

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.NOS.1015 AND 1016 OF 2009

S.A.NO.1015 OF 2009

1.Rani Ammal

2.Durai (Deceased)

3.Shanthi

4.Jayalakshmi

5.Geetha

6.Bhavani

7.Ravikumar

(Appellants 3 to 7 brought on record
as LRs' of the deceased 2nd appellant
vide order of Court dated 24.11.2014
made in M.P.No.1 of 2012)

... Appellants

Vs.

Dr.K.Kaliaperumal

... Respondent

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.04.2009 made in A.S.No.24 of 2007 on the file of the Court of the Subordinate Judge, Madurantakam, confirming the judgment and decree dated 04.04.2007 made in O.S.No.189 of 1996 on the file of the Court of the District Munsif, Madurantakam.

For Appellants : Mr.S.V.Jayaraman
Senior Counsel for Mr.T.Dhanasekaran

For Respondent : Mr.S.Parthasarathy
Senior Counsel for Mr.P.Dinesh Kumar

S.A.NO.1016 OF 2009

Rani Ammal

... Appellant

Vs.

Dr.K.Kaliaperumal

... Respondent

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.04.2009 made in A.S.No.25 of 2008 on the file of the Court of the Subordinate Judge, Madurantakam, confirming the judgment and decree dated 04.04.2007 made in O.S.No.269 of 1997 on the file of the Court of the District Munsif, Madurantakam.

For Appellant : Mr.S.V.Jayaraman
Senior Counsel for Mr.T.Dhanasekaran

For Respondent : Mr.S.Parthasarathy
Senior Counsel for Mr.P.Dinesh Kumar

COMMON JUDGMENT

These Second Appeals arise out of the common judgment passed in O.S.No.189 of 1996 and O.S.No.269 of 1997, as confirmed by the Lower Appellate Court in A.S.No.24 of 2007 and A.S.No.25 of 2008 dated 30.04.2009.

2. The unsuccessful defendants are the appellants herein. Originally, the respondent filed a suit in O.S.No.189 of 1996 for mandatory injunction to remove the pipelines of the defendants embeded in the suit property and also their projections into the suit property on the eastern side and for consequential permanent injunction. The appellant Rani Ammal filed a suit in O.S.No.269 of 1997 for mandatory injunction directing the respondent to remove the sunshade, pipelines, embeded pipes, A/C machines and other projections in the two feet lane lying in between the houses of the appellant and respondent. The Trial Court after framing appropriate issues partly decreed the suit in O.S.No.189 of 1996 filed by the respondent herein and dismissed the suit in O.S.No.269 of 1997 filed by the appellant, on 04.04.2007. As against the common judgment passed by the Trial Court, the appellant preferred two appeals, in which, the respondent preferred Cross Appeal, against the decree passed in O.S.No.189 of 1996 partly dismissing his prayer. The Lower Appellate Court allowed the cross appeal and dismissed the appeals preferred by the appellant in A.S.Nos.24 and 25 of 2008. Against the judgment and decree passed in A.S.Nos.24 of 2007 and 25 of 2008, dated 30.04.2009, as stated supra, the appellants have preferred the above two second appeals.

3. Record of proceedings shows that both the Second Appeals were admitted on the following substantial questions of

law:-

"S.A.NO.1015 OF 2009 AND S.A.NO.1016 OF 2009

1.Whether the Courts below have erred in holding that the alleged settlement between the parties marked as Ex.A7 cannot be given effect to as it was a settlement made pending disposal of the suit?

2.Whether the Courts below have given a perverse finding that the disputed portion belongs to the respondent / plaintiff?

4. According to the plaintiff in O.S.No.189 of 1996, Dr.K.Kaliyaperumal/the respondent herein, is the absolute and exclusive owner of the site bearing S.Nos.1017/1 and 2 together with buildings and accessories thereon, situated in Door No.125 Car Street, Madurantakam. The said property was allotted to his share by a registered partition deed dated 14.09.1982. His father put up construction in the site after getting approval from Madurantakam Municipality on 24.02.1977. At the time of construction, two feet along the western margin of the building was left vacant for the purpose of maintenance, free flow of air and light. He also put up windows, sunshades and ventilation in the ground and first floor on the western side, measuring 21 inches, east to west i.e., within the 24 inches. His father has also constructed and embedded drainage pipes and put up a brick wall upto ground level to protect the embedded drainage pipes. Since the appellant started trespassing into suit property on the western side vacant space in S.No.1017/1 of the respondent by fixing the drainage pipes and projecting the roof of the ground floor overlapping the sunshades, he filed a suit for mandatory injunction and permanent injunction in O.S.No.189 of 1996.

