

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 03.01.2019

Judgment Pronounced on : 01.02.2019

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.116 of 2008

Amirtham ... Appellant/Plaintiff
Vs.
Lalithamani ... Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 08.08.2007 made in A.S.No.23 of 2004 on the file of the First Additional Subordinate Court at Coimbatore filed against the Judgment and Decree dated 08.03.2004 made in O.S.No.2232 of 1994 on the file of the III Additional District Munsif, Coimbatore by reversing the judgment made in suit.

For Appellant : Mr.V.Manohar
For Respondent : Mr.K.Ragupathy

JUDGMENT

The plaintiff in O.S.No.2232 of 1994 on the file of III Additional Munsif Court at Coimbatore, having succeeded before the trial Court, but lost before the first Appellate Court in A.S.No.23 of 2004 has come before this Court. The suit is laid for mandatory injunction. Parties would be referred to by their rank before the trial court.

2. The facts leading to this case are in narrow compass:

- The suit property is described as a narrow strip of land measuring 2' X 58' running north to south. The properties of the plaintiff and the defendant lie adjacently, and the defendant's property lie to the east of plaintiff's property. The aforesaid suit property lies between these two properties and controversy now required to be addressed in this appeal is in whose property the suit property lies.
- The case of the plaintiff is that on 12.02.1979 she had purchased the property from her erstwhile owner, and the property conveyed under the sale deed measures 80' X 58' or 4,640 sq.ft. The plaintiff has been in possession and enjoyment of the property that she had purchased. She had

left a vacant space measuring a width of 2 feet all around the building in her property, to enable her to carry out any repair works in the property. The plaintiff has been using this vacant space and it is part of the property that she had purchased. While so, the defendant stealthily blocked the 2 feet wide vacant space that lie to the east of her eastern wall of her residence, and had put up a shed blocking the passage, and she made further attempts to interfere with the same on 20.12.2014 which was thwarted by the plaintiff. In these circumstances, the plaintiff had come forward with the suit for mandatory injunction seeking a direction to the defendant to remove the obstruction made by her in the southern portion of the suit property and for other ancillary relief of injunction.

3. The defendant in her written statement would allege that her husband Devarajan had purchased the property on 18.02.1972 and that the suit property actually fall within her property, and is not part of plaintiff's property. It is further alleged that the plaintiff has put up a construction in her property up to her eastern boundary wall, and there is no property matching the description of the suit property that lie beyond her eastern wall. In fact, the construction in the plaintiff's property was put up by plaintiff's father Gopalsamy Naidu and when this defendant objected to the said construction that he had not left any vacant space beyond its eastern wall, he agreed that the defendant's husband Devarajan could construct his bathroom etc, touching his eastern wall. Both Gopalsamy Naidu and Devarajan entered into a written agreement in this regard. Accordingly, Gopalsamy Naidu was allowed to put up a construction touching the eastern wall of the plaintiff's residential building. On the demise of Devarajan, the property devolved on his widow, the defendant herein and their three sons, who are necessary parties to the proceedings.

4. The suit went for trial, and before the trial court the plaintiff's husband has examined himself as PW1. For the defendant, she examined herself as DW1 and examined one independent witness as DW2. The plaintiff has produced as many as 15 documents of which the primary document is her title deed, dated 12.02.1979, marked as Ext.A1. For the defendant, she relied primarily on Ext.B-1 dated 18.02.1972 under which her husband Devarajan has purchased the property and Ext.B-2 dated 30.04.1978 which may be characterised as an agreement/Memorandum of Understanding (MoU) entered into between plaintiff's father Gopalsamy Naidu and defendant's husband Devarajan. A Commissioner was appointed by the Court and he has initially produced his reports Exts.C1 and C2. On appreciation of evidence before it, the trial court decreed the suit.

