

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 22.02.2018
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1891 of 2001

1.P.Sengodan
2.P.Muthu
3.S.Ramar

... Appellants/Appellants/
Defendants

Vs.

N.V.S.Ramachandran

... Respondent/Respondent/
Defendants

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 25.10.2000 made in A.S.No.136 of 1999 by the learned I Additional District Judge cum Chief Judicial Magistrate, Salem, which confirmed the judgment and decree dated 05.03.1999 made in O.S.No.509 of 1993 by the learned II Additional District Munsif, Salem.

For Appellants : Mr.T.Kumar

For Respondent : Mr.V.Deepan Rajkrishna
for M/s.R.Tholgappian

J U D G M E N T

The un-successful defendants who lost their case before both the Courts below have come forward with this second appeal.

2.The sum and substance of the plaint averments are as follows: The plaintiff is the son of one Subramaniya Chettiyar. The said Subramaniya Chettiyar had four sons and after his death, his four sons partitioned the properties which are houses and vacant lands by means of a registered partition deed dated 01.12.1957. The two houses and vacant land which fell to the share of the plaintiff is shown in the rough plan attached with the plaint as 'P' and 'P-1'. They form part of 'D' schedule in the partition deed.

3.The family left about 9 feet East - West, now forming part of N.V.S. Street and a common lane, East-West about 3 to 5 feet in width so that all the four sons can use the common land. There is no dispute regarding the ownership of houses or the

vacant land. One of the brother of the plaintiff namely, Kandasamy Chettiar died about seven years ago and his legal heirs sold the houses to the defendants on 22.10.1986 by way of three sale deeds.

4.The vacant land falling on the Western side of the defendants house after 'A B' wall belongs to the plaintiff and he is in possession and enjoyment of the same. The Western wall shown as 'A B' in the plaint plan about 75 feet North - South is the common wall for the plaintiff and the defendants. The defendants are running a power loom and three months back, they put up an oil engine in the common East - West lane shown as 'E' in the plaint plan and they are prevented by the plaintiff from using the same. The defendants promised to remove the same within a month. The plaintiff wanted to repair the 'A B' wall. The defendants contended and claimed the wall as their own. In spite of several attempts, the defendants adamantly refused to remove the oil engine and claimed the ownership of the wall.

5.Hence, the respondent/ plaintiff filed a suit for declaration, declaring that the wall mentioned in 'A' schedule is common to the plaintiff and defendants, permanent injunction restraining the defendants from doing any act against such common usage and for mandatory injunction directing the defendants to remove the engine put up by them in the place mentioned as 'E' in the plaint plan namely, the common lane.

6.The sum and substance of the written statement filed by the first defendant and adopted by the other defendants are as follows: The defendants admitted the relationship between the plaintiff and their vendor and the partition deed dated 01.12.1957 between the plaintiff and his brothers. The defendants also admitted that after the

death of one of the brother of the plaintiff namely, Kandasamy Chettiar, his legal heirs sold their property to the defendants on 22.10.1986 by way of three sale deeds, however, denied the other averments in the plaint.

7.The defendants denied the common lane East-West about 3 to 5 feet in width was left for the usage of four sons. The defendants contended that the main dispute relates to the vacant sites and further contended that it is mischievously false to allege that the vacant land situated on the Western side of the defendants house after 'A B' wall belongs to the plaintiff and that the plaintiff is in possession and enjoyment of the same.

8.The defendants further contended that though the properties were purchased by way of three sale deeds, the defendants are commonly enjoying the property without any division by metes and bounds and the second defendant has

entered into an agreement to purchase the property of the first defendant.

9.The defendants further contended that the building bearing Door No.4/70 with 3 feet vacant site in the West and upto the compound wall on the Southern side originally belonged to late N.V.S.Kandasamy Chettiar, the eldest brother of the plaintiff. There was partition between the plaintiff and his brothers on 01.12.1957 and was registered as Doc.No.3843/1957 before the Joint Sub-Registrar, Salem. In the said partition, the said N.V.S.Kandasamy Chettiar was allotted the properties described in the 'A' schedule. After the partition, the sharers were enjoying the properties in their own rights.

10.The defendants further contended that the plaintiff and his brothers were having separate power loom factories. The vendors of the defendants were having power loom factories in the property for over 20 years prior to the sale in favour of the defendants. The wall has been put up between the properties of their vendors and one Govindaraj about 20 years before.

11.The defendants further contended that the defendants are the actual owners of the vacant site 3 feet width West of the existing 'A B' wall. The plaintiff and his brothers do not have any legal right in the said portion of the property. Infact, there are seven windows existing in the Western wall of the building of the defendants, having openings in the vacant site on the West and the rain water from the roof of the

defendants building is also falling only on the Western side within the limits of the defendants property.

12.The defendants further contended that the property of the plaintiff lies West of the 3 feet vacant place belonging to the defendants. The said 3 feet vacant place is used by the defendants to reach the water tank situated on the Southern side of the property. The Southern limit of the defendants property is the existing East to West stone wall and North of Bangalore Kandasamy's property. In other words, the defendants building is bounded as South of Panchayat Road, North of Bangalore Kandasamy's land, West of N.V.S.Govindaraju's building, East of the plaintiff's land and the North to South Basement.

