

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.Nos.592 of 2015 and 367 of 2016

Orders reserved on 19.07.2018	Orders pronounced on 31.07.2018
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N.Reddappa Reddy

.. Appellant in both
S.As.

Vs.

1.Chandra
2.Thulasi
3.K.Sargunan

.. Respondents
in both S.As.

COMMON PRAYER: Second Appeals are filed under Section 100 of C.P.C against the judgments and decrees dated 22.09.2014 made in A.S.No.247 of 2013 and Cross-Objection No.418 of 2013 on the file of the IV Additional City Civil Court, Chennai, against the judgment and decree dated 05.01.2013 made in O.S.No.3736 of 2000 on the file of the VIII Assistant City Civil Court, Chennai.

For Appellant : Mr.P.Subba Reddy

For R1 : Mr.N.Manokaran
for Mr.M.C.Govindan

C O M M O N J U D G M E N T

These Second Appeals are filed against the judgments and decrees dated 22.09.2014 made in A.S.No.247 of 2013 and Cross-Objection No.418 of 2013 on the file of the IV Additional City Civil Court, Chennai, against the judgment and decree dated 05.01.2013 made in O.S.No.3736 of 2000 on the file of the VIII Assistant City Civil Court, Chennai.

2.The appellant in both the Second Appeals is plaintiff and respondents are defendants in O.S.No.3736 of 2000 on the file of the VIII Assistant City Civil Court, Chennai. The appellant filed the said suit for permanent injunction restraining the respondents from interfering with the appellant's property in putting up gate, compound wall, development of the plots, usage

of plots in any manner the appellant wants for Plot Nos.21 and 22, II Street, Chookalingam Nagar Colony, Gopalapuram, Vellala Teynampet, Chennai 600 086; for a declaration to declare that Clause 3 of the Partition deed dated 29.10.1906 relating to drawing of water from the well in Plot No.22, Gopalapuram, Vellala Teynampet, Chennai 600 086 by using the irrigation method of Yetram, Kavalai, etc., to do cultivation is not valid and cannot be enforced as it is hereby prohibited in the City of Chennai in view of the prohibition of cultivation in the City by Legislation and to struck off as per order dated 11.07.2005 passed in I.A.No.13508 of 2004.

2(a).According to the appellant, he is the owner of Plot No.21, measuring an extent 2336 Sq.Ft. and Plot No.22, measuring an extent of 2272 Sq.Ft. in Survey Nos.1330/1, 1330/2 and 1330/3 (part), Block No.37, Mylapore Village, Old R.S.No.1395. A well with 13 feet diameter is situate in Plot No.22, touching Plot No.21. Originally, larger extent of land belonged to Sivasankaran Mudaliar and Appadurai Mudaliar. By the family partition deed dated 29.10.1906, they partitioned the properties, by which Eastern portion of the property was allotted to Sivasankaran Mudaliar and Western side of the property was allotted to Appadurai Mudaliar. Even before partition and after partition, both the brothers were doing cultivation in the entire area by using old method of Yetram, kavalai, etc., to draw water for irrigation of the lands.

2(b).There are two wells in the entire property, one in Eastern side and one in Western side, situated in each brother's land, allotted to them in the partition. They were drawing water from both the wells to cultivate their lands. Sivasankaran Mudaliar formed lay out which was sanctioned in L.A.No.72 of 1957 dated 12.06.1957. Appadurai Mudaliar formed lay out which was sanctioned in L.A.No.53 of 1961. The family members of Appadurai Mudaliar sold major portion of their plots to various persons and persons who had purchased the property, have built houses. The family members of Sivasankaran Mudaliar sold few plots and are also promoting flats through a developer or by themselves. There is no cultivation in the property. In view of the same, old method of drawing water from the well for irrigation, is also abandoned. There is prohibition of cultivation in Chennai City. The plots purchased by the appellant is adjacent to main house of family members of Sivasankaran Mudaliar.

2(c).Due to enmity, K.Suseela, daughter of Sivasankaran Mudaliar filed O.S.No.659 of 1965 against the family members of Appadurai Mudaliar and vendors of appellant. The said K.Suseela, mother of the respondent also filed O.S.No.5454 of 1976. Both the suits were finally decided by this Court, whereby it was held that K.Suseela was entitled to draw water from the well

situated in Plot No.22 and also 25 feet around the well for maintenance purpose. The suit was decreed in favour of said K.Suseela. The two plot Nos.21 and 22 belonging to the appellant is approximately two grounds and the appellant wants to develop the lands. The neighbours of the appellant issued a notice dated 18.02.2000, directing the appellant to close the well, because of mosquito menace. The Corporation also issued notice dated 04.05.2000 to close the well. Even earlier, on 13.03.2000, the Corporation also has issued notice under Tamil Nadu Public Health Act.