5. The appellant filed a suit in O.S.No.269 of 1997 stating that she purchased the suit property under a registered sale deed on 15.07.1976 and subsequent to the purchase, she has been in continuous possession and enjoyment of the property. At the time of purchase, the property was a country tiled house and around the house, vacant space was left out for air and light purpose. The father of the defendant therein, purchased the site comprised in Survey No.1017/1 & 2 under a registered sale deed, dated 18.01.1977, that is after the purchase of the property made by her. In the year 1978, father of the defendant therein, had put up construction and sunshade, drainage pipes by encroaching into the space left by the plaintiff in her side. The high handed act of the respondent's father was objected by the plaintiff and her husband. Based on the cause of action, the appellant filed a suit for mandatory injunction directing the defendant therein to remove sunshade, pipelines, embedded pipes,

A/C machines and other projections in "B" schedule property, which is the vacant space lying along the suit property.

6. The Trial Court partly decreed the suit in O.S.No.189 of 1996 filed by respondent and dismissed the suit filed by appellant in O.S.No.269 of 1997, on 04.04.2007. The Trial Court has found that pursuant to the order of injunction granted by it in I.A.No.1110 of 1997 dated 09.09.1997, the appellant filed a suit in O.S.No.269 of 1997 on 10.09.1997 for mandatory injunction. Even though the appellant was aware that her neighbour trespassed into the property and encroached the vacant space, waited for twenty years and filed the suit. A finding was given that the vacant space belongs to respondent / Dr.K.Kaliyaperumal, since the appellant / Rani Ammal has failed to prove that they left vacant space on the east of her property. Accordingly, the respondent Dr.K.Kaliyaperumal is entitled to remove all the projections overlapping his sunshades alone put up by the appellants and rejected the prayer in respect of removal of pipelines. Against the decree and judgment passed in both the suit, the appellant preferred two appeals. The respondent preferred a Cross Appeal against the partial rejection of relief with respect to drainage pipes. The Lower Appellate Court dismissed both the appeals, and allowed the Cross Appeal, thereby granting relief of mandatory injunction for removal of pipelines embedded and decreed the suit in O.S.No.189 of 1996 in its entirety.

7. As stated supra, both the Second Appeals were admitted only on two substantial questions of law, which reads as under:

"S.A.NO.1015 OF 2009 & S.A.NO.1016 OF 2009

1.Whether the Courts below have erred in holding that the alleged settlement between the parties marked as Ex.A7 cannot be given effect to as it was a settlement made pending disposal of the suit?

2.Whether the Courts below have given a perverse finding that the disputed portion belongs to the respondent / plaintiff? "

8. In so far as Ex.A7 is concerned, it is a compromise entered into between the parties on 18.10.1995 wherein it is agreed that Rani Ammal will not create any problem and undertook to construct her house without disturbing the house already constructed by Dr.K.Kaliyaperumal. It is also important to note that the property of Rani Ammal / the appellants herein, lies in S.No.1013/7 and the property of Dr.K.Kaliyaperumal lies in S.No.1017/1 and 2. Even after entering into the mutual settlement, Rani Ammal pursued the suit for mandatory injunction. If it is true that the settlement is binding on both

the parties, they should have terminated the proceedings by consensus. After having tested the issues on merits and lost, it is not open to the appellant to fall back on the settlement. Therefore, the settlement could not be given effect to as it was made pending disposal of the suit.

9. In so far as the respondent is concerned, he has filed a suit for mandatory injunction as early as 1995. Whereas the appellant filed the suit in the year 1997, after completing her construction. As per the settlement, it is categorically admitted by Rani Ammal that (i) Dr.K.Kaliyaperumal is the owner of the property situated in S.No.1017/1 and 2; (ii) he had put up construction twenty years before the construction made by Rani Ammal; (iii) even though her husband raised objections, they have not filed any suit against the encroachment made by Dr.K.Kaliyaperumal, but filed suit only in the year 1997. As per the settlement, Rani Ammal has agreed that she will not create any issue over the sunshades put up by Dr.K.Kaliyaperumal. Therefore, even assuming that Ex.A7 was given effect to, it is accepted by the said Rani Ammal that she will not object to the sunshades and the encroachment made by Dr.K.Kaliyaperumal, which goes in favour of Dr.K.Kaliyaperumal and therefore, the appellant Rani Ammal cannot take advantage of the case.

