

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.1050 of 2002

1. Jaya Shanmughasundaram
2. Akilandavalli @ Akilandeswari ... Appellants/Plaintiffs

/Vs/

1. M.K.Vadivel (Deceased)
2. V.Palanivel
3. V.Krishnaveni ... Respondents/Defendants

Respondents 2 and 3 brought on record as Lrs of the deceased sole respondent vide order of Court dated 02.08.2018 made in CMP.No.12247 to 12249/2018 in S.A.No.1050/2002

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and Judgment dated 18.9.2001 in A.S.No.16 of 2001 on the file of the learned Subordinate Court, Mettur, upholding the decree and judgment dated 17.11.2000 in O.S.No.371 of 1996 on the file of the District Munsif Court-cum-Judicial Magistrate, Omalur.

For Appellants : Mrs.Aswini Devi for
Mr.T.R.Rajaraman

For R1 : Died

For R2 and R3 : Set ex-parte vide Court
order dated 30.08.2018

JUDGMENT

The unsuccessful plaintiffs in O.S.No.554/93 on the file of the District Munsif Court-cum-Judicial Magistrate, Omalur, are the appellants herein. The plaintiffs initially filed a suit for permanent injunction restraining the defendant Mr.M.K.Vadivel

(since deceased) from interfering with their (plaintiffs') possession and enjoyment over the suit property. The suit property is described in the plaint schedule as a vacant site situate in door No.3, second Ward, Tharamangalam, Omalur Taluk, Salem District, measuring 60.04 feet X 28.04 feet. The plaintiffs have also prayed for a mandatory injunction directing the defendant to remove the encroachments made by him in the suit property.

2. During the pendency of the Second Appeal, the sole respondent died and his legal heirs were impleaded as respondents 2 and 3. No appearance on behalf of the respondents 2 and 3.

3. For the sake of convenience, the parties are called as per their ranking in the trial Court.

4. The case of the plaintiffs is that they are in possession and enjoyment of the suit property and that the defendant (since deceased) had constructed a house adjacent to the suit property and the roof of the house of the defendant is put up in such a way that the water from the roof would pour on the suit property. Therefore, they prayed for a permanent injunction restraining the defendant from interfering with their peaceful possession and enjoyment of the suit property. Subsequently, the plaintiffs amended the plaint and the prayer for mandatory injunction to remove the encroachments made by the defendant in the suit property was included.

5. The defendant in his written statement has contended that he has constructed his house within his property, after demolishing the existing super structure during the year 1991. It is also contended by the defendant that he did not encroach upon the plaintiffs' properties. According to the defendant, the suit filed by the plaintiffs is not maintainable.

6. The trial Court, after framing necessary issues and after full contest dismissed the suit. Aggrieved over the same, the plaintiffs preferred an appeal in A.S.No.16/2001 before the Sub Court, Mettur. The learned Subordinate Judge, Mettur, after analysing the evidence on record, partly allowed the Appeal by holding that the plaintiffs are entitled for a permanent injunction as prayed for by them. However, the first Appellate Court dismissed the suit with regard to the mandatory injunction claimed by the plaintiffs.

7. Now, the plaintiffs have filed the present Second Appeal on the following substantial questions of law:-

"1. When the defendant has put up his

construction only during the pendency of the suit, is the learned Subordinate Judge right in dismissing the suit with respect to mandatory injunction?

2. When the learned Subordinate Judge has found that the plaintiff is having title to the property, is the learned Subordinate Judge right in dismissing the suit with respect to mandatory injunction?

3. Is the learned Subordinate Judge right in decreeing the suit with respect to declaration of title alone without granting the consequential relief of mandatory injunction?"

8. The crux of the issue in the Second Appeal is whether the defendant had encroached upon the plaintiffs land to an extent measuring 2 1/2 feet X 20 feet as alleged by the plaintiffs. At the outset, it may be observed that the plaintiffs have not adduced any evidence to show that the defendant had encroached upon their property. PW1 had also admitted that the southern wall of the defendant is constructed within his property. The plaintiffs have adduced only the documents showing the extent of land which belonged to them. The plaintiffs did not take steps to measure the exact extent of the defendant's property over which the defendant has constructed his house. In the absence of the measurement of the defendant's house, it is difficult to come to the conclusion that the defendant has encroached upon the plaintiffs land.

9. In fact, the plaintiffs did not take steps to appoint an Advocate Commissioner to find out the measurement of the defendant's house. The plaintiffs, who filed the suit should prove their case by adducing acceptable evidence. It is also pertinent to point out that the plaintiffs have not given the measurement of the encroached area in the plaint schedule.

10. The first Appellate Court based on the patta (Ex.A4) had concluded that the defendant's house is constructed till the end of the southern side boundary and that his roof projects over the property of the plaintiffs. It is further observed that the encroached portion over the plaintiffs area is 2 1/2 ft and that since the defendant had his windows on the southern wall of his house, there is every possibility for him to further encroach upon the land of the plaintiffs.

11. These observations based on surmises and conjectures

cannot be accepted. The plaintiffs in a suit for mandatory injunction should have specified the exact area of encroachment made by the defendant. The suit property has not been amended properly, after inclusion of the prayer for mandatory injunction. As already observed, the plaintiffs have not adduced the best evidence to show that either the defendant is attempting to trespass into their property, or has actually encroached upon their property. In view of all the reasons stated above, I hold that the present appeal is liable to be dismissed.

i) In the result, the Second Appeal is dismissed. No costs.

ii) the decree and judgment dated 18.09.2001 passed by the Sub-Judge, Mettur, is set aside.

iii) the decree and judgment passed by the learned District Munsif Court-cum-Judicial Magistrate, Omalur, dated 17.11.2000 in O.S.No.371/1996 is restored and the suit in O.S.No.371 of 1996 is dismissed with costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

dna

To

1.The Subordinate Judge, Mettur.

2.The District Munsif -cum-Judicial Magistrate,
Omalur.

3.The Section Officer, सतयमेव जयते
VR Section, High Court, Madras 600 104.

S.A.No.1050 of 2002

EV(CO)
CSL/04.12.2018

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