

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.11.2018

CORAM :

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

S.A.No.737 of 2005

P.Palanisamy

...Appellant/Plaintiff

vs.

Mumtaz

...Respondent/ Defendant

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 23.09.2004 passed in A.S.No.15 of 2004 on the file of the District Judge, The Nilgiris at Uthagamandalam, confirming the judgment and decree passed in by the Subordinate Judge, Uthagamandalam, in O.S.No. 62/96 dated 27.02.2004.

For Appellant : Mr.C.Yesuraj
For Respondent : Dr.R.Gowri

J U D G M E N T

The present second appeal on hand is filed challenging the judgment and decree passed in O.S.No. 62 of 1996 dated 27.02.2004 and the judgment and decree in A.S.No.15 of 2004 dated 23.09.2004.

2. The plaintiff is the appellant before this Court. The suit was filed for a judgment and decree directing the defendant to construct a revetment on the northern side of the suit scheduled property to the length of 95.6 metres, by way of a mandatory injunction or in the alternative directing the defendant to pay to the plaintiff the sum of Rs.2,74,650/- towards cost of construction of revetment. Further direction is sought for to direct the defendant to pay the plaintiff a sum of Rs.1,06,095.20/- on account of damages sustained by the plaintiff as per the details given in the plaint.

3. The plaintiff is the absolute owner of the property measuring an extent of 0.91.5 Hectares, within the Gudalur Town Panchayat. The property is situated in the heart of the Gudalur Town and is a valuable property. The plaintiff has raised tea plantation in the land and fenced the same. The defendant is the adjacent owner of the property in S.No.1029/1 of Gudalur Town. It is stated that the defendant is running a school in his land. The land of the plaintiff and the defendant are abutting each other.

4. During the month of July and August 1995, the defendant in order to form a play ground for the benefit of the students studying in the defendant's school levelled the land on the northern side of the plaintiff's property without taking due care and consequently the terrain of the plaintiff land has destroyed. To form the play ground park was removed indiscriminately and the plaintiff's land on the northern side has deved. Unless proper revetment is constructed, further damage would be caused to the land belongs to the plaintiff as the plaintiff's land is situated in the upper area. On account of such activities of the defendant, the plaintiff was constrained to file the suit for mandatory injunction and for claiming damages.

5. The learned counsel appearing on behalf of the appellant also states that, considering the peculiar nature of the land belongs to the plaintiff as well as the defendant, construction of a wall after levelling the land belongs to the defendant is highly necessary, in order to protect the strength of the land belongs to the plaintiff. Thus the plaintiff has got a definite cause of action and therefore the case of the plaintiff is to be considered.

6. The learned counsel appearing on behalf of the defendant states that, neither the suit scheduled property is situated in the heart of the Gudalur Town nor the same is a valuable property. The plaintiff had planted tea plantations and the suit scheduled property is situated just above the defendant's land. It is admitted that the defendant had formed the school play ground much earlier to the institution of the suit itself. The suit is an afterthought and in order to extract money the civil suit was filed by the plaintiff. The suit was filed during March 1996 by that time another monsoon was also over. Nothing has happened even at the time of filing of the suit and therefore there was no cause of action for the plaintiff to institute the suit against the defendant.

7. The defendant had formed school playground as early as in April 1995 and at that point of time there was no objection from the side of the plaintiff. The plaintiff planted the tea plantations in the suit scheduled property during and after July 1995, without any proper drainage system or water let outs. During the heavy rains in 1995, heavy flow of water through the plaintiff's land brought mud, stones, small rocks and a few trees to the defendant's school play ground. The defendant had spent a huge amount to clear all such debris fell in the play ground belongs to the defendant.

8. This apart, there was no damage caused in respect of the land belongs to the plaintiff. Relying on the said facts, the learned counsel for the defendant states that, the plaintiff has

not established any cause of action for institution of the suit and the suit itself was filed based on presumptions and assumptions. Thus, there is no infirmity in respect of the judgment and decree passed both by the Trial Court as well as by the First Appellant Court.

9. At the time of admission of present second appeal on hand, the following substantial question of law was raised by the appellants.

"i) Whether the Courts below erred in dismissing the suit for want of adequate and inconsistent cause of action, when the cause of action has been properly stated in the plaint in paragraphs 5,10 and 13 ?

ii) Whether the Courts below erred in not taking into account the clear and categorical admissions made by the respondent in the written statement as well as in evidence ?

iii) Whether the Courts below erred in dismissing the suit in irrelevant consideration and on assumptions and presumptions ?"