10. The learned counsel appearing for the appellant would argue that the suit for mandatory injunction is not maintainable without there being a prayer for declaration of title.

11. From the perusal of the plaint filed by Dr.K.Kaliyaperumal, it is seen that he acquired title to the property by way of a partition deed entered into between his father and brother. He was allotted to the shares in S.No.1017/1 & 2. Furthermore, it is admitted by the oral evidence of Rani Ammal that her property lies in S.No.1013/7 and Dr.K.Kaliyaperumal constructed the property twenty years back in S.No.1017/1. Even the Panchayat settlement made between the parties, which is marked as Ex.A7 also clearly mention that the vacant space situate within S.No.1017/1&2. In her evidence also, the said Rani Ammal admits that Dr.K.Kaliyaperumal is the owner of the property in respect of the suit property. In that event, it is very clear that there is no dispute about title and identification of properties. Once the title is admitted, it cannot be said that the suit for mandatory injunction is not maintainable.

12. In this regard, it is useful to refer to the following judgments of this Court, wherein, it has been categorically held that admitted facts need not be proved:-

(i) JAYANTHI AND ANOTHER VS.
DR.K.SELVARAJ AND OTHERS [2014 (4) CTC 618]

" 8.1. It is not the case where the plaintiff does not have possession. Though it is a suit for injunction simpliciter, the issue of title is not directly and substantially in issue, so far as defendants 1 to 3 are concerned. It is a case where there are necessary pleadings with regard to title. The parties have been permitted to lead evidence on title. The issue regarding title is simple and straight-forward. Therefore, it is possible to decide the issue regarding title even though the suit is filed for injunction. As per the norms laid down in the above case, this case would be an exception to the normal rule that question of title will not be decided in a suit for injunction. The plaintiff having clear title and possession, suing for injunction, should not be driven to costlier and more cumbersome remedy of suit for declaration, merely because the defendants 1 to 3 make a claim, when they are legally estopped from making any claim."

(ii) V.N.KRISHNASAMY VS. E.S.VASUDEVAN
[2015 (2) MWN (CIVIL) 582]

"25. For the very same proposition, the learned Senior counsel for the respondent relied upon the decision reported in 2014 (4) CTC 618, Jayanthi and another v. Dr.K.Selvaraj and others, wherein also the decision of the Hon'ble Apex Court made in the case of Anathula Sudhakar v. P.Buchi Reddy (Dead) by LRs. and others has been relied upon. It is appropriate to incorporate paragraph 8.1 of the said decision:

" 8.1. It is not the case where the plaintiff does not have possession. Though it is a suit for injunction simpliciter, the issue of title is not directly and substantially in issue, so far as defendants 1 to 3 are concerned. It is a case where there are necessary pleadings with regard to title. The parties have been permitted to lead evidence on title. The issue regarding title is simple and straight-forward. Therefore, it is possible to decide

the issue regarding title even though the suit is filed for injunction. As per the norms laid down in the above case, this case would be an exception to the normal rule that question of title will not be decided in a suit for injunction. The plaintiff having clear title and possession, suing for injunction, should not be driven to costlier and more cumbersome remedy of suit for declaration, merely because the defendants 1 to 3 make a claim, when they are legally estopped from making any claim. "

As per the decision reported in 2008 (6) CTC 237, Anathula Sudhakar v. P.Buchi Reddy (Dead) by LRs. and others, persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. It was further held in the said decision that the court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case. In the present case on hand, prayer for injunction itself is sufficient and there is no necessity for filing the suit for declaration because the respondent herein has clearly established his title over the property through documentary evidences."

