



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 30.08.2019
CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI
S.A. (MD)No.280 of 2009

WEB COPY

P.Periyannan

.. Appellant/2nd Respondent/
2nd Respondent

Vs.

1.M.Palanisamy

2.M.Viswanathan

3.M.Jayaraman

.. 1st & 2nd Respondents/Appellants/Plaintiffs

.. 3rd Respondent/1st Respondent/1st Respondent

Prayer : Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree passed in A.S.No.18 of 2008 dated 11.08.2008 on the file of the Sub Court, Virudhunagar reversing the Judgment and Decree dated 08.01.2008 passed in O.S.No.513 of 2004 on the file of the learned District Munsif, Virudhunagar.

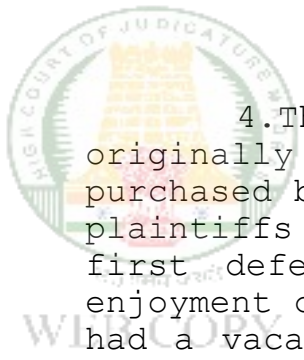
For Appellant	: Mr.Ramesh
	For Mr.V.Raghavachari
For Respondent No.1	: Mr.N.Rajachandra sekar
For Respondent No.2	: Mr.Ashok Kumar
For Respondent No.3	: Mr.R.Murugan

JUDGMENT

Heard the learned counsel on both the side.

2.This appeal is filed against the judgment and decree passed in A.S.No.18 of 2008 dated 11.08.2008 on the file of the Sub Court, Virudhunagar reversing the Judgment and Decree dated 08.01.2008 passed in O.S.No.513 of 2004 on the file of the learned District Munsif, Virudhunagar.

3.The appellant herein is the second defendant, the respondents 1 and 2 herein are the plaintiffs and the third respondent herein is the first defendant in the suit. The respondents 1 and 2 herein filed a suit in O.S.No.513 of 2004 before the learned District Munsif, Virudhunagar for a prayer of permanent injunction and for mandatory injunction. The suit was partly decreed by the trial Court. Against which, the respondents 1 and 2 herein filed an appeal in A.S.No.18 of 2008 before the Sub Judge, Virudhunagar. The appeal was allowed by the first appellate Court. Against the judgment and decree, the appellant herein has filed this second appeal.



4.The case of the plaintiffs is that the suit property originally belong to Mariammal and her sons and the property was purchased by Alagammal on 15.02.1980. Alagammal is the mother of the plaintiffs and the first defendant. The parents of the plaintiff and first defendant died before 2002 and the suit property was in enjoyment of the plaintiff and first defendant. The second defendant had a vacant site on the western side of the property. The second defendant has no right over the suit property. The second defendant damaged the northern corner of the western wall of the plaintiff and the first defendant and hence, the plaintiff filed a suit against the second defendant not to disturb the peaceful possession and enjoyment and not to damage the southern corner of the western wall and for a mandatory injunction to remove the stone construction put up on the northern corner of the suit property.

5.The brief substance of the written statement filed by the second defendant is that the suit property did not belong to the plaintiff. The suit property originally belong to Pannaimuthu. He sold the property to Chellasamy and he constructed a house in the year 1934. After his death, his wife and other legal heirs partitioned the property and the suit property was allotted to the share of Selvam and that Selvam sold the property to the mother of the plaintiffs and the first defendant on 15.12.1980. In the sale deed of the second defendant, the eastern boundary is shown as the house of Alagammal. The second defendant is enjoying the property and he removed the tiled rafter affixed to the suit property and change it into a concrete construction. First the plaintiffs did not object to the construction and then they objected to the same. The second defendant removed the tiled rafter and constructed a concrete roofing. There is no lane between the property of the plaintiffs and that of the second defendant. The suit property is a common wall which belong to the second defendant and the suit is to be dismissed.

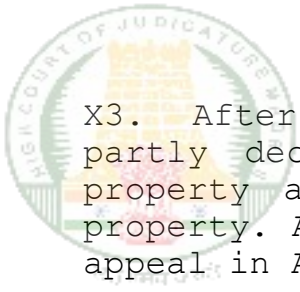
6.On the above said pleadings, the following issues were framed:

“(i)வாதி கோரும் நிரந்தர உறுத்துக்க கட்டளை பரிகாரம் கிடைக்கக்கூடியதா ?

(ii)வாதி கோரும் செயல் உறுத்துக்க கட்டளை பரிகாரம் கிடைக்கக்கூடியதா ?

(iii)வாதி கிடைக்கக்கூடிய இதர பரிகாரம் யாது ?”

