth in the plaint. The plaintiff has no cause of action to move the suit and the suit is barred by limitation and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWS 1 & 2 were examined and Exs.A1 to 3 were marked. On the side of the defendants, DW1 was examined and Exs.B1 to 3 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court as well as the first appellate Court have accepted the plaintiff's case and accordingly, granted the reliefs in favour of the plaintiff as prayed for. Aggrieved over the same, the present second appeal has come to be preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated:

" 1. Whether the suit barred by limitation?

2. Whether the Courts below decreed the suit without any legal evidence and relying upon the surmises and conjectures?"

9. From the materials averred, it is seen that the suit property viz., the bund is situated between the plaintiff's land and the defendants' land. According to the plaintiff, the suit bund measures 300 feet in length and 10 feet in width. However, according to the case of the defendants, the suit bund only measures 259 feet in length and measures 4 to 5 feet only on the

northern side and almost less than 2 feet on the southern side. The plaintiff has laid the suit claiming the reliefs of declaration and mandatory injunction in respect of the suit bund against the defendants. At the foremost, it has to be mentioned that the defendants have taken a plea in their written statement that the suit is barred by limitation. However, it is found that the trial Court has not framed any issue as regards the plea of limitation raised by the defendants in the suit and that apart, it is also seen that no discussion has also been made by the trial Court in respect of the above aspect of the defence raised by the defendants and it is thus found that the defence of the defendants that the suit should fail on the point of limitation has not been determined one way or the other by the trial Court. Similarly, the first appellate Court has also not gone into the question of limitation and accordingly, no point for determination with reference to the same has been formulated by the first appellate Court and it is further seen that no discussion has also been made on the point of limitation by the first appellate Court.

10. In this second appeal, it is seen that one of the substantial questions of law formulated for consideration is, whether the suit laid by the plaintiff is barred by limitation.

11. From the evidence adduced by the parties and the materials placed, it is found that there is no title deed available on either side to show that the suit bund measures in length and breadth as respectively pleaded by them. However, it is seen that the Courts below have accepted the plaintiff's case mainly based upon the Commissioner's report and plan and accordingly, taking into consideration the commissioner report and plan, which points out that at the northern portion, the bund measures about 9 feet in width and thereafter, the width gradually gets reduced at various points and accordingly, cumulatively taking into account the above factors, it is seen that the Courts below have proceeded to hold that the bund measures only 10 feet in width and 300 feet in length as put forth by the plaintiff. Inasmuch as I propose to dispose of this matter on the point of limitation, in my considered opinion, it is unnecessary go into the question as to whether the suit bund measures in length and width as claimed by the plaintiff or as claimed by the defendants. At the foremost, it has to be seen whether the plaintiff has laid the suit in time.

12. A reading of the plaint would go to show that according to the plaintiff, the cause of action for the suit arose on and from 1988 onwards, when the defendants had encroached into the suit property by cutting the suit bund on their side and annexing the same with their lands till August, 1997. Similarly, the plaintiff has also averred in para 11 of the

plaint that the defendants have started removing the eastern stone embankments of the suit bund in the year 1988 itself and gradually encroached into the suit bund every year, thereby, almost reducing the width of the suit bund to half its size, despite the protests made by the plaintiff and later, according to the plaintiff, the defendants had refused to restore the suit bund to its original position firmly in the last week of August, 1997 and hence, it is stated that the plaintiff has been necessitated to lay the suit for appropriate reliefs.

13. The above case of the plaintiff has been strongly repudiated by the defendants contending that they have not removed the stone embankment of the suit bund on their side and not reduced the suit bund to half its size as projected by the plaintiff and they have also disputed the case of the plaintiff that he had been protesting the same repeatedly and despite the said protests, the defendants had been carrying on their illegal activities above referred to and on the other hand, according to the defendants, it is only the plaintiff, who had encroached into the suit bund by annexing the same with their lands on their side and it is further stated that in this connection, the first defendant has laid the suit against the plaintiff in O.S.No.399/88.