2(d).The respondents want to retain the well and also promote flats in the area. The appellant wants to put up a big gate for easy access to car, etc., On 12.05.2000, the husband of the first respondent protested and brought people, in order to prevent the appellant and his family members from entering into the property. The appellant gave a complaint on the same day and case has been registered against the husband of the first respondent. The appellant also gave a complaint to the Commissioner of Police, against the husband of the first respondent who prevented the appellant and his family members to enter into the property. On 09.06.2000, the first respondent's husband along with unsocial elements prevented the appellant and his family members from entering into his property. The respondents do not have any right in Plot Nos.21 and 22, owned by the appellant, except the right to draw water from the well.

2(e).Clause mentioned in partition deed dated 29.10.1906 has no value in view of subsequent legislation passed, prohibiting cultivation in Chennai City. Based on the above averments, the appellant filed suit.

3.The respondents filed separate written statements and denied all the averments made in the plaint. According to the respondents, they have a right to draw water and use surrounding area for drawing water as well as for maintenance purpose. There is no law prohibiting cultivation in Madras City. There are many wells in the Madras City and only to deprive the respondents and their joint property, the appellant came out with the allegation that well is health hazard.

4(a).The major portion of the property in Survey No.1330/1 belonging to the respondents is a coconut grove and respondents are drawing water from the well in Plot Nos.21 and 22 in Survey No.1330/2.

4(b).The mother of the respondents filed O.S.No.659 of 1965 and O.S.No.5454 of 1976 against family members of Appadurai Mudaliar and vendors of the appellant. The respondents are not claiming right against the appellant only after he purchased the property. The dispute between the parties started in the year 1965 itself. The appellant is a retired Assistant Executive

Engineer in Corporation of Chennai and with the help of employees, appellant issued notice only with an intention to compel the respondents to agree to close the well. The respondents did not receive any notice for closure of the well even though they are co-owners. K.Suseela, mother of the respondents got a decree, establishing her right in the well in Plot Nos.21 and 22 and lands adjoining the well.

4(c).The Clause in partition deed is still valid. The appellant's vendors contested the suit filed by K.Suseela, but they did not challenge this Clause in partition deed. The respondents are co-owners and no cause of action has arisen for the present suit. The appellant is a purchaser, pending suit and decree in the suits filed by the mother of the respondents are binding on the appellant. The appellant wants to put up a gate and compound wall to develop the entire Plot Nos.21 and 22, in which the respondents have right over the well and the land surrounding the well.

4(d). The appellant is not entitled to the relief sought for in the present suit in view of the judgment made in O.S.No.659 of 1965 and O.S.No.5454 of 1976.

4(e).Based on the above pleadings, issues and additional issues were framed. Before the Trial Court, the appellant examined himself as P.W.1 and marked 11 documents as Exs.A1 to A11. The first respondent examined herself as D.W.1, her husband as D.W.2 and third respondent as D.W.3 and marked 29 documents as Exs.B1 to B29. The learned Trial Judge considering the pleadings, oral and documentary evidence, Advocate Commissioner's report annexed with Ex.B9 and the decree in O.S.No.5454 of 1976, partly allowed the suit, granting permanent injunction in respect of 1490 Sq.Ft. of the property described in the plaint. The suit was dismissed in respect of the remaining property and also for the relief of declaration.

5.Against the decree of permanent injunction for 1490 Sq.Ft., the first respondent filed A.S.No.247 of 2013. The appellant filed Cross Objection No.418 of 2013, challenging the portion of the judgment and decree dismissing the suit. The learned I Appellate Judge framed necessary points for consideration and by the common judgment and decree dated 22.09.2014, allowed the first appeal A.S.No.247 of 2013 and dismissed the Cross Objection No.418 of 2013 filed by the appellant, holding that there is no definite boundaries in respect of 1490 Sq.Ft.

6.Against the common judgment and decree allowing the first appeal and dismissing the Cross Objection, the appellant has come out with the present two Second Appeals.

7.The learned counsel for the appellant contended that partition deed was executed before the property was not plotted into house site. Clause 3 of partition deed gives power to the parties only to enter into the land where the well is situate and for a right to draw water, take materials to repair by common expenses by both the parties. This Court in S.A.No.1758 of 1998 which arose out of O.S.No.5454 of 1976 and S.A.No.1791 of 1992 has held that parties are entitled to draw water and to take water to their respective lands and it is not dealt with Plot Nos.21 and 22. The contention of the respondents that Plot Nos.21 and 22 have been treated as common by both the parties in misconception and it is only false representation to the Court.