7.Two witnesses were examined as P.W.1 and P.W.2 and 5 documents were marked as Exs.A1 to A5 on the side of the plaintiffs and two witnesses were examined as D.W.1 and D.W.2 and 3 documents were marked as Exs.B1 to B3 on the side of the defendants. One Court witness was examined as C.W.1 and two Court documents were marked as Exs.C1 and C2 and three witnesses documents were marked as Exs.X1 to



X3. After considering the evidences and arguments, the trial Court partly decreed the suit with regard to the first item of the property and dismissed the suit against the second item of the property. Against which, the respondents 1 and 2 herein preferred an appeal in A.S.No.18 of 2008 before the Sub Court, Virudhunagar.

WEB COPY

8. In the grounds of appeal in A.S.No.18 of 2008, it is stated that the trial Court failed to decree the suit in its entirety. The trial Court failed to frame necessary issues and to give findings on those issues. The trial Court failed to consider Ex.A1 and gave a finding that the parent deeds of Ex.A1 was not filed. The trial Court come to a wrong conclusion that the Commissioner report was not objected and appointment of Commissioner was not sought for and the measurement of the lane was not stated in the plaint and failed to consider that the second schedule property was a part of the first schedule property. The trial Court gave much more importance to the oral evidence rather than the documentary evidence. On the aforesaid pleadings, the following issues were framed:

“(i) விசாரணை நீதிமன்றம் வழங்கிய தீர்ப்பு மற்றும் தீர்ப்பாணை சட்டத்தின்படி அமைந்துள்ளதா ?

(ii) இதர பரிகாரம் என்ன ?”

9. The first appellate Court allowed the appeal and partly set aside the judgment and decree of the trial Court and decreed the suit with regard to the second item of the suit property also. Aggrieved by the judgment and decree, the appellant herein has preferred this second appeal.

10. In the grounds of second appeal, it is stated that the lower Court is wrong in taking the two words in the written statement as admission. The words 'the plaintiff's wall' stated in paragraph nos.4 and 5 were only typographical error and the intention of the defendant is to mention the same as 'suit wall'. A wall between two buildings is persumably owned in common and both the parties raised respective rafter over the intervening suit wall. The lower Court failed to consider that the defendants are exercising their right as co-owner of the wall by installing two beams. There is no other explanation for the holes on the defendant's side of the suit wall. The evidence of D.W.2 is valid as he is a resident in the village for over 65 years. The lower Appellate Court failed to consider when there is a dispute regarding the title, it is duty of the plaintiffs to seek for a relief of declaration.

11. This Court by its order dated 15.06.2016, has admitted the second appeal and has framed the following substantial questions of law, which are as follows:

“(a) Whether the first appellate Court is right in granting decree in respect of the 2nd item of the suit property, without



considering the fact that the respondents/plaintiffs have not proved their title to the suit property since the appellant herein has raised a defense that the property is a common property of both the plaintiff and the defendants ?

(b) Whether the finding of the first appellate Court is perverse ?

(c) Whether this Court has to invoke Section 100 C.P.C.?

(d) Whether the first appellate Court is not properly appreciate the oral evidence of both side and admission made by the respondents/plaintiffs ?”

Issue No.(a), (b) and (d) :

12.On the side of the appellant, it is stated that the first appellate Court is not correct in decreeing the suit regarding the second item of the suit property without considering the fact that when the defendant is claiming the property as the common property, the respondents have not proved their title to the suit property,

13.On the side of the respondents, it is stated that the second defendant has admitted that the suit property was purchased by the mother of the plaintiffs. Ex.A1 is the title deed filed by the respondents. Ex.A2 is the patta in the name of Alagammal. Ex.A3 are the tax receipts. It is stated that the second schedule property is the part and parcel of the first schedule property. It is stated that in Ex.A1, the western boundary is mentioned as vacant site. Whereas the defendants have not proved the property as the common property. The defendants have not filed any documents of title. Exs.B1 to B3 are only tax receipt, EB receipt and water tax receipt which are subsequent to the filing of the suit and these documents are not sufficient to prove that the suit property is a common property.

14.On the side of the appellant, it is stated that the plaintiff failed to prove that there was a common lane between house of the plaintiffs and that of the second defendant. No measurement of the common lane is stated in the plaint and the plaintiff failed to mention the extent of the lane beyond the western wall. It is stated that in the witness documents 1 to 3, no common lane is stated in the revenue records.

15.On the side of the appellant, it is stated that the plaintiff should have prayed for declaration when the defendants questioned the title. The learned counsel for the appellant relied on the judgment passed by this Court in the case of **Chinna Nachiappan and another v. P.L. Lakshmanan** reported in **2007 (4) CTC 70**, which reads as follows:

“He should necessarily pray for declaration of his title..... Hence, in this view of the matter, the substantial question of law could rightly be decided to the effect that the original suit is bad for absence of



a prayer for declaration of title."