14. It is found that in respect of the suit bund, a suit for permanent injunction has been laid by the first defendant in O.S.No.399/88 against the plaintiff and it is also seen that pending the above said suit and another suit between the parties in O.S.No.701/88, the present suit has come to be laid by the plaintiff on the footing that in O.S.No.399/88, the first defendant had put forth the contentions that the width of the suit bund is only about 4 to 5 feet. If really, that had been the basis for the plaintiff to institute the present lis, as rightly put forth by the defendants counsel, the plaintiff would have worked out his remedies as regards the same in O.S.No.399/88 itself by seeking appropriate remedies in the said suit either by way of a counter claim or by way of other appropriate methods. Be that as it may, it is found that the present suit has come to be laid by the plaintiff for the reliefs of declaration and mandatory injunction.

15. The plaintiff examined as PW1 during the course of cross-examination has admitted that the defendants had been gradually reducing the width of the suit bund by encroaching into the bund and he cannot say, during which of the months, the defendants had annexed the portion of the bund along with their lands and it is found that a suggestion has also been put to the plaintiff by the defendants that if really, the defendants had cut the bund and annexed the same with their lands, the plaintiff would have taken necessary action against the

defendants immediately and no doubt, the said suggestion has been denied by the plaintiff. It is seen from the above evidence of the plaintiff, he is unaware as to at what period of time, the defendants had been cutting the suit bund and annexing the same along with their lands. However, as seen from the pleadings set out in the plaint, it is the specific case of the plaintiff that from 1988 onwards gradually the defendants had been cutting the suit bund on their side and annexing the same with their lands and thereby, reducing its size to half. Similarly, PW2 examined on behalf of the plaintiff, during the course of cross examination, has also admitted that he cannot say on what date and at what time, the defendants had been cutting the bund and also cannot say to what extent, they had cut the bund and annexed with their portion and further, according to him, he had at no point of time measured the bund. So, PW2 is also not aware as to from what period onwards and to what extent, the defendants had been cutting the suit bund and annexing the same with their land portion.

16. In the light of the above said evidence of PWs1 & 2 and considering the pleadings set out in the plaint, it is found that even as per the plaint averments alone, it is noted that the cause of action for the suit had arisen for the plaintiff during the year 1988 itself. It is the specific case of the plaintiff that right from 1988 onwards, till August, 1997 and even thereafter, the defendants had been gradually cutting the stone bund and annexing the portion of the suit bund along with their lands and such being the position, as rightly argued by the defendants' counsel, it is seen that the suit laid by the plaintiff both for the reliefs of declaration and mandatory injunction is hit by law of limitation. In this connection, it is argued by the defendants' counsel that as per the Provisions/Articles contained in the Limitation Act, 1963, the plaintiff seeking the reliefs of declaration and mandatory injunction should have instituted the suit for claiming the above said reliefs, when the right to sue first accrued to the plaintiff. Applying the same to the facts and circumstances of the case at hand, when even according to the case of the plaintiff the defendants have started cutting the stone in the suit bund and annexed the same with their portion of the land from 1988 onwards gradually and the said acts had continued persistently, despite the protests made by the plaintiff, it is found that the right to sue against the same had occurred to the plaintiff during 1988 itself and in such view of the matter, it is seen that if at all the case of the plaintiff with reference to the same has any element of truth, he should have laid the suit within the period of time allowed by law i.e. within three years from 1988 onwards and on the other hand, it is seen that the plaintiff has chosen to lay the suit only during the year 1997 for the reliefs claimed in the plaint. Thus, it is found

that considering the plaint averments and the evidence adduced by the plaintiff as discussed above and considering the resistance put forth by the defendants to the case of the plaintiff as pointed out supra, it is seen that the plaintiff having miserably failed to lay the suit within 3 years, when the right to sue had first occurred to him, it is seen that as argued by the defendants' counsel, the plaintiff's suit is clearly hit by the law of limitation.

