

THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 09.08.2019

Judgment Delivered on : 19.08.2019

CORAM:

THE HONOURABLE Mr.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1989 of 2000

1.S.Sivasubramaniam
2.T.S.Nagalakshmi
3.T.S.Parvathi
4.T.S.Rajarajeshwari
5.T.S.Gayathri

... Appellants 1 to 5/
Appellants 1 to 5/Defendants 2,4,5,6 & 7

Versus

1.K.Gurumoorthy
2.T.S.Padmavathi

... Respondents 1 & 2/
Respondents 1 & 2/Plaintiff/3rd Defendant

[Memo dated 19.12.2018 in USR.No.10266 of 2018
is recorded. R2 given up, vide order dated 04.01.2019
in SA.No.1989 of 2000]

This Second Appeal has been filed under Section 100 of C.P.C., against the Judgment and decree dated 30.06.2000 in A.S.No.21 of 1999 on the file of the Subordinate Judge, Gobichettipalayam confirming the Judgment and decree dated 12.03.1999 passed in O.S.No.262 of 1991 on the file of the District Munsif Court, Gobichettipalayam.

For Appellants : Mr.R.T.Duraisamy
For Respondents : Mr.T.Murgamanickam - Senior Counsel
for Ms.P.T.Ramadevi - for R1
: R2- Given up

JUDGMENT

The defendants are the appellants herein.

2.The first respondent/plaintiff filed a suit in O.S.No.262 of 1991 before the District Munsif Court, Gobichettipalayam for the relief of declaration of title and for declaration of easementary right to drain the rain water and eves and for

mandatory injunction to remove the wall constructed on the eastern portion of the property.

3.The appellants/defendants resisted the claim on the ground that as per Exs.A1 to A5 documents, sale deeds executed by one K.S.Kuttiannan to Meenakshi, Sundaram and Baghiyalakshmi, the title to the property subsequently changed hands from person to person and thereafter the title vested in their favour. The appellants/defendants also denied the entitlement of the plaintiff's relief claimed in the plaint inter-alia contended that earlier the elder brother of the plaintiff, as a Manager of the family filed the suit in O.S.No.167 of 1988 seeking the similar relief, which was dismissed and now for the very same relief, the suit has been filed and hence, the present suit is barred by res-judicata and further raised a plea of constructive res-judicata. In support of the case, the defendants also filed the documents under Exs.B1, B2 & B3, plaint in O.S.No.167 of 1988 and the Advocate Commissioner's report and copy of the Judgment made in O.S.No.167 of 1988 respectively. The Advocate Commissioner's report was filed under Exs.C1 & C2 in this case.

4.On consideration of both oral and documentary evidence adduced before the Trial Court, the Trial Court has given a finding that the subject matter of the suit property in O.S.No.167 of 1988 is different and held that the first respondent/plaintiff is entitled to the said relief as prayed for.

5.The learned counsel for the appellants/defendants would contend that there was an oral dispute between the parties, as the Kartha of the family - the elder brother of the plaintiff has filed the suit in O.S.No.167 of 1988, for declaration of title and the same was dismissed after contest. After Panchayat dispute was settled and now the younger brother, plaintiff in the above suit, seeks the similar relief. However, by adding the additional relief, he seeks declaration of title for easementary rights and both the Courts below without properly appreciating the earlier judgment and decree made in O.S.No.167 of 1988 and have wrongly come to the conclusion that the first respondent/plaintiff is entitled to the relief of declaration of title as well as easementary rights as raised therein. The present suit, in respect of the same property between the same parties is barred under res-judicata and having filed suit seeking additional relief of declaration of title to the wall on the ground of easementary rights is also hit by Order II Rule 2 of CPC.

6.On the basis of the above submission made, at the time of admission of this second appeal, the following substantial of questions of law are framed.

“(i) Whether the courts below are correct in holding that the present suit is not barred by law of Res-Judicata when the earlier suit O.S.No.167 of 1988 filed by the same parties, seeking same reliefs with reference to the same property?

(ii) Whether the courts below are correct in holding that the plaintiff can maintain the present suit with the relief of the declaration of the walls which was omitted by his elder brother K.Raju as Family Manager in O.S.No.167 of 1988 as per order II Rule 2 C.P.C?”

7.Learned counsel for the appellants/defendants would contend that the suit property in both the suits i.e., the previous suit and the present suit filed by the elder brother of the plaintiff in O.S.No.167 of 1988 are one and the same and the easementary rights, now, sought for by the first respondent/plaintiff was omitted in the earlier suit. Therefore on the principles of constructive res-judicata under Order II and Rule 2, the same cannot be now added, is the submissions made in support of the substantial questions of law.