5. The defendant took the matter in appeal before the first appellate court. On 30.04.2003, the first Appellate Court allowed the appeal and remanded the matter with a direction to appoint a Commissioner, to measure the property. Challenging the order of remand, the defendant had preferred C.M.A.No.1015 of 2005. Vide order dated 16.03.2007, this Court has directed the First Appellate Court itself to appoint a Commissioner and to dispose the appeal. Accordingly, the Commissioner was appointed whose report and plan came to be marked as Exts.C3 and C4. Both sides appeared to have filed objections to the Commissioner's report but they did not seem to have pursued their objection seriously, as the Commissioner was not cross-examined on the objections raised. On appreciating the evidence before it, the First Appellate Court allowed the appeal on 08.08.2007 and dismissed the suit. The reasoning of the First Appellate Court is two fold: (a) Under Ext.B-2, dated 30.04.1978, the plaintiff's father Gopalsamy Naidu has conceded that the suit property is part of defendant's property. In the process, it rejected the Commissioner's report in Exts.C3 and C4 wherein the Commissioner has found, after measuring the properties of both the plaintiff and the defendant, that the suit property actually forms part of plaintiff's property. (b) That inasmuch as the defendant has raised a dispute on title, the three sons of the defendant are necessary parties. Challenging the said decree of the First Appellate Court, this appeal is preferred.

6. At the time of admission, the following substantial questions of law are framed.

a) Whether or not the lower appellate Court committed error in dismissing the suit for non-joinder of necessary party, despite the fact that others have nothing to do with the encroachment alleged or cause of action averred in the case?

b) Whether or not the lower appellate Court committed wrong in ignoring the direction to give an opportunity to let in additional evidence in C.M.A.No.1015 of 2005, on the file of this Court while disposing of the appeal?

7. The respondent's argument was along the line of reasoning of the first Appellate Court.

8. The learned counsel for the appellant submitted:

- Stricto sensu the dispute herein does not involve a dispute on title to the suit property but only as to the identity of the suit property. The point involved is as among the two parties, in whose property does the suit property lie? Accordingly, if the property is identified as falling

within the boundary of the plaintiff's property, necessarily it is considered as the property belonging to the plaintiff and in the absence of the defendant establishing a better title, the plaintiff's title to the suit property cannot be considered as facing any threat. A dispute as to the exact identity of the property should not be construed as one involving in title.

- So far as this evidence in the case goes, the Commissioner appointed by the first Appellate Court, has found that after measuring the properties of the plaintiff and the defendant in terms of their respective sale deed viz., Exts.A-1 and B-2 that the suit property falls only within the property of the plaintiff. If this property is identified as falling within the property of the plaintiff or within its boundary, inasmuch as the defendant does not claim any right beyond the western boundary of her property, the First Appellate Court ought to have held that there is no dispute of title is involved. To support, his submissions, the learned counsel for the appellant brought to the notice of this Court, the judgment of the Hon'ble Supreme Court in *Anthula Sudhakar v. P.Buchi Reddy (dead) by L.Rs., and others* [(2008) 4 SCC 594] and contended that the case on hand does not fall under any of the circumstances indicated in *Anthula Sudhakar* case. If there is no dispute on title is involved, it is not necessary that defendant's sons are impleaded.
- So far as the construction under Ext.B2 goes, nowhere in that document Gopalsamy Naidu has conceded that the suit property falls within the property of the defendant's property. All that this document has granted the defendant's husband Devarajan was only a permission to put up a structure by taking linear support from Gopalsamy Naidu's eastern wall, and that Gopalsamy Naidu himself will have access through Devarajan's property to maintain that wall. In this regard, the first Appellate Court was in error in rejecting the Commissioner's report in Exts.C3 and C4. If at all the defendant was aggrieved by this, she ought to have cross-examined the Commissioner on her objection, and mere filing of an objection to the Commissioner's report is not adequate to reject its evidenciary value in terms of Order 26 Rule 10 CPC.
- Even turning to Ext.B2 document, while constructing the document, the Court only attempts to understand the intention of the parties in the document. It is therefore, imperative when PW1 was in the box, it was necessary for the defendant to confront her with Ext.B2, but it was not so confronted. Here the first Appellate Court fell in error

in accepting the construction which the defendant alone had put on Ext.B-2.

9. Whether a dispute as to identity of the property involves title. It may, but it is not always required to be so. The suit property here is a strip of land measuring 2 ft x 58' ft. Both the parties say it is part of their respective plots of land. And, neither side dispute the title they have obtained to their respective plots under their respective sale deeds. In other words, while the plaintiff does not dispute the title of the defendant to her property purchased by Devarajan under Ext.B-1, the defendant too does not dispute the title of the plaintiff's property which her father had purchased under Ext.A-1. The confusion and the conflict is about whether the suit property that lie about the middle of both the properties of the plaintiff and the defendant is part of the plaintiff's property or not. If the suit is property is part of plaintiff's property covered under Ext.A-1, then inasmuch as the defendant does not dispute Ext.A-1, it cannot be said that she has raised an issue on title to the suit property pointedly. The Commissioner appointed by the first Appellate Court has identified the suit property within the property covered by Ext.A-1. And, his report Ext.C-3 and C-4 remain unimpeached. The defendant has not produced any evidence that may otherwise reduce the evidentiary value of Commissioner's report. This Court therefore, holds that in the instant case, there is no dispute on title to the property is involved and consequently the suit as framed is maintainable.