8.There is no dispute with regard to wells which are common. Excluding well area, other areas in the plots cannot be treated as common area. When the lay out was formed by Sivasankaran Mudaliar in the year 1957 and Appadurai Mudaliar in the year 1961, independently with regard to the properties, there is no dispute with regard to enjoyment of the well and drawing water from the well. In O.S.No.659 of 1965, it was held that respondents' mother is entitled to 12 feet space East of well along with a pipe line, up to her property for the purpose of taking water and cart. Similarly, in O.S.No.5454 of 1976, it was held that respondents' mother is entitled to 25 feet around the well. In both the suits, Plot Nos.21 and 22 are not an issue. The third respondent, as D.W.3 has admitted that old method of drawing water by Yetram, Kavalai, etc., were abandoned a long ago. The extent of well is 133 Sq.Ft. and area around the well and extent of the well is 3118 Sq.Ft. Apart from this extent, the appellant is entitled to exclusive possession of balance extent of 1490 Sq.Ft. The learned Trial Judge has rightly moulded the relief and granted injunction in respect of 1490 Sq.Ft. by giving reasons for the same. The learned I Appellate Judge on erroneous consideration, set aside the said finding and allowed the First Appeal and dismissed the Cross Objection.

8(a).As per Order VII Rule 3 of C.P.C, the Court has power to mould the relief and grant decree for a lesser relief. In this case, the Trial Court has rightly given the relief for lesser extent. The learned counsel for the appellant relied on the judgments of this Court reported in 2002 (1) CTC 472 (Angammal and 2 others Vs. Komara Gounder and 2 others) and 2001 (4) CTC 513 (Natarajan Vs. R.Muthukrishnan), wherein this Court has held that Courts have power to mould the relief and grant lesser relief.

8(b).The learned counsel for the appellant relied on the judgment of the Hon'ble Apex Court reported in 2005 (1) CTC 368 (Bhanu Kumar Jain Vs. Archana Kumar and another) and submitted that principle of res-judicata applies not only in separate subsequent proceedings, but also in subsequent stage of same proceedings. In the present case, the application filed by the

respondents to reject the plaint on the ground of "barred by law" was rejected by the I Appellate Court as well as by this Court in C.M.A.No.946 of 2004.

8(c).The learned counsel for the appellant further contended that the appellant has filed C.S.No.7 of 2012, challenging the validity of the judgments and decrees in O.S.Nos.659 of 1965 and 5454 of 1976. The appellant is entitled to enjoy 1490 Sq.Ft. as decreed by the Trial Court till C.S.No.7 of 2012 is finally decided. The learned counsel for the appellant contended that in paragraph 10 of the written statement filed by the first respondent, she has admitted the claim of the appellant for remaining portion.

9.Per contra, the learned counsel for the first respondent contended that K.Suseela, mother of the respondents filed O.S.Nos.659 of 1965 and 5454 of 1976, claiming right over the well in Plot No.21 as well as area surrounding the said well. The vendors of the appellant were parties to the suit. The suit O.S.No.659 of 1965 finally ended in Second Appeal and S.L.P. O.S.No.5454 of 1976 ended in this Court. The decree was passed in favour of K.Suseela, holding that she is entitled to draw water from well and 25 feet around the well. The said decree has become final. The appellant purchased the suit property pending Second Appeal and therefore, decree passed in the above suits are binding on him. The appellant, having purchased the property pending legal proceedings, has not acquired any right over Plot Nos.21 and 22.

9(a).After the earlier suits have been finally decided, the appellant is trying to re-litigate the issue which is abuse of process of law and relied on the judgments viz., 2005-4-L.W. 206 (The Member Concern Department of Post, Government of India, Ministry of Communication, rep. by its Chief Post Master General, Anna Salai, Chennai 600 002 Vs. Annapoorni and others), 2013 (3) MWN (Civil) 717 (Kairunnisa Begum and others Vs. B.N.Sreedhara Murthy and others) and 2013 (1) CTC 180 (N.Babu Vs. S.Shanmugam and others). The learned counsel for the first respondent further contended that present suit is hit by Principles of res-judicata as the very same issue had been decided in the earlier suit in O.S.Nos.659 of 1965 and 5454 of 1976.