17. Despite the plea of limitation raised by the defendants in the written statement, it is seen that the Courts below had failed to consider the said aspect in their judgments by framing necessary issue and point for determination and accordingly, it is found that the failure of the Courts below in framing necessary issue/point on the question of limitation, despite the plea made by the defendants with reference to the same in the written statement, in my considered opinion, has resulted in a serious miscarriage of justice and it is found that the lower Courts had thereby erroneously disposed of the suit in favour of the plaintiff without their being any material as such to hold and determine that the suit bund actually measures 10 feet in width and 300 feet in length as pleaded by the plaintiff. It is found that the Courts below had been carried away by the Commissioner's report and plan and certain statements made by the first defendant during the course of evidence in O.S.No.399/88 and on that basis, it is seen that the Courts below have accepted the plaintiff's case in toto without there being any material in support of the plaintiff's case as such. Particularly, the Courts below having failed to determine the point of limitation, being vital to the entitlement of the plaint to obtain the reliefs claimed in the suit. It is seen thus that the judgments and decrees of the Courts below cannot be sustained any further and accordingly, they are liable to be set aside.

18. In the light of the above discussions, I hold that the Courts below have decreed the suit in favour of the plaintiff without any legal basis /evidence/material and as rightly put forth by the defendants' counsel the Courts below seem to have disposed of the suit in favour of the plaintiff based on surmises and conjectures and I further hold that the plaintiff's suit is hit by law of limitation and accordingly, the substantial questions of law formulated in this second appeal are answered against the plaintiff and in favour of the defendants.

19. In conclusion, the Judgment and decree dated 09.10.2000 made in A.S.No.1 of 2000 on the file of the Principal District Court, Erode, confirming the judgment and decree dated 06.10.1999 made in O.S.No.404/1997 on the file of the First Additional District Munsif Court, Erode, are set aside and

accordingly, the suit laid by the plaintiff is dismissed with costs. Resultantly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/--

Assistant Registrar(CS III)

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Sub Assistant Registrar

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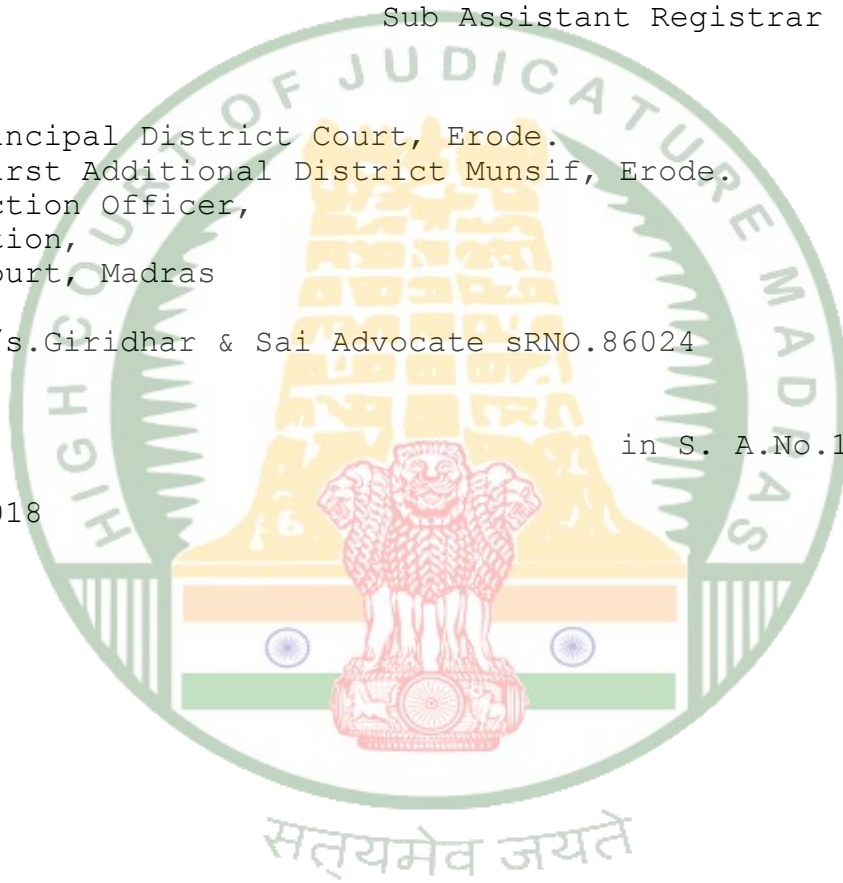
To

1. The Principal District Court, Erode.
2. The First Additional District Munsif, Erode.
3. The Section Officer,  
VR Section,  
High Court, Madras

+1cc to M/s.Giridhar & Sai Advocate sRNO.86024

in S. A.No.1128 of 2001

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