

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :21.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.697 of 2000

and

CMP.No.9816/2005

Sakunthala Ammal

... Appellant/Appellant/Defendant

Vs.

Abdul Muthalif

...Respondent/Respondent/Plaintiff

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree dated 30.11.1999 made in A.S.No.40 of 1998 on the file of the Principal District Court, Villupuram District, Villupuram, partly allowing the Judgment and Decree dated 28.11.1997 made in O.S.No.602 of 1996 on the file of the Additional District Munsif Court, Villupuram.

For Appellant : Mr. T. Dhanyakumar

For Respondent :No appearance

J U D G M E N T

The unsuccessful defendant/appellant, who has lost the case before the court below filed the second appeal.

2. For the sake of convenience, the rank of the parties hereinafter referred to as 'defendant' for the appellant and 'plaintiff' for the respondent.

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

The suit schedule property is a Wall measuring about 1½ feet East- West and roughly about 105 feet North-South. The said property originally belonged to one Gopal Gounder and he has sold the eastern half of the wall in favour of one Kulathur Noor Mohamed Sahib by means of an unregistered sale deed dated 23.11.1894 and allowed the vendee to use the western half also for the purpose of resting the Beams rafters, etc.,

a) The plaintiff is the great grand son of the vendee Noor Mohamed Sahib, and he has been in possession and enjoyment of the suit property for the last several decades as a owner of the eastern half and as dominant owner of the western half. The plaintiff therefore submits that he has prescribed his title by

way of adverse possession in respect of eastern half of the suit property and as prescribed his right of easement by prescription in respect of the western half of the suit wall.

b) The defendant is the owner of the property situated on the west of the suit property and the defendant never enjoyed the suit property. As a matter of fact, there is a lane to an extent of 3 feet East to West in between the suit property and the defendant's house. Neither the defendant nor her predecessor in title have ever disturbed the enjoyment of the plaintiff of the suit property.

c) While being so, the defendant proclaimed with village that she is going to demolish the suit wall. Thereafter the plaintiff filed a suit in O.S.No.1094/1994 for declaration and injunction. Subsequently, the suit was withdrawn on 19.10.1995 with liberty to file a fresh suit on the same cause of action. Subsequent to the withdrawal of the suit, the defendant and his relatives tried to demolish the wall so as to cause loss to the plaintiff. As a matter of fact, the said wall itself is in the most dilapidated condition and requires immediate repairing. As otherwise, there is every danger of the wall being collapsed. Aggrieved by the threat of the defendant, the plaintiff filed a suit for permanent injunction thereby restraining the defendant her men and agent from preventing the plaintiff, from effecting repairs and remain in possession of the suit property.

4. The averments contained in the written statement, in brief, are as follows:

The defendant denied the plaint averments in toto. Originally, the suit schedule property is adjacent to the defendant's property. The defendant property measures about East-West 34 feet and South-North 105 feet. On the western side of the defendant's property, there was an old wall and the same was purchased on 12.12.1948 by Thambusamy Mudaliar, grand father of the defendant and one portion of the property belonged to the wife of the Thambusamy Mudaliar viz. Pounambal and the defendant's sisters viz., Saroja and Jamuna. The defendant purchased the share of Pounambal, Saroja and Jamuna in the year 1979 for valuable consideration. Accordingly, she prescribed a title over the suit schedule property by way of a sale deed dated 12.12.1949 and 17.10.1979. After the said purchase, the entire suit schedule property along with defendant's property enjoyed by his father. Thereafter, the defendant without any disturbances or any obstructions prescribed the adverse possession in the suit schedule property. The defendant's father, Thambusamy Mudaliar after purchase of the property in the year 1948, constructed the backward of the house leaving 3 feet land adjacent to the suit wall i.e., between the suit wall and defendant's house, there is a space of 3 feet to reach the backward of the property. The plaintiff has no right either by way of adverse possession or by way of title in the suit schedule property. In order to defeat the defendant, the

plaintiff has filed a vexatious suit claiming the suit wall.