9(b).No injunction can be granted in respect of un-identified extent of 1490 Sq.ft, out of 4608 Sq.ft. In view of the fact that said extent is not identified and specific with boundaries, the Trial Court erred in applying the provisions of Order VII Rule 3 of C.P.C and moulded the relief. The said portion of the judgment of the Trial Court is contrary to the decision of this Court dated 22.09.1997 marked as Ex.B3. The relief in respect of un-identified portion of common property is

abuse of law.

9(c).The entire extent of Plot Nos.21 and 22 are common for both the families of Sivasankaran Mudaliar and Appadurai Mudaliar. The family members of Appadurai Mudaliar without any right over the said plots, have sold the properties to the vendors of the appellant, pending suit and appellant's vendors sold the properties to the appellant, pending Second Appeal. In the Second Appeal, this Court has held that K.Suseela has common right to enjoy the well, as well as surrounding area of the well and the learned Trial Judge erred in granting decree of injunction for 1490 Sq.ft. The said extent is un-divided share. As per Order VII Rule 3 and Order XX Rule 9 of C.P.C, a party must describe the immovable property by boundaries or by numbers in a record of settlement or survey and immovable property must be sufficiently described to identify the same. Trial Court has not granted any decree for this extent with specific boundaries after demarcation. To substantiate this contention, the learned counsel for the first respondent relied on the judgment reported in 1978 TLNJ 197(Pankajammal and others Vs. Pichai Nattar).

9(d).The learned I Appellate Judge has rightly considered this issue and has reversed the judgment of the Trial Court by giving valid reasons. The first respondent did not admit that claim of the appellant over the remaining area. A reading of paragraph 10 of the written statement would show that first respondent has not admitted the claim of the appellant. The appellant is relying on a single sentence and contending that first respondent admitted the claim of appellant for remaining portion.

10.Heard the learned counsel for the appellant as well as the first respondent and perused the materials available on record.

11.Both the Second Appeals are not admitted and no Substantial Questions of Law were framed. Considering the materials on record, the following Substantial Questions of Law are framed:

"1.Whether suit filed by the appellant is hit by Principles of res-judicata?

2.Whether Clause 3 of partition deed dated 29.10.1906 is invalid?

3.Whether appellant is entitled to permanent injunction as prayed for in the suit or in alternate, whether the appellant is entitled to permanent injunction in respect of 1490 Sq.Ft. in the suit property?"

Substantial Question of Law-1:

12.The learned counsel for the first respondent contended that suit filed by the respondents is hit by Principles of res-judicata. According to the learned counsel for the first respondent, the appellant is re-litigating the issue which is

already considered and decided in two suits O.S.Nos.659 of 1965 and 5454 of 1976 filed by the mother of the respondents. The appellant purchased the suit property pending Second Appeal from the parties to the suit and he has not acquired any title to the suit property. From the materials on record, it is seen that the first respondent has filed application in I.A.No.12277 of 2000 under Order XV Rule 1 of C.P.C to dismiss the suit. The said application was treated as application filed under Order VII Rule 11 of C.P.C. The Trial Court allowed the application and rejected the plaint. The appellant filed A.S.No.126 of 2002 and learned I Appellate Judge allowed the appeal and set aside the order of Trial Court, rejecting the plaint. This Court confirmed the said judgment by judgment dated 23.04.2004 in C.M.A.No.946 of 2004. The first respondent filed S.L.P.No.18180 of 2004 and the same was dismissed by the Hon'ble Apex Court. In view of the said judgment, the contention of the learned counsel for the respondents that appellant is re-litigating the issue and the suit is barred by res-judicata is without merits. The Substantial Question of Law No.1 is answered against the respondents.

Substantial Questions of Law-2 and 3:

13.The appellant has claimed right over the entire extent in Plot Nos.21 and 22, measuring 4608 Sq.ft. According to the appellant, originally water was drawn from the well by old method of Yetram, Kavalai, etc., In view of the same, both the brothers on partition were given equal right to enter into land in which the well is situated and also bring cart and other materials for repair. No exclusive right is given over the land in which well is situate, to any one of the brothers. Subsequently, both the brothers formed separate lay outs and converted the lands into house sites. The portion of the land in which well is situate is numbered as Plot Nos.21 and 22, in layout formed by Appadurai Mudaliar.

