

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.01.2018

PRONOUNCED ON : 17.01.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.295 of 2003

Shanmugam

... Appellant/Appellant/Defendant

Vs.

1.Vijayakumar

2.Sathiamoorthy ...Respondents/Respondents/Plaintiffs

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 23.11.2001 made in A.S.No.34 of 2000 on the file of the Principal District Court, Cuddalore District, Cuddalore confirming the Judgment and Decree dated 12.01.2000 made in O.S.No.229 of 1996 on the file of the Subordinate Judge of Cuddalore.

For Appellant : Mr.R.Vasudevan

For Respondents: Mr.R.Gururaj

J U D G M E N T

This second appeal is directed against the Judgment and Decree dated 23.11.2001 passed in A.S.No.34 of 2000 on the file of the Principal District Court, Cuddalore confirming the Judgment and Decree dated 12.01.2000 passed in O.S.No.229 of 1996 on the file of the Subordinate Court, Cuddalore.

2. The parties are referred to as per the rankings in the trial court.

3.Suit for declaration, permanent injunction and mandatory injunction.

4.The case of the plaintiffs in brief is that the plaintiffs and the defendant are brothers and the sons of Rajathi ammal. The house property bearing No.35 Subbaray Chetty Street, Tirupapuliyur was given to Rajathi ammal, the mother, under the sale deed conferring only a life estate and the vested remainder was created in favour of her sons, namely the plaintiffs and the defendant and after the demise of Rajathi ammal in the year 1989, the plaintiffs and the defendant jointly enjoyed the above

said suit property and subsequently, the first plaintiff laid the suit for partition claiming 1/3 share in the house property and other items in O.S.No.65 of 1995, on the file of the Sub Court, Cuddalore and a preliminary decree was passed in the said suit on 30.01.1995 and later the first plaintiff preferred an application in I.A.No.315 of 1995 for passing a final decree and similarly the second plaintiff and the defendant filed another application for passing a final decree and in the said proceedings, a Commissioner was appointed, to divide the property. At the point of time, when the division was effected by the Commissioner, the house was in existence and the plaintiffs and the defendant agreed to demolish the existing house and put up a new construction within the portion allotted to them respectively, in the final decree, the East and West measurement of the house property was only 26 ½ feet and accordingly, as per the suggestions made, the two portions were divided in the front area adjoining the street, each to be allotted to the first plaintiff and the defendant and the back portion was suggested to be allotted to the second plaintiff and further it was also suggested that the common passage to be provided for the second plaintiff to reach the back portion and accordingly, the Commissioner had accepted the suggestions made by the parties and divided the property as suggested and the common passage in between the properties allotted to the plaintiffs and the defendant was demarcated and the final decree was passed, pursuant to the report of the Commissioner on 30.03.1995 and it has been specifically provided in the final decree that the parties should use the passage in common and the common passage provided under the final decree is shown in the plaint as A B C C1 F E D1 D and the property allotted to the first plaintiff is shown as B B1 C1 C and the property allotted to the second plaintiff is shown as E F G H and the property allotted to the defendant is shown as A A1 D1 D in the plaint plan and at the time of the partition, there was a wall in the portion shown as A A2 Q Q1 and R R1 D D2 and the same is the eastern wall of the property allotted to the defendant and there was a wall in the portion shown as P Q R S and there are two wooden pillars shown as W1 W2 in the plan and the hall was kept open originally and the defendant agreed to demolish the house portion and put up new construction within the portion allotted to him and due to misunderstanding, the defendant caused inconvenience in the enjoyment of the common passage and not demolished the wall shown as A A2 Q Q1 and R R1 D D2, so as to make it a passage and further, the defendant also laid a foundation on 15.07.1996 in the portion X1 X2 X3 X4, measuring north south 20 feet and east west 1 ¼ feet and dug up foundation in the common passage and attempting to put up further constructions in the common passage and hence according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5.The case of the defendant in brief is that it is only the defendant, who had looked after the plaintiffs and maintained the house property till date and accepted the final decree passed in O.S.No.65 of 1995 and however, as put forth by the plaintiffs, the defendant did not construct the wall in the common passage as alleged and the plaintiffs having failed to get an order of injunction, entered into the property and cut the teak wood trees and hence the complaint has been lodged by the defendant and the plaintiffs also gave a false complaint against the defendant and the suit has been laid by the plaintiff falsely and hence the defendant is entitled to get damages in a sum of Rs.1,00,000/- and the suit is liable to be dismissed.

6.The case of the plaintiffs in the reply statement is that it is false to state that the plaintiffs had removed the teakwood and other materials and it is false to state that the defendant has been put to loss of a sum of Rs.1,00,000/- and the defendant is liable and bound to follow the terms of the final decree and on the other hand, taking advantage of the absence of the plaintiffs, it is only the defendant who had encroached into the suit property and put up the unlawful construction as stated in the plaint and hence the suit is to be decreed as prayed for.