16.The learned counsel for the appellant relied on the judgment passed by this Court in the case of **V.Ranga Durai and Others v. S.Jayalakshmi and another** reported in (2007) 5 MLJ 1228, which reads as follows:

"On the other hand, Mr.V.Raghavan, learned counsel appearing for the respondents would submit that it has been the definite case of the defendants that the plaintiffs have no title. He would submit that it is not as if in the additional written statement the defendants have denied the suit property as a common passage.

He would further submit that inasmuch as the plaintiff's declared, the suit for injunction is not maintainable for which he would rely upon the judgment of this Court reported in *Arasappan v. Subramania Karayalar*, 2001 (1) LW 724."

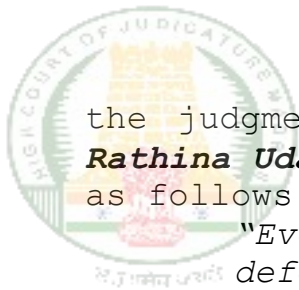
17.On the side of the respondents, it is stated that there is no dispute in the title and there is no necessity to seek a prayer of declaration of title. The learned counsel for the respondents relied on the judgment passed by the Hon'ble Supreme Court in the case of **Muddasani Sarojana v. Muddasani Venkat Narsaiah & Ors.** Reported in **AIR 2007 ANDHRA PRADESH 50**, which reads as follows:

"If the plaintiff is able to disclose the title, beyond any pale of doubt, even in respect of his predecessors, or transferors, then he does not have the necessity to pray for the relief of declaration of title. Where, however, there is serious dispute as to the existence of title in the plaintiff and the same doubt exists as to the title of the predecessor and transferors, the necessity to seek declaration of title exists."

18.The learned counsel for the respondents relied on the judgment passed by this Court in the case of **State of Tamil Nadu and others v. Krishnasamy Chettiar and others** reported in **2017 (3) MWN (Civil) 68**, which reads as follows:

"Attempt to encroach upon land of his official capacity D.W.1 in his deposition admitted plaintiff's title - Such admission operates as estoppel against its maker, when there is no dispute with respect to title -Suit for bare injunction is maintainable, without prayer of declaration of title - Second appeal disposed of"

19.The learned counsel for the appellant argued that it is the duty of the plaintiffs to prove their case and that relied on



the judgment passed by this Court in the case of **M.Venkammal v. Rathina Udayar and another** reported in **1999 (1) MLJ 606**, which reads as follows:

"Even the witness examined on the side of the defendants also is not consistent. But, however, the plaintiff is not entitled to take advantage of the weakness in the case of the defence. The plaintiff must prove her case on the basis of her documents of title. There is a clear reference in Ex.B2 that the three shares were purchased after deducting the two shares. D.W.3 in as attessor to Ex.B2. But the trial Court came to the conclusion that D.W.3 may not be a witness to this document."

20.On the side of the appellant, it is stated that the appellant had affixed the title roof on the common wall and that was not objected by the respondents. The learned counsel for the appellant relied on the judgment passed by this Court in the case of **M.Ramalingam v. N.Thangavelu** reported in **1997 - 2 - L.W. 35**, which reads as follows:

"The main point urged by learned counsel is, regarding the principle of acquiescence. It is submitted that a decree for mandatory injunction should not be granted since the plaintiff was a silent spectator when the construction was going on. Having spent huge amounts for putting up constructions in the property, asking him to demolish the same, cannot be legally supported."

21.On the side appellant, it is stated that if at all the respondents is having any right, they can claim only compensation and they cannot claim mandatory injunction. The learned counsel for the appellant relied on the judgment passed by this Court in the case of **S.Palanivelu v. K.Veradammal** reported in **AIR 1977 MADRAS 342**, which reads as follows:

"Negligence may in certain circumstances be consistent with honesty but where title is obviously founded on possession which is knowingly obtained by trespass, it is impossible to hold that the trespasser honestly believed that he was the absolute owner... I would, therefore, hold that the defendants are not legally entitled to the value of the improvements under S. 51 of the T.P.Act.

But in the present case as already stated the appellant appears to have put up a portion of the well and to have done other acts in the trespassed portion of the suit property under the bonafide beliefs that the portion of the property was part of R.S.3173/12.....The respondent was trying to



encroach upon their property and when they permitted the latter to complete their construction, it was evident that they were acquiescing in the act of the respondent. He therefore, considered that this was not a case for directing delivery of possession. Inasmuch as there was a prayer in the plaint for the grant of equitable relief by way of mandatory injunction, the learned Judge held that it would be competent for the Court to substitute in the place of the relief sought, a decree for compensation"

22.The learned counsel for the appellant relied on the judgment passed by this Court in the case of **S.Muthusami Goundar v. A.Annamalai and others** reported in **AIR 1981 MADRAS 220**, which reads as follows:

"in those circumstances, I held that the Court would be justified in inferring acquiescence on the part of the respondent and considered that it was not a case for directing delivery of possession of the trespassed portion but it was a case where the respondent plaintiff had to be compensated in money for the value of the trespassed portion and I called for a finding from the lower appellate Court as regards the market value of the trespassed portion."

