

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.445 of 1998
and C.M.P.No.4685 of 1998

R.Varadaraj

...Appellant

Vs.

1.Patti Chettiar(died)
2.Marudaiyan
3.Subbammal
4.Natarajan
5.Balusamy
6.Sinthambi

...Respondents

(RR2 to 6 brought on record as LR's of the deceased sole respondent vide order of court dated 19.06.2019 made in CMP.No.17604 to 17606 of 2003 in SA.No.445 of 1998)

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.07.1996, in A.S.No.97 of 1995 on the file of the I Additional District Judge and Chief Judicial Magistrate of Coimbatore reversing the decree and judgment dated 23.02.1995 in O.S.No.2036 of 1990 on the file of the III Additional District Munsif of Coimbatore.

For Appellant : Mr.J.Hariharan
For Mr.V.Nochoolas

For Respondents

R1 : Died
R2, 4 & 6 : Notice served - No Appearance
R3 & 5 : Not ready in notice -
No Appearance

JUDGMENT

This second appeal is directed as against the judgment and decree dated 30.07.1996, in A.S.No.97 of 1995 on the file of the I Additional District Judge and Chief Judicial Magistrate of Coimbatore reversing the decree and judgment dated 23.02.1995 in O.S.No.2036 of 1990 on the file of the III Additional District Munsif of Coimbatore.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The plaintiff owns 5 acres of agricultural land in S.F.No.225 and 279 situated at No.22, Nanjundapuram Village. Immediately abutting the lands of the plaintiff on the north, the defendant owns 3.27 acres of land in SF.No.276 and 278 situated at No.22, Nanjundapuram Village. The lands of the defendant are higher in level by about 5 to 6 feet than the lands of the plaintiff. Even in the year 1979, the defendant started making preparation by scooping out soil along the southern boundary of the land by digging pits very close to the boundary of the land belongs to the plaintiff in order to plant coconut saplings. Though the plaintiff objected the same, the defendant planted 18 coconut trees almost on the boundary line. All the trees were grown up and due to close proximity, all the trees are leaning towards the land of the plaintiff and their branches are overhanging the lands of the defendant. The overhanging branches of the said trees extend upto the distance of about 15 feet into the lands of the plaintiff and it caused shade on the fertile land of the plaintiff. Since the plaintiff usually cultivates sugarcane because of the coconut trees shade, the plaintiff is not able to use that portion of the land for proper cultivation. Therefore, the plaintiff filed a suit for mandatory injunction to remove the coconut trees which were planted by the defendant on the boundary of the land belongs to the plaintiff.

4. The defendant resisted the plaintiff's case by filing written statement denying all the averments averred in the plaintiff as false and frivolous. Further stated that the plaintiff dug up a ditch of about 4 to 5 feet depth on the boundary line and it was close to the coconut trees which were planted on the land belongs to the defendant. Therefore, panchayat was held, in which he also agreed to close the same. Therefore, the defendant filed a suit in O.S.No.728 of 1987 and Advocate Commissioner was appointed to note down the nature and condition of the new ditch. He visited the suit property and noted down the physical features and filed his report. According to his report, the age of the coconut trees are more than the ditch dug by the plaintiff. He also levelled his land by using machine, in which the land belongs to the plaintiff came down to the level of 4 feet from the level of the defendant land. Therefore, there is a landslide and as such possibility of causing inconvenience to the coconut trees. As such, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 and P.W.2 were examined and five documents were marked as Ex.A.1 to Ex.A.5. On the side of the defendant, D.W.1 and D.W.2 were examined and Ex.B.1 was marked. The Commissioner's report and plan and the second report of the Advocate Commissioner were marked as Ex.C.1 to Ex.C.3. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial court partly decreed the suit, thereby the defendant was directed to cut the branches of the coconut trees numbered as 7, 10 and 12 and dismissed the other reliefs sought for by the plaintiff. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in A.S.No.97 of 1995 before the I Additional District Judge and Chief Judicial Magistrate, Coimbatore. The first appellate Court on appreciating the materials placed on records, partly allowed the appeal and directed the defendant to cut down the entire trees numbered as 7, 10 and 12. Challenging the same, the defendant has come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial question of law was framed :-

a) Even assuming that the shadow of coconut trees is causing damages to the land of the plaintiff, whether the lower appellate court is correct in directing the coconut tree itself instead of directing the cutting down of the branches which are projecting into or over hanging the lands of the plaintiff.

7. The learned counsel appearing for the defendant is present and reiterated the averments set out in the written statement and in supporting his contention, he also relied upon the judgment in the case of Putraya Vs. Krishna Gota reported in 1935 AIR (Madras) 31.

8. Heard Mr.J.Hariharan, learned counsel appearing for the defendant. Though notice was served to the respondents, none appeared on behalf of them.

9. According to the plaintiff, the defendant planted 18 coconut trees on the boundary line of the lands belong to the plaintiff. Now all the trees have grown up and affected the plaintiff's cultivation of his land, since all the coconut trees have shadows on the land belongs to the plaintiff. Admittedly, no quarrel about the land belongs to the plaintiff as well as the defendant. The Advocate Commissioner was appointed and his reports and plan were marked as Ex.C.1 to Ex.C.3. Accordingly, 18 coconut trees were planted by the defendant in the land

belongs to him. All the 18 trees were numbered from 1 to 18, in which the coconut trees numbered 7, 10 and 12 have grown on the side of the plaintiff's property. The seventh coconut tree has grown up to 4 feet, tenth coconut tree has grown up to 4 feet and twelfth coconut tree has grown upto 1 foot on the plaintiff's land. Therefore, there are totally three trees slanting and giving shadows on the land belongs to the plaintiff. Though these trees were planted in the land belongs to the defendant, the shadow of the said trees would affect the cultivation of the crops of the plaintiff. At the same time