(iii) STATE OF TAMIL NADU BY THE DISTRICT COLLECTOR, SALEM AND OTHERS VS. T.KRISHNASAMY CHETTIAR [2017 (3) MWN (CIVIL) 68]

"15.In Union of India vs. Ibrahim Uddin (2012 (8) SCC 148), the Hon'ble Apex Court has held as follows:-

"Section 58 of the Indian Evidence Act provides that a fact may not need to be proved in any proceeding which the parties thereto agreed to

admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands or which they admitted by their pleading, even in that case court may, in its discretion, even if such a admission has been made by the party, require the fact admitted to be proved otherwise than by such admission. In fact, admission by a party may be oral or in writing. Admissions are governed under Sections 17 to 31 of the Evidence Act and such admission can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispense it with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission. "

16. D.W.1 in his deposition, admits that the title in favour of the plaintiff. Therefore, as pointed out above by the Hon'ble Supreme Court, such admission operate as estoppel against its maker. While so, when there is no dispute with respect to title of the plaintiff, suit for bare injunction is maintainable. "

13. In the instant case, Rani Ammal has clearly admitted that the property was purchased by Kesavan father of the plaintiff Dr.K.Kaliyaperumal, twenty years back. Therefore, the contention that the suit is not maintainable, as there is no prayer for declaration of title, is not sustainable in law.

14. In so far as the second question of law is concerned i.e., whether the Courts below have given a perverse finding that the disputed portion belongs to the respondent / plaintiff / defendant, an Advocate Commissioner was appointed and she has measured the property. But in respect of the western

portion of the building, she has not done any measurement. In order to clarify the factual issues, Dr.K.Kaliyaperumal, filed a petition for reopening of arguments.

15. Earlier, this Court in CRP (PD) No.412 of 2006, has dismissed the revision petition filed by Dr.K.Kaliyaperumal, for reissuance of warrant to the Advocate Commissioner, on 31.10.2006, "since Rani Ammal, having admitted that the property in S.No.1017/1 and 2 was purchased by Dr.K.Kaliyaperumal, in more than one occasion, in writing as well as in her oral evidence, it cannot be said that the finding given by the Courts below are perverse". Against the order passed in CRP (PD) No.412 of 2006 dated 31.10.2006, the appellants have not preferred any appeal. Title of the respondent has been categorically admitted and has become final. The disputed portion, as admitted, is within S.No.1017/1 & 2, property of respondent. In that event, finding given by the Courts below, on the admitted facts cannot be declared as perverse.

16. Learned counsel appearing for the respondent would point out that the appellant has preferred two Second Appeals against the decrees passed in O.S.Nos.189 of 1996 and 269 of 1997. Whereas, there is no appeal against the decree passed in Cross Appeal No.24 of 2007. Cross Appeal has been allowed and since there is no appeal against the same, the decree has become final. Once a decree with respect to the same property has become final, it will operate against the appellant as res judicata.

17. In support of his contention, the learned counsel for the respondent relied on the following judgments:

(i) Judgment of the Hon'ble Supreme Court in BADRI NARAYAN SINGH VS. KAMDEO PRASAD SINGH AND ANOTHER [AIR 1962 SC 338 (1)]

(ii) Judgment of this Court in THANGAVELU KOUNDER AND OTHERS VS. VENKATARAMA KOUNDER AND OTHERS [1988 (2) LW 14]

(iii) Judgment of this Court in K.VISWANATHAN AND OTHERS VS. R.APPAVOO CHETTIAR AND OTHERS [2010 (3) CTC 799]

(iv) Judgment of the Hon'ble Supreme Court in SRI GANGAI VINAYAGAR TEMPLE VS. MEENAKSHI AMMAL AND OTHERS [2015 (3) SCC 624]

It is categorically held in those judgments that the trial of two suits together and common judgment rendered therein with separate decrees, if one of the adjudication is allowed to become final, that adjudication assumes finality and res

judicata can be pleaded in the course of appeal against other judgment and decree.

18. In the instant case, the lower appellate court has set aside the findings of the Trial Court in O.S.No.189 of 1996 and partly allowed the suit. Three decrees came to be passed by virtue of a common judgment. The appellant has chosen to challenge the decrees passed by the Lower Appellate Court confirming the judgment of the Trial Court. But, in so far as the decree varying the findings of the trial court in the said Cross Appeal has not been challenged. Once the decree passed in favour of the plaintiff goes unchallenged, it will certainly operate as a res judicata in respect of the other decree.

