

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
RESERVED ON: 04.10.2018  
DELIVERED ON: 09.10.2018  
CORAM:  
THE HON'BLE MRS.JUSTICE R. HEMALATHA  
S.A.No.139 and 140 of 1997

In S.A.No.139 of 1997

1. S.V.Rengappa Gowder (deceased)
2. Kariammal
3. R.Thangarajan
4. S.R.Kamala
5. S.R.Vimala

(Appellants 2 to 5 brought on record as legal heirs of the deceased sole appellant vide order dated 05.01.2018 in CMP No.166 and 167 of 2010 in S.A.No.139 of 1997)  
... Appellants

Vs.

1. Sembian (deceased)
2. Nagammal
3. Kannammal
4. Ponnammal

(Respondents 3 and 4 brought on record as legal heirs of the deceased first defendant vide order dated 15.02.2018 in CMP No.1346 of 2018 in S.A.No.139 of 1997)  
... Respondents

In S.A.No.140 of 1997

1. S.V.Rengappa Gowder
2. Kariammal
3. R.Thangarajan
4. S.R.Kamala
5. S.R.Vimala

(Appellants 2 to 5 brought on record as legal heirs of the deceased sole appellant vide order dated 05.01.2018 made in Cmp No.168 & 169 of 2010 in SA No.140 of 1997)  
... Appellants

Vs.

1. Sembian
2. Nagammal
3. Kannammal
4. Ponnammal ... Respondents

PRAYER in S.A.No.39 of 1997: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 15.10.1996 passed by the Additional District Judge, Coimbatore in A.S.No.21 of 1996 upholding the decree and judgment dated 31.10.1995 passed by the District Munsif, Mettupalayam in O.S.No.45 of 1995.

PRAYER in S.A.No.40 of 1997: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 15.10.1996 passed by the Additional District Judge, Coimbatore in A.S.No.18 of 1996 upholding the decree and judgment dated 31.10.1995 passed by the District Munsif, Mettupalayam in O.S.No.40 of 1995.

For Appellants in both appeals : Mr.T.M.Hariharan

For Respondents 2 to 5 : Mr.V.Sivakumar  
in both appeals

### COMMON JUDGMENT

These second appeals are against the decree and judgment dated 15.10.1996 in A.S.No.21/1996 and A.S.No.18/1996 on the file of the Additional District Judge, Coimbatore upholding the decree and judgment dated 31.10.1995 in O.S.No.45/1995 and 40/1995 respectively on the file of the District Munsif, Mettupalayam.

2. The original suit in O.S.No.45 of 1995 was filed by the respondents 1 and 2 in the present appeal. It is also pertinent to mention at this juncture that the appellant (since deceased during the pendency of the second appeal) had also filed a suit in O.S.No.40 of 1995 before the District Munsif, Mettupalayam against the present respondents, which was dismissed and the same was upheld by the first appellate court. The suit property and the grounds are common.

3. The present appellants 2 to 5 are the legal heirs of the original appellant, owning and enjoying the 'A' schedule property, which they obtained through a final decree for partition in O.S.No.287 of 1961 (Ex.B1). The first respondent had purchased the 'B' schedule property from one Nanjaiyan, who got the property in his name vide family partition dated 24.02.1968 (Ex.A2), through a sale deed dated 22.03.1971 (Ex.A1). According to the appellants, the open space, which is situated on the north of the appellants' house and south of the respondents' house belongs absolutely to them, which they have been using exclusively for bath and other washing purposes. Further, according to the appellants, the respondents have encroached into this exclusive open space by allowing their roof to project into it to the extent of 4 1/2 feet on the western side on the north of 'A' schedule property. The respondents also started demolishing the East-West wall of their house to make way for a door and therefore, the suit for mandatory injunction for removal of the roof projection, directing the respondent to put up a drain along their East-West roof on the south and for a permanent injunction.

4. In both the courts below, the contention of the appellants was that the open space on the north of the property was an appurtenant land to their house and that the existence of a washing stone and water tap in the open space, as reported by the advocate commissioner, would prove their contention. However, both the lower courts concluded that Ex.A1 and Ex.A2 substantiated the respondents' contention that the 'B' schedule property was purchased by them with the compound wall intact and no encroachment whatsoever. On the other hand, in Ex.B1 there is no mention about the open space on the north of the appellants' property. This being so, the advocate commissioner's report (Ex.C1) speaks about recent door way put up by the appellants on the western and eastern entrances of the open space. The lower courts opined that while the appellant heavily relied on the final decree (Ex.B1) of the partition suit under which the 15th item was allotted to the appellant, the

disputed open space did not find a place. The act of the appellants to have inserted the open space in the description of 'A' schedule property in the plaint in O.S.No.40 of 1995 and in the written statement in O.S.No.45 of 1995 was not viewed with favour by both the courts below. The appellant had also failed to substantiate that there was an encroachment of 4 1/2 feet on the western side of the north of the 'A' schedule, interfering with the peaceful possession of the A' schedule property by the appellants (O.S.No.40 of 1995).

5. The respondents' contention was that the open space situate between both the properties was common, used by both as a source of light and as a pathway for whitewashing, colouring and cleaning of the other walls and that it was the act of the appellant that restricted the common usage of the open space. The act of the appellants by closing the open space by way of putting up of concrete door frames on the eastern and western entrances and also doors is totally illegal and the claim made by the appellants that the open space is their exclusive property is false and is required to be proved by them. The respondents' further contention is that the 'B' schedule property was purchased by them with the 'protruding' roof and a compound wall and that no new construction was put up by them. The suit in O.S.No.45 of 1995 filed by the respondents was for common right of enjoyment and title over the suit open space and for mandatory injunction for removal of the concrete door frames on the western and eastern entrances.

6. The trial court had dismissed the suit in O.S.No.40 of 1995 filed by the appellant and decreed the suit in O.S.No.45 of 1995 filed by the respondents and the same was confirmed by the first appellate court. The act of the appellants by including the open space in the description of 'A' schedule property in the plaint/written statement of O.S.No.40 of 1995 and O.S.No.45 of 1995 respectively is a clear attempt that there was no evidence whatsoever on the part of the appellant to substantiate his exclusive claim over the said disputed portion of open space. The concrete structure on both the eastern and western entrances put up by the appellants are only self defeating as it was not there till the 'B' schedule property was owned by appellant's brother Nanjaiyan and only after the sale to the respondents, this claim crops up. Both the lower courts have given their decisions on a solid premise and I find no any reason to interfere with their findings. Therefore, the appeals are liable to be dismissed.

7. In the result,

(i) the second appeal in S.A.No.139 of 1997 is dismissed. No costs.

(ii) the second appeal in S.A.No.140 of 1997 is dismissed. No costs.

09.10.2018

Index : Yes/No

Internet : Yes/No

Speaking Order/Non Speaking Order

mst

To

1. The Additional District Judge, Coimbatore.

2. The District Munsif, Mettupalayam.

R. HEMALATHA, J.

mst

S.A.No.139 anf 140 of 1997

09.10.2018