13(a).The learned counsel for the appellant contended that it is situated in portion of the land allotted to Appadurai Mudaliar. After old method of drawing water from the well was abandoned, the family members of Sivasankaran Mudaliar lost their common right over the said plots. The members of Appadurai Mudaliar family have right to sell the property. In the suit filed by K.Suseela, mother of the respondents, it was held that she has right to draw water from the well and an extent of 25 feet around the well. The right of the parties in respect of ownership of plots was not an issue. In view of the same, the appellant as a purchaser is entitled to be in possession of the entire extent of suit property and is entitled to put up compound wall and gate to enter into Plot Nos.21 and 22. In any event, the appellant is entitled to exclusive possession of 1490 Sq.Ft. in the suit property.

13(b).These contentions are contrary to the judgments in the earlier suits O.S.Nos.659 of 1965 and 5454 of 1976. In the said suits, the vendors of the appellant were parties and appellant

purchased properties pending Second Appeal. In the suits, it was held that K.Suseela was entitled to draw water from the well as well as right over 25 feet around the well and pathway measuring 12 feet from the East of well. The said judgments have become final. Till the said judgments are set aside by the competent Court, those judgments are bindings of the appellant. The right of K.Suseela in respect of right over the well and 25 feet around the well together with the pathway was granted based on Clause 3 of partition deed. The vendors of appellant or family members of Appadurai Mudaliar did not challenge the said clause. The judgments have become final, upholding the right of K.Suseela, based on the partition deed. In view of the earlier proceedings which are binding on the appellant, the appellant is not entitled to re-agitate that Clause 3 of partition deed is not valid.

14.The extent to which the respondents are entitled to as per the judgment in the suit property is un-divided portion and it is not demarcated. In view of the same, alternate contention of the learned counsel for the appellant that appellant is entitled to injunction in respect of 1490 Sq.ft. in the suit property is not acceptable. The learned Trial Judge granted injunction in respect of 1490 Sq.ft., but decree does not contain the portion to which the appellant is entitled to permanent injunction. The decree reproduced the suit property as only 4608 Sq.ft. i.e., Plot No.21 measuring 2,336 Sq.ft. and Plot No.22, measuring 2,272 Sq.ft. with a well thereon (attached with a plan). The learned Trial Judge failed to consider Order VII Rule 3 of C.P.C as well as Order XX Rule 9 of C.P.C. These provisions specifically state that in a suit for immovable property, the property must be properly described and identified. The property must be identified by boundaries or by numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. In the present case, 1490 Sq.ft. is not demarcated and identified. The learned Trial Judge has not given boundaries in respect of 1490 Sq.ft. from and out of larger extent. In view of the same, the decree for injunction cannot be enforced. It is well settled that when an injunction is issued against the property or a person, the property must be described properly and should not be in controversy with regard to identification of the property. The learned I Appellate Judge has considered these aspects in proper perspective and has rightly set aside the decree of Trial Court.

15.The appellant has given up his claim for declaration that Clause 3 of partition deed dated 29.10.1906 is invalid. In the Second Appeal, both the learned counsel for the appellant and first respondent made submissions in respect of this issue. I have considered the contentions of both the counsel and held that Clause 3 of partition deed is valid as the same had been decided to show grant of right to K.Suseela, on the earlier proceedings and the said judgments have become final and binding

on the appellant.

16. In the earlier proceedings, based on the said Clause, K.Suseela is granted right over the well and 25 feet. land around the well and pathway. In view of the same, the appellant is not entitled to permanent injunction as sought for in respect of entire suit property. As far as alternate lesser relief of permanent injunction in respect of 1490 Sq.ft. is concerned, the learned Trial Judge even after considering Ex.B9, in which the sketch filed by the Advocate Commissioner annexed with decree in O.S.No.5454 of 1976 did not demarcate 1490 Sq.ft. with specific boundaries. Further, the appellant has also not filed any application for amendment of plaint, claiming alternate relief for lesser extent by giving boundaries of 1490 Sq.ft., so that the said extent is specific and could be easily identified without any controversy. The learned I Appellate Judge has considered Order VII Rule 3 and Order XX Rule 9 of C.P.C and materials on record elaborately and reversed the judgment of the Trial Court, granting permanent injunction to an extent of 1490 Sq.ft. There is no error of law in the said findings. For the above reasons, the Substantial Questions of Law 2 and 3 are answered against the appellant and in favour of the respondents.

17. In the result, both the Second Appeals are dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

gsa/kj
To

1. The Judge, IV Additional City Civil Court, Chennai.

2. The Judge, VIII Assistant City Civil Court, Chennai.

Copy to:

The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.M.C.Govindan, Advocate sr.no.52008

+2cc to Mr.P.Subba Reddy, Advocate sr.no.51716(27/09/2018)

S.A.Nos.592 of 2015 and 367 of 2016

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