19. The learned Senior Counsel appearing for the appellant would contend that it is a clerical error that the cross appeal was not mentioned while filing the memorandum of grounds in the appeal. But a perusal of the decree would go to show that the suit in O.S.No.189 of 1996 was valued at Rs.7,500/- in so far as the relief of mandatory injunction is concerned and Rs.7,600/- in so far as the relief of permanent injunction is concerned, in total the suit was valued at Rs.15,100/-. Whereas the Second Appeal in S.A.No.1015 of 2009 is valued at Rs.7,500/- in respect of the decree passed in O.S.No.189 of 1996 alone. Once there is a specific decree allowing the cross appeal is made, a separate appeal should have been filed. In the absence of separate appeal and payment of separate court fee, it cannot be said that it is only a clerical error in preparing the memorandum of grounds of Second Appeal. It is well proved that there is no appeal made against the decree passed in Cross Appeal with respect to the grant of mandatory injunction by the appellants and therefore, the decree granted by the lower appellate court would certainly operate as res judicata against her case. Even on merits, Ex.A7 which is relied on by her, would go to show that she is estopped from contesting the suit, after having admitted the extents of the sunshades constructed by Dr.K.Kaliyaperumal twenty years back without any challenge in a manner known to law. If at all she had any objections, she should have filed a suit long back, that is, within three years that is to say on or before 1981. The suit itself came to be filed belatedly and therefore, Ex.A7 stands against Rani Ammal. Even if it is given effect to, that will not strengthen the case of Rani Ammal. Since it is an admitted fact that the property belongs to Dr.K.Kaliyaperumal, there is no perversity in the finding that the disputed portion belongs to him.

20. In such circumstances, both the Second Appeals merit no consideration and the questions of law framed are all

questions of fact and answered against the appellants.
Accordingly, both the Second Appeals are dismissed. No costs.

Sd/-
Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

TK

To

1.The Subordinate Court
Madurantakam.

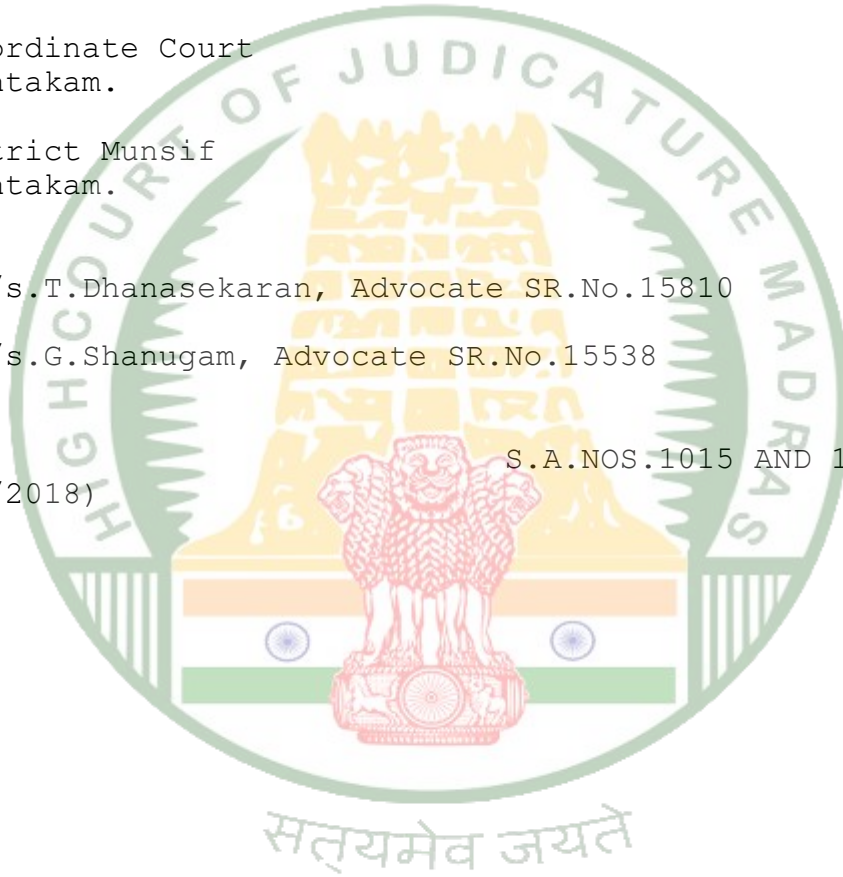
2.The District Munsif
Madurantakam.

+1cc to M/s.T.Dhanasekaran, Advocate SR.No.15810

+1cc to M/s.G.Shanugam, Advocate SR.No.15538

S.A.NOS.1015 AND 1016 OF 2009

GMV (13/11/2018)



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