8.According to the learned counsel for the appellants, Mr.K.Raju, the elder brother of the plaintiff filed the suit in O.S.No.167 of 1988 as a Family Manager against to T.S.Subbaraya Pandithar and S.Sivasubramaniam, who are the defendants 1 and 2 in the present suit. The other defendants 3 to 7 are the legal representatives of the first defendant, therefore, the parties in both the suits are same, the properties in both the suits are same and the relief sought for in both the suits are same, hence, the present suit is clearly barred by law of res-judicata. If the reliefs claimed in the present suit is different from that of O.S.No.167 of 1988 the plaintiff cannot file a suit for the relief, which was omitted by his elder brother as Family Manager in O.S.No.167 of 1988 as per Order II Rule 2 of CPC. As per the report filed by the Advocate Commissioner, the extension of the suit wall was made by the defendants even before filing the suit. Therefore, the evidence and pleadings of the plaintiff that the defendants constructed the extension of wall, pending disposal of the suit is wrong and the plaintiff did not come to the Court with clean hands.

9.Per contra, Mr. Murugamanickam, learned Senior Counsel for the first respondent/plaintiff would contend that the suit property in O.S.No.167 of 1988 and the present suit in O.S.No.262 of 1991 are different and declaration of title to the wall has been specifically sought for and in view of the construction of another wall by the appellants/defendants,

easementary right to discharge the rain water on the northern side has been denied and hence sought for mandatory injunction to remove the construction by way of the present suit.

10. After going through the submissions of the respective counsel and also the findings rendered by the both the Courts below, it appears that both the plaintiffs and the defendants having driven the title, from the same, and the common predecessor in title and it is also seen that elder brother of the plaintiff, as a manager of the family filed the suit in O.S.No.167 of 1988 and the same has been dismissed and the present suit in O.S.No.262 of 1991 is filed by the younger brother Gurumoorthy, with regard to the property in dispute. It is to be stated that as per Exs.B1, B2 & B3 plaint in O.S.No.167 of 1988, the Advocate Commissioner's report and the copy of the Judgment made in O.S.No.167 of 1988 respectively, it indicates the nature of the property contained therein.

11. It is seen that as per Ex.B2, the sketch marked by the Advocate Commissioner along with his report in the previous suit in O.S.No.167 of 1988, ABCD marked portions are the subject matter of the that suit and it appears from the cross-examination of PW.1 and as per Ex.B2, the subject matter of the lis in the previous suit in O.S.No.167 of 1988 is lying on the western side of the present suit and the lis in O.S.No.167 of 1988, is the portions marked as ABCD in Ex.B2. On a combined reading of Ex.B2, sketch marked by the Advocate Commissioner in O.S.No.167 of 1988 and the admission elicited in the cross-examination of DW.1, regarding locations of property is different, both the Courts below have held that in the partition in the family between the father of the defendant and his brother's paternal grand-father of the defendant namely Venkatakrishnan, he was allotted that the suit property in this case and he had sold the property under Ex.A3/sale deed executed by one Venkata pandithar in favour of one Subbaraya pandithar on 07.12.1925.

12. Ex.A4 is the sale deed executed by Venkatta Krishnan in favour of one Kotteshwara Iyer on 26.02.1947. Ex.A5/sale deed was executed by one Srinivasa Iyer in favour of one Sundaram Iyer on 11.12.1950 from whom the legal heirs of the Sundaram Iyer namely his daughter-in-law Baghiyalakshmi and her daughter Meenakshi and the plaintiff purchased the suit property under Ex.A1 and consequently held, the plaintiff had purchased the suit property from the concerned authorities in title.

13. Furthermore, it remains to be stated that in all the sale deeds marked as Exs.A1, A3, A4 and A5, there is a specific recital with regard to the suit property indicating the fact that the wall in the northern side as well as southern side has

been conveyed to the plaintiff's father and in other words, it is the suit wall which has been specifically sold by the ancestors of the defendants assumes significance.

14.It is to be stated that as per the Advocate Commissioner reports Exs.C1 & C2 marked in this case, it is seen that in A and B wall on the northern side of the suit property the defendants northern roof was seating away from 2 feet. However, the same was also been admitted by the defendants in the cross-examination. In other words, the southern roof of the property of the defendants lies 2 feet away from the suit wall from the northern side. Furthermore, the roof of the defendant was not resting on the suit wall also assumes significance, in view of the specific stand taken by the first respondent/plaintiff.