10. Turning to the second part, nowhere in Ext.B-2, had the plaintiff's father seen conceded that the strip of land (the suit property) belonged to defendant's husband Devarajan. He had merely permitted Devarajan to construct his bathrooms touching his eastern wall, and had hence required Devarjan to ensure that the said eastern wall was not damaged. He had also reserved his right to enter through Devarajan's property for maintaining his eastern wall. Now irrespective of if Ext.B-2 was confronted to P.W.1 or not, the document does not indicate that may be termed as an admission by plaintiff's father of the title of defendant's husband Devrajan. This Court finds that the first appellate court has egregiously erred in constructing Ext.B-2, the way it has constructed.

11. There is no case for the defendant that she is an irrevocable licensee to defend her possession of part of the suit property. Necessarily these bathrooms have to go.

12. In the result, the appeal is allowed and the judgment and decree dated 08.08.2007 made in A.S.No.23 of 2004 on the file of the First Additional Subordinate Court at Coimbatore filed

against the Judgment and Decree dated 08.03.2004 made in O.S.No.2232 of 1994 on the file of the III Additional Munsif Court at Coimbatore is set aside. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

ssn/ds

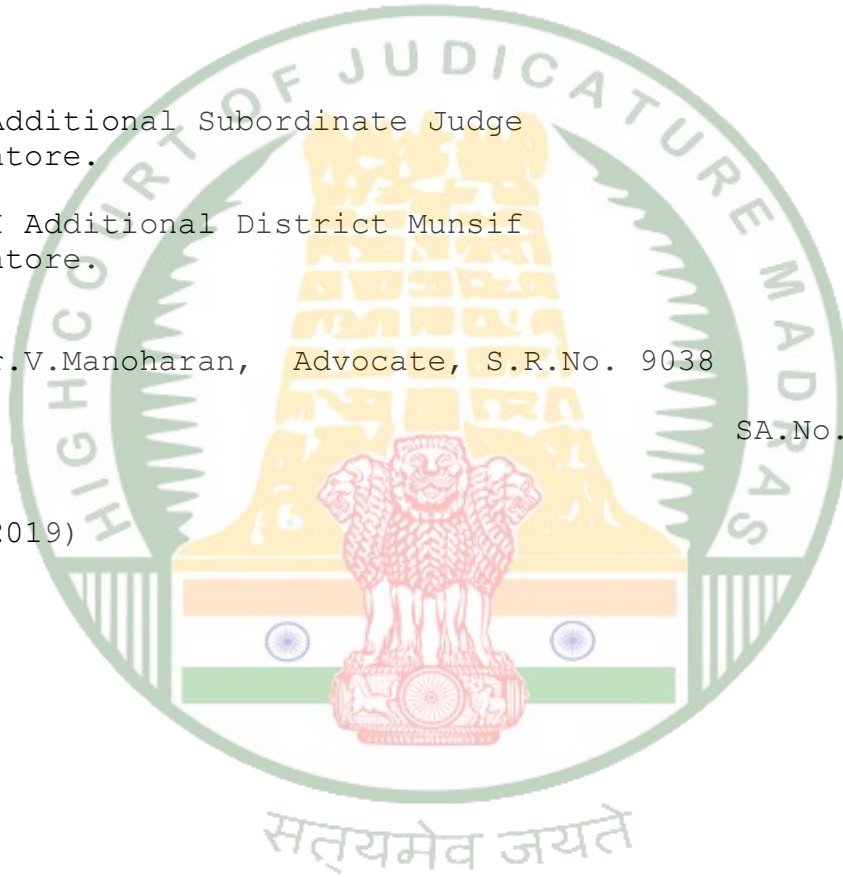
To:

1. The I Additional Subordinate Judge
Coimbatore.
2. The III Additional District Munsif
Coimbatore.

+lcc to Mr.V.Manoharan, Advocate, S.R.No. 9038

SA.No.116 of 2008

GJ II(CO)
GN(25/05/2019)



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