10. The first question of law raised in relation to the cause of action raised in the plaint. On a perusal of the copy of the plaint it is stated that, "the cause of action for the suit aroused at Gudalur in the month of April and May 1995 and July and August 1995. The suit was instituted on 28.02.1995. Admittedly, the defendant had not interfered with the possession and enjoyment of the property belongs to the plaintiff. The only grievance set out in the plaint is that on account of the creation of the play ground by the defendant in his land, the land stability in that locality is weaker. However, there is no infringement of the right of the plaintiff even at the time of institution of the suit by the plaintiff."

11. The question arises whether creation of the play ground by the defendant caused any damages to the property belongs to the plaintiff. Even the Trial Court made a categorical finding that, the suit itself was instituted belatedly after the formation of the play ground by the defendant in their land. Even after completion of two monsoons there was no damage caused to the land belongs to the plaintiff as stated in the plaint. This apart, the plaintiff has not established any definite cause of action for the purpose of grant of relief as such sought for in the suit.

12. The contention of the plaintiff was that on account of the formation of the play ground, there is a possibility of damage to be caused in respect of the land belongs to the plaintiff. However, there is no proof nor the plaintiff established by producing some documents or by adducing evidences in this regard. In the absence of any document or evidences to that effect, Court cannot presume that the damage would be

caused in future. Reliefs cannot be granted based on certain presumptions and assumptions. A definite cause of action must be established at the time of institution of the suit by the plaintiff. Possibilities, circumstances or certain presumptions cannot constitute a definite cause of action, especially, in the cases of this nature.

13. Admittedly, even after formation of the school play ground no damage caused to the property belongs to the plaintiff. This apart, the question of law raised in this regard deserves no further merit consideration. Further the plaintiff has failed to establish factually the damage if any caused. Therefore the findings of the Trial Court as well as the First Appellant Court that the plaintiff had not established a definite cause of action is in accord with law and there is no infirmity as such.

14. The second question of law raised is that, whether the Courts below erred in not taking in to account the clear and categorical admissions made by the respondent in the written statement as well as the evidence. This cannot be considered as a substantial question of law, in view of the fact that the factual aspects were considered by both the Courts and concurrent findings given. Such factual aspects considered and the finding was given became final and the High Court cannot interfere with such concluded factual findings in a second appeal under Section 100 of Code of Civil Procedure. The facts which were adjudicated and concluded both before the Trial Court as well as before the First Appellant Court became final and the same can be interfered with by the High Court, in the absence of any perversity. Thus, in the absence of any perversity, such concluded facts cannot be re-opened in the second appeal. This being the principles to be followed, the second question of law raised has no substance and it relates to the factual aspects, which were recorded and concluded both before the Trial Court and as well as before the First Appellant Court.

15. The third question of law cannot be considered as the substantial question of law as the same reads that, whether the Courts below erred in dismissing the suit in irrelevant consideration and on assumptions and presumptions. It is established that the suit itself was filed on assumptions and presumptions. The Courts found that there was no definite cause of action for the plaintiff for the institution of the suit against the defendant. Admittedly, the defendant had not interfered with the possession and enjoyment of the land belongs to the plaintiff. Admittedly, the defendant has created a play ground in his land for the benefit of the students, who all are studying in the school established by the defendant. Thus, there is no infringement of right established by the plaintiff and

therefore the findings of the Trial Court as well as the First Appellant Court that the plaintiff had not established a definite cause of action is in accordance with law and there is no infirmity as such.

16. The question of law raised are in relation to the factual aspects, which were already concluded through the findings of the Trial Court as well as by the First Appellate Court. Thus, this Court is not convinced with the manner in which the question of law is framed by the appellant in the present Second Appeal. In view of these facts and the circumstances and with reference to the question of law raised, this Court has no hesitation to conclude that the appellant has not established any valid or substantial question of law, so as to interfere with the findings of the Trial Court as well as the Appellate Court. Thus, the judgment and decree passed by the Trial Court dated 27.02.2004 in O.S.No.62/96 and the judgment and decree dated 23.09.2004 passed in A.S.No.15 of 2004 stands confirmed.

17. Accordingly, the second appeal is devoid of merits and stands dismissed. No Costs. Consequently connected civil miscellaneous petitions are closed.

pkn/kak

Sd/--
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

To

1.The District Judge, The Nilgiris,
Uthagamandalam.

2.The Subordinate Judge,
Uthagamandalam.

Copy To:-

The Section Officer
VR Section, High Court
Madras.

+1CC To Mr.D.J.Venkatesan, Advocate SR.NO.77458.

S.A.No.737 of 2005

RSI (CO)
KAK(17/2/2018)