13.The defendants further contended that there are oil engine, dynamo, generator set with electric motor installed by the vendors about 15 years before and they were running their factory and immediately after the purchase, the defendants also installed the same type of machineries in the said place and two walls are already existing which are connected to the East West stone wall. The defendants are innocent purchasers purchased

the properties from the legal heirs of N.V.S.Kandasamy Chettiar and the defendants are enjoying their property with the same old existing physical features all these years. There was a minor dispute inbetween the plaintiff and the defendants. Thereby, the plaintiff has filed a vexatious suit as against the defendants.

14.After elaborate discussions and after framing issues, the lower Court decreed the suit with respect to the reliefs prayed regarding the Western wall of the defendants house described in 'A' schedule of the plaint and dismissed the suit with respect to the relief of Mandatory injunction regarding the oil engine placed in the land described in 'B' schedule property. As against the decreetal order, the defendants filed appeal before the lower Appellate Court and the lower Appellate Court confirmed the decree passed by the lower Court. As against the concurrent findings, the present second appeal is filed.

15.At the time of admission of the second appeal, this Court framed the following substantial questions of law:

"1.Whether it is proper in accepting the report of the Commissioner while deciding one relief and rejecting the same report in total while deciding the other relief?

2.Whether the report of the Commissioner can be taken into consideration when the recital of two set of documents differ in respect of the same property?"

16.The learned counsel appearing for the appellants/defendants would submit that originally the properties belonged to the plaintiff's family and the defendants purchased the properties from the legal heirs of one of the brother of the plaintiff and the appellants enjoyed the properties by installing an oil engine in the power loom factory and the plaintiff knows that the entire wall belongs to the defendants and they are in exclusive possession of the property. Inorder to deprive the rights of the defendants, the plaintiff has filed the vexatious suit against the defendants.

17.The learned counsel appearing for the appellants/defendants would further submit that in order to prove their case, the defendants marked Ex.B1 - Rough plan filed by the defendants, Ex.B2 - Complaint copy dated 03.06.1993 filed by the defendants and the Commissioner's Report and Plan were marked as Ex.C1 and Ex.C2 respectively. However, the lower Court without considering the documents and oral evidence, decreed the suit with respect to the relief prayed regarding the Western wall of the defendants house described in 'A' schedule of the plaint and dismissed the suit with respect to the relief of Mandatory

injunction regarding the oil engine placed in the land described in 'B' schedule property and the same was confirmed by the lower Appellate Court, which is un-sustainable in law. Accordingly, he prayed for allowing the appeal.

18.The learned counsel appearing for the respondent/plaintiff would submit that admittedly the properties were divided inbetween the plaintiff and his brothers by way of a partition deed dated 01.12.1957. In the partition, the suit wall is mentioned as common property. The plaintiff and the vendors of the defendants were commonly enjoying the wall and the same was partitioned. After perusal of the entire documents, the lower Court granted decree in favour of the plaintiff. However, the plaintiff has not filed any appeal as against the rejection of the relief of Mandatory injunction.

19.Heard the arguments advanced on either side and perused the materials placed on record.

20.Perusal of material records discloses that the plaintiff and his brothers partitioned the family properties and the partition deed is marked as Ex.A1. The defendants purchased the properties from the the legal heirs of N.V.S.Kandasamy Chettiar who is none other than the brother of the plaintiff. Though the defendants have not marked the sale deeds, the plaintiff has marked all the sale deeds under Ex.A2 to Ex.A4. The predecessor - in - title of the defendants has only common right over the North South wall described in the plaint 'A B' wall. Neither the sons of the said N.V.S.Kandasamy Chettiar nor the purchasers under them can have exclusive right over the said wall.

21.There is no evidence except the interested testimony of D.W.1 that the predecessors - in - title ever had exclusive right over the common wall and 3 feet width stretch ahead on the West. The Advocate Commissioner's report which was marked as Ex.C1 and Ex.C2 would show that there are seven windows on the common wall having opening towards the West thereof. However, the plaintiff would admit that the defendants have been using the stretch of about 3 feet width on the immediate West of common wall. The defendants 2 to 4 who purchased their properties in the year 1986 cannot claim any manner of right over the said portion of 3 feet width on the basis of

their enjoyment right from the date of their purchase to go over to the water tank located on the South of the property.

22.When the partition deed marked as Ex.A1 has given only common right over the suit 'A B' wall, to the predecessors - in - title of the defendants, they cannot claim exclusive right over the common wall or the 3 feet width portion abutting thereto just because the windows put up therein have opening

towards the West. In any angle, the defendants did not establish their right of user or the exclusive ownership of the common wall.

23.In the absence of any materials, I do not find anything to interfere with the well considered findings of the lower Court as well as the lower Appellate Court. Accordingly, the substantial questions of law are answered against the appellants and the second appeal is dismissed.

24.In the result, the second appeal is dismissed. The judgment and decree dated 25.10.2000 made in A.S.No.136 of 1999 by the learned I Additional District Judge cum Chief Judicial Magistrate, Salem, confirming the judgment and decree dated 05.03.1999 made in O.S.No.509 of 1993 by the learned II Additional District Munsif, Salem, is confirmed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The I Additional District Judge cum Chief Judicial Magistrate, Salem.

2.The II Additional District Munsif, Salem.

+1 cc to Mr.R.Tholgappian Advocate sr 14430

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