7. In support of the plaintiffs' case, P.W.1 was examined. Exs.A1 to A3 were marked. On the side of the defendant, D.W.1 was examined. No document has been marked. C.W.1 was also examined. Exs.C1 and C2 were marked.

8.On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiffs' case and accordingly decreed the suit as prayed for. Impugning the same, the present second appeal has come to be laid.

9.At the time of admission of the second appeal the following substantial question of law was formulated for consideration.

Whether the Courts below are justified in granting a decree for mandatory injunction for the removal of existing wall marked as " A A1 Q Q1 and R R1 D D2" and foundation marked as X2 X3 X4 inspite of the fact that the entire building belonging to the appellant will collapse as spoken to by D.W.1 and evidenced by the report of the Commissioner under Ex.C1?

10.The plaintiffs and the defendant are brothers and the sons of Rajathi ammal. It is not in dispute that the house property with reference to which the suit has been laid was settled in favour of the Rajathi ammal giving life estate to her and the vested remainder to her sons, namely the plaintiffs and the defendant. After the demise of Rajathi ammal, it is found that the partition suit in O.S.No.65 of 1995 has come to be laid and accordingly, the parties are each found to be entitled to 1/3 share in the property and accordingly preliminary and final decrees have come to be passed in the above said suit allotting the portions to which the parties are entitled to. It is not in dispute that the parties had agreed for demolishing the existing construction put up in the property and lay a new construction in the portions allotted to them. The plaintiffs have filed the plaint plan and it is seen that and also not disputed the portion shown as B B1 C1 C was allotted to the first plaintiff, the portion shown as E F G H was allotted to the second plaintiff and the portion shown as A A1 D1 D was allotted to the defendant. It is found that the parties had agreed to leave the common passage shown as A B C C1 F E D1 D for the convenient enjoyment of the respective portions allotted to the three brothers particularly, for enabling the second plaintiff to have access to his portion located in the rear area. It is not in dispute that at the time of partition, the wall shown as A A2 Q Q1 R R1 D D2 was in existence and another wall was in the portion shown as P Q R S and the parties had agreed to demolish the existing construction including the above said wall and put up new construction in the portions allotted to them respectively. According to the plaintiffs, due to misunderstanding, the defendant caused inconvenience in the usage of the common passage and thereby had refused to demolish the existing wall as above stated, so as to make it a common passage and further according to the plaintiffs, the defendant has also unlawfully laid the foundation in the portion shown as X1 X2 X3 X4 and it is the further grievance of the plaintiffs that the defendant is making arrangement to put up further construction in the common passage. Hence, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs. The defendant has not raised any serious defence to the case of the plaintiffs other than stating that it is only the plaintiffs who had attempted to take the wooden pillars and other articles from the property illegally and thereby the same had resulted in the lodging of complaint and counter complaint by the parties concerned.

11.As regards the case of the plaintiffs, the first plaintiff examined as P.W.1 has tendered evidence and marked Exs.A1 and A2 and from the above said documents, it is seen that, as pleaded by the plaintiffs, in the partition decree passed in O.S.No.65 of 1995, specific portions had been allotted

to the respective parties. Further, it is found that as projected by the plaintiffs, the portion shown as A B C C1 F E D1 D has been earmarked as the common passage for the convenient enjoyment of the respective portions allotted to the parties concerned. The defendant examined as D.W.1 has clearly admitted the above partition decree, both preliminary as well as final in O.S.No.65 of 1995 and also admitted that he has been allotted one portion as shown in the plan on the western side and admitted that the eastern portion was allotted to the first plaintiff and the rear portion on the southern side was allotted to the second plaintiff and it has been also admitted by him that the east west measurement of his allotted property is 10 $\frac{1}{4}$ feet and further admitted that the common passage had been earmarked for the convenient enjoyment of the parties of their respective portions and clearly admitted that the portion shown as common passage inclusive of the A B C D portion is left in common for the usage of the parties and therefore it is seen that as put forth by the plaintiffs, the common passage shown in the plaint plan had been kept in common by the parties concerned for the convenient enjoyment of their respective portions. In this matter, the Commissioner was appointed and he has filed his report and plan and the Commissioner has been examined as C.W.1. As rightly found by the Courts below, on a perusal of the evidence tendered by C.W.1, the Commissioner and the report and plan filed by her marked as Exs.C1 and C2 coupled with other materials placed in this matter would go to clearly disclose that the defendant has unlawfully put up the foundation in the common passage area shown as X1 X2 X3 X4 and had also failed to remove the existing wall put up in the common passage area and thereby rendered the convenient enjoyment of the common passage area futile and further as apprehended by the plaintiffs, also made attempts to put up further construction in the common passage and hence, it is seen that the plaintiffs had been constrained to lay the suit against the defendant.