23.The learned counsel for the respondents has argued that the defendants failed to prove their common possession and they had admitted that the wall belong to the plaintiffs in their written statement and he relied on the judgment passed by this Court in the case of **Sivasami and others v. Rajakumar and others** reported in **2017 (2) MWN (Civil) 248**, which reads as follows:

"Suit for permanent injunction - plaintiff seeking decree for injunction to prove possession - records show that plaintiff is in possession from date of purchase - plaintiff paid property tax - defendant is estopped from disputing plaintiff's title in view of admission made in a document - defendant though pleaded adverse possession, not proved same - suit liable to be decreed - appeal filed by defendant fails - second appeal is dismissed."

24.The learned counsel for the respondents has stated that the court fee paid is correct and he relied on the judgment passed by this Court in the case of **Subramani v. Panneer** reported in **(2015) 1 MLJ 708**, which reads as follows:

"if case does not fall under Section 27(a) of Act, then only same can be valued and Court fee can



be paid under Section 27(c) of Act"

25.The learned counsel for the respondents has stated that the defendants claim a common right over the second schedule wall through an oral sale which is inadmissible. He relied on the judgment passed by the Hon'ble Supreme Court in the case of **Satyawan and others v. Raghbir** reported in **AIR 2002 PUNJAB AND HARYANA 290**, which reads as follows:

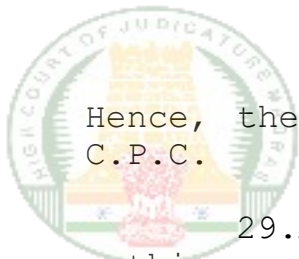
"Oral exchange-Relating to immovable property of value of Rs.100/- or more - such transaction falls within scope of Section 49 - It is not admissible in evidence if not registered."

26.The claim of the appellant is that the place was village natham and his maternal uncle Ramasamy got patta in the year 2005 and that no such assessment order was produced. The title of the plaintiffs regarding the first schedule property is admitted by the second defendant. There is no question of declaration of title. The appellant has also admitted in his written statement that he fixed the rafter in the wall of the plaintiffs. It is the duty of the defendants to prove that the wall is a common wall. D.W.1 has admitted that he removed the eastern wall and put up construction. Mere pleadings cannot confer any title. Patta was given only in 2005. There was no possibility for construction in the year 1997 as alleged by the defendants/appellant.

27.It is seen from the records that Exs.A1 to A3 which reveal the possession of the plaintiffs in the suit property. There is no dispute by the defendants as to the first item of the property and the defendants claiming the suit second schedule property as a common property. But in the written statement in paragraph nos.4 and 5, it is clearly admitted that the wall belong to the plaintiffs. The allegation of the appellant is that this words are typographical error and they cannot be taken into consideration. A person claiming a property as a common property is having a duty to prove the same. The claim of the defendants is that they purchased the property under an oral sale. No document is filed on the side of the defendants to prove that the western wall is a common property. Hence, this questions raised by the appellant are not acceptable.

Issue No.(c) :

28.On the side of the appellant, it is stated that this Court has to invoke Section 100 of C.P.C. Section 100 C.P.C., deals with second appeal wherein it is stated that "in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law." The appellant failed to raise any substantial question of law and all the questions raised by the appellant are only questions of facts.



Hence, there is no necessity for this Court to invoke Section 100 C.P.C.

29.All the issues are decided against the appellant. There is nothing sufficient enough to interfere in the judgment and decree of the first appellate Court. This **second appeal** is **dismissed** by confirming the judgment and decree passed in A.S.No.18 of 2008 dated 11.08.2008 on the file of the Sub Court, Virudhunagar. No Costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)

To

- 1.The Sub Judge, Virudhunagar.
- 2.The District Munsif, Virudhunagar.
- 3.The V.R.Section,(2 COPIES)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to MR.V.RAGHAVACHARI, Advocate (SR-84515[F] dated 30/08/2019)

+1 CC to MR.N, RAJACHANDRASEKARAN, Advocate (SR-84914[F] dated 03/09/2019)

S.A.(MD)No.280 of 2009

30.08.2019

MRN

MK (15.11.2019) 9P 7C