5. The plaintiff's allegation is that his vendor was permitted to rest the beam rafters on the wall and it is an imaginary one. No permission was granted either by his vendor or by the defendant. Before filing the present suit, the plaintiff instituted a suit in O.S.No.1094/1994 against the defendant and subsequently the said suit was withdrawn. Thereafter he filed the present suit which is an unsustainable one.

6. Though no one appeared on behalf of the respondent, this court decided to proceed the case based on the available materials and records.

7. On perusal of the entire records, after framing the issues, the lower court decreed the suit in favour of the plaintiff. As against the decreetal order, the defendant filed an appeal before the lower appellate court. The lower appellate court rejected the injunction prayer. However, it grants permission to the plaintiff to repair his property yearly four days. Aggrieved by the permission granted by the lower appellate court in favour of the plaintiff, the present second appeal is filed.

8. At the time of entertaining the second appeal, this court has framed the following substantial question of law:

"Whether the decision of the Lower Appellate Court declaring that the plaintiff and the defendant are jointly entitled to the suit wall is contrary to evidence and perverse?"

9. Learned counsel for the appellant would submit that admittedly the suit schedule property belonged to the defendant. Though the lower court decreed the suit, the lower appellate court has rejected the injunction prayer and granted only permission to the plaintiff to repair his house yearly four days. The said permission was granted without any title. Though the lower appellate court has arrived at a conclusion that the plaintiff has no right over the suit wall, permission granted is unsustainable. When the plaintiff did not prescribe any title over the property either by way of title or by way of adverse possession, granting permission to the plaintiff to repair his house is not permissible.

10. Perusal of the materials, records and the findings of the lower appellate court reveals that the prayer was rejected with regard to the injunction prayer and granted permission to the respondent/plaintiff for repairing his house yearly four days is based only on the decision of this court reported in 1965 II MLJ 522 in the case of L. Damodaraswami Naidu Vs.

S.T. Damodaraswami Naidu. The relevant paragraphs are extracted as follows:

"My attention was drawn by the learned counsel to a recent decision of Veeraswami, J., in Kamalammal v. Chakravarthy. It was not necessary to discuss the question because the Court in that case was not called upon to decide whether this right of access was a necessary easement that would attach to every wall. Therein referring to Bhagavatula Subramanya Sastri vs. Bhagavatula Lakshminara Simham the learned Judge has observed as follows:

"In that case all that was held was that a house owner in order to repair his wall on his neighbour's side of the premises had the right to go to the other side of the wall on the land of his neighbour, the right being in the nature of a necessary easement."

The question in the case before Veeraswami, J., was a claim to access through a staircase inside the other party's house to repair a wall in the first floor. This claim was denied pointing out that in Bhagavatula Subramanya Sastri vs. Bhagavatula Lakshminara Simham, it was also held that the easement of access for repairs did not extend going over the neighbour's roof for the purpose. Whether the right of access for repairs would be a necessary easement was not the subject of decision by Veeraswami, J. In the view I take, and as the facts of the present case differ from the facts of the decision in Bhagavatula Subramanya Sastri vs. Bhagavatula Lakshminara Simham, I prefer to follow the decision of Krishnaswami Naidu, J., and hold that the plaintiff in this case has the right he claims to go over the vacant space of the defendant to carry on repairs to the exposed northern wall. It may be rested as an urban servitude customarily enjoyed or on the facts of this case as a grant implied from the existence of the wall for over twenty years at the very extremity of the property.

The trial Court while granting the decree has imposed limitations on the exercise of the right. The Court below has provided that the plaintiff be allowed to exercise the right twice a year, once in January and once in June. I do not see any need for giving access twice during the year for repairs. In my view as in Bhagavatula Subramanya Sastri vs. Bhagavatula Lakshminara Simham, it would be sufficient if the plaintiff is permitted to go on the defendant land for repairing the wall in question once a year. He must, as provided by the

trial Court give a fortnight's notice in writing at the time when he intends to make the repairs. The repairs, as already provided should be between 9 a.m., and 5 p.m. and shall not exceed four days in the year."