12.As above stated, no serious defence at all has been projected by the defendant in this lis. He would only state that on account of the illegal activities of the plaintiffs, he had been put to loss which according to him is quantified at Rs.1,00,000/-. However, if the above plea of the defendant is worthy of acceptance, as rightly argued, the defendant would have made a counter claim as against the plaintiffs with reference to the same. Further, the defendant has also failed to place any material, as such, that he had incurred any loss on account of the alleged illegal activities attributed to the plaintiffs.

13.When the parties have agreed to leave the common passage as shown in the plaint plan for the convenient enjoyment of the respective portions allotted to them as per the decrees passed

in O.S.No.65 of 1995 and the parties had also agreed to demolish the existing construction in the common passage area and when the defendant had failed to carry out his liability or task in the removal of the existing wall laid in the common passage and on the other hand, with the object of making it inconvenient to the plaintiffs to enjoy the common passage, when it is found that the defendant had also put up unlawful foundation shown as X1 X2 X3 X4 in the common passage area and further endeavoured to put up further construction in the common passage area, it is seen that the plaintiffs had been necessitated to lay the suit for appropriate reliefs. The case of the plaintiffs, in the light of the above discussions, is found to have been established beyond doubt, by the oral and documentary evidence adduced in the matter as well as the report and plan of the Advocate Commissioner coupled with the evidence of the Advocate Commissioner. Accordingly, it is found that the Courts below have rightly found acceptance to the plaintiffs case and noting that it is only the defendant, who is the offending party and liable to remove the illegal constructions put up in the passage and bound to remove the existing construction already put up in the passage, accordingly granted the necessary reliefs in favour of the plaintiffs.

14.The determination of the Courts below in support of the plaintiffs' case is found to be based on the proper reasonings and appreciation of the material placed on record, in the right perceptive both on factual as well as legal aspects and in such view of the matter, it is found that the reasonings and conclusions of the Courts below for upholding plaintiffs' case do not warrant any interference. Accordingly, it is found that the Courts below are justified in granting the reliefs sought for by the plaintiffs, when it is seen that no material has been placed by the defendant that the removal of the existing wall and the foundation as above stated would cause damage to the property and when the testimony of C.W.1 and the documents Ex.C1 and C2 do not in any manner advance the above theory of defendant, the substantial question of law formulated in the matter is answered against the defendant and in favour of the plaintiffs.

15.In the result, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

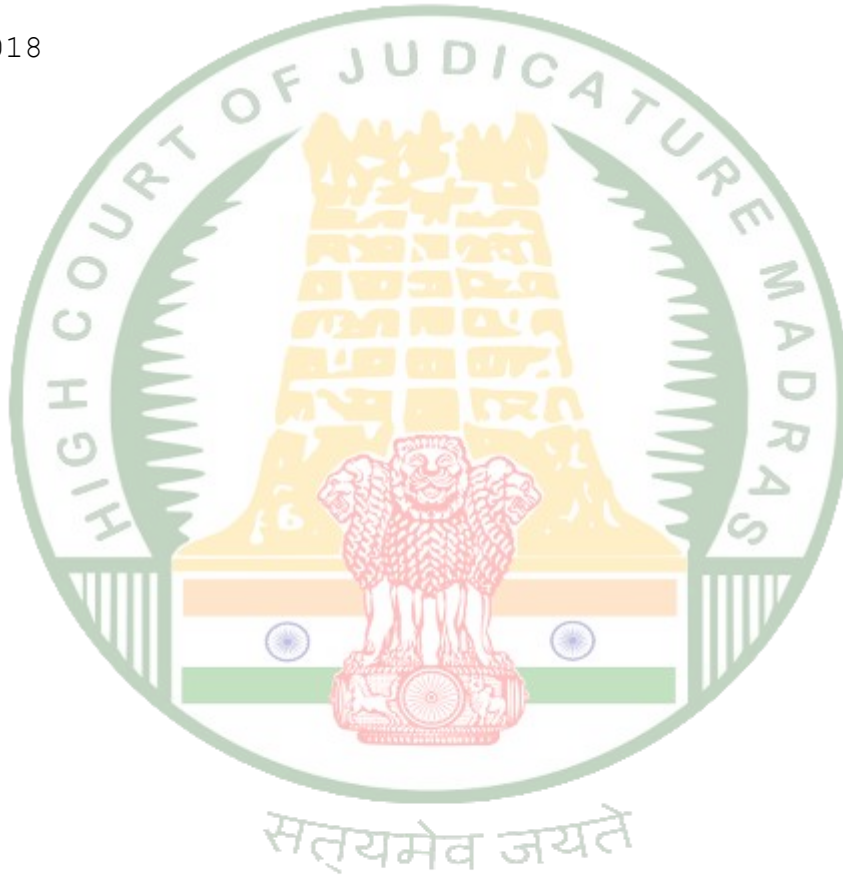
To

- 1.The Principal District Judge, Cuddalore District, Cuddalore.
- 2.The Subordinate Judge, Cuddalore.

+lcc to Mr.D.Baskar, Advocate Sr.No.4279

S.A. No.295 of 2003

GJII (CO)
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