15.Thus, based upon the factual position as could be seen from exhibits C1 and C2 coupled with admission of DW.1 in the cross-examination, both the Courts below have rightly come to the conclusion that the east and west wall on the northern side of the suit belongs to the first respondent/plaintiff and the roof of the appellants/defendants house was rested and emanated in the suit wall and the suit wall in this case is not the subject matter of the list in O.S.No.167 of 1988 and the roof of the defendants have not raised on the suit wall. Accordingly, both the Courts below have rightly decreed the suit for declaration of title of the first respondent/plaintiff in respect of the suit wall and it is a well considered and well merit, finding of fact and I do not find any irregularity and illegality in the said concurrent finding of fact, in the absence of any positive material and the same is hereby confirmed.

16.It remains to be stated that both parties have admitted the facts as narrated supra. The property now purchased by the father of the plaintiff is from one of common predecessor in title and as such they are entitled for any easementary right, if any existed at the time of sale deed in their favour. It appears from the evidence of PW.1, the rain water has to drain on the northern side and accordingly, the wall now constructed by the defendants is preventing the easementary right to drain the rain water and eves. Taking note of the physical feature as containing in the Advocate Commissioner's report Ex.C1, which supports the case of the plaintiff and based upon Ex.C2, sketch, wherein it is properly identified as A and A1 and the Advocate Commissioner's report clearly reflects the true state of affairs that on the marked portion of A and the northern side of the wall rain water drain has been set up and on the basis, the eves water has been collected by one small pot, which was kept there. Thereafter, the rain water drained through on Dhoni (in tamil) in the suit property. Hence, both the Courts below

had found that the evidence of PW.1 stands duly corroborated with the physical feature noted in the Advocate Commissioner's report C1 & C2 and also admission of DW.1 that the predecessor in title between the parties are common and the property in this suits different from the suit property in previous suit in O.S.No.167 of 1988, hence it rightly come to the conclusion that the first respondent/plaintiff is entitled for the easementary right to drain the water for eves.

17. Accordingly, the easementary right is duly granted by the Trial Court and confirmed by the Lower Appellate Court and the construction put up by the appellants/defendants is preventing the easementary right of the plaintiff, hence, both the Courts below concurrently concluded that the first respondent/plaintiff is entitled for mandatory injunction and directing the defendants to remove the wall on the ground that the easementary right is prevented and the same is a well considered and well merited and the said finding which does not warrant any interference by this Court.

18. Hence, this Court finds that since the property involved in both the suits in OS.No.167 of 1988 and the present suit in O.S.No.262 of 1991 are different and distinct, based upon the decision stated supra, this Court holds that the issue of res-judicata as raised by the appellants/defendants in the substantial questions of law No.1, does not arises for consideration and accordingly, the substantial of question No.1 is answered in negotiation against the plaintiff.

19. On hearing the substantial questions of law No.2 as to the point on constructive res-judicata, on perusing the written statement and also the evidence of DW.1, it is seen that no such plea has been raised either in the pleadings or in deposition by DW.1, while he was in the witness box. The said plea has never been raised before the Lower Appellate Court. Besides, it is also seen that on construction of wall, preventing the enjoyment of easementary rights, with regard to the northern side of the wall in the suit property the plaintiff has filed the present suit and hence, the cause of action for this suit and the previous suit in O.S.No.167 of 1988 are different and also coupled with the fact that the said plea not raised before the Courts below and which has been raised for the first time in the Second Appeal, it does not warrant any consideration on both factual and legal grounds. Accordingly, the substantial question of law No.2 is also negatived as against the appellants/defendants.

20. In fine, the first respond/plaintiff has let in oral evidence and demonstrated that the subject matter of the suit property and the suit property in O.S.No.167 of 1988 are

entirely different and distinct and also let in legally acceptable evidence for the relief on declaration of title to the suit wall and the cause of action for both the suits are different. In view of the admitted position as admitted by DW.1, as stated supra, the relief granted by the both the Courts below are hereby confirmed. The declaration of title for the suit wall is also hereby confirmed and the first respondent/plaintiff is entitled for the mandatory injunction as stated supra.

21. In the result, this Second Appeal is dismissed and the Judgment and decree dated 30.06.2000 in A.S.No.21 of 1999 on the file of the Subordinate Judge, Gobichettipalayam confirming the Judgment and decree dated 12.03.1999 passed in O.S.No.262 of 1991 on the file of the District Munsif Court, Gobichettipalayam are hereby confirmed. No costs.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

klt

To

1. The Subordinate Judge, Gobichettipalayam.
2. The District Munsif, Gobichettipalayam.
3. The Section Officer,
V.R. Section, High Court, Madras - 104.

+1cc to Mrs.P.T.Ramadevi, Advocate, SR.No.70511.
+1cc to Mr.R.T.Duraisamy, Advocate, SR.No.70527.

Judgment in
S.A.No.1989 of 2000

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CSR: 13.02.2020

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