11. On perusal of the findings of the lower court it is seen that the lower court has arrived at a conclusion that the plaintiff rested the beam rafters on the suit wall and the said conclusion was arrived by both the courts below based on the Advocate Commissioner's Report. Admittedly the plaintiff rested his beam rafters on the suit wall and the same was approved by the defendant for a long period. However, the lower appellate court rejecting the prayer for permanent injunction but granting permission to the plaintiff only to repair his house yearly four days, is not illogical one.

12. In view of the above, the lower appellate court has perfectly applied the decision of this court in the present case on hand since the decision is squarely applicable to this case. Accordingly, decision of the lower appellate court rejecting the injunction and granting permission to the respondent/plaintiff to repair his house yearly four days, is not an erroneous one. Hence, I do not find any error or irregularity or infirmity in the order passed by the lower appellate court. Accordingly, the substantial question of law is answered against the appellant and it is relevant to note that the lower appellate court has not granted any exclusive right except permission to repair his house.

In the result, the second appeal is dismissed and the Judgment and Decree dated 30.11.1999 made in A.S.No.40 of 1998 on the file of the Principal District Court, Villupuram District, Villupuram, partly allowing the Judgment and Decree dated 28.11.1997 made in O.S.No.602 of 1996 on the file of Additional District Munsif Court, Villupuram, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IX)

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Sub Assistant Registrar

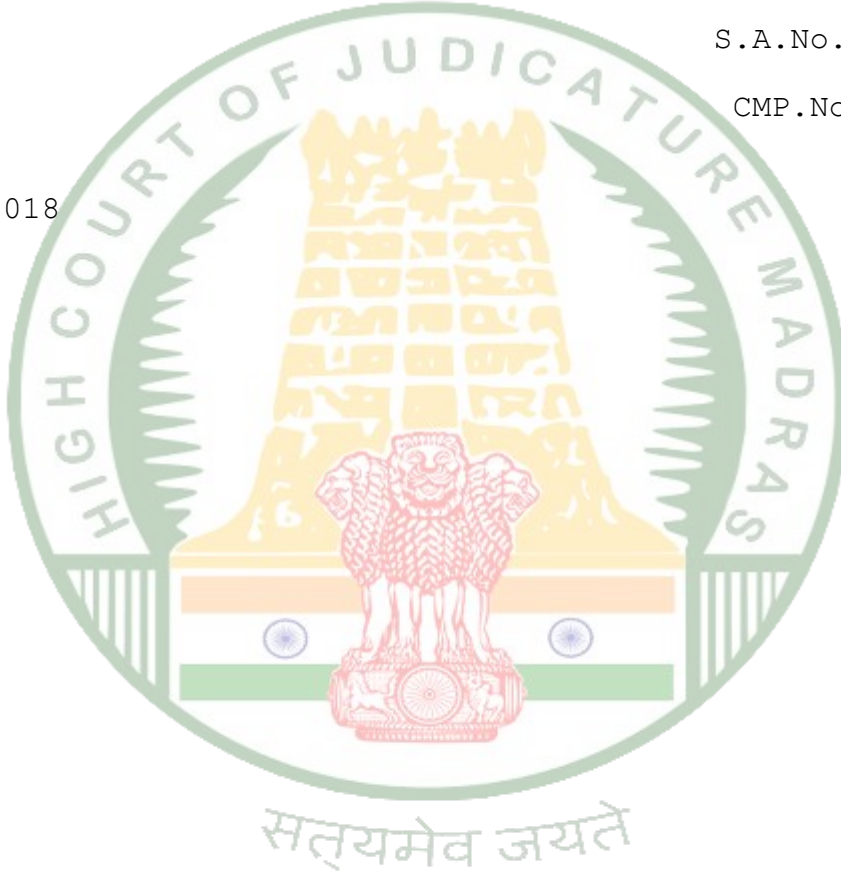
To

1. The Principal District Court,
Villupuram District,
Villupuram.
2. The Additional District Munsif Court,
Villupuram.

+lcc to Mr. T. Dhanyakumar, Advocate sr.no.13780

S.A.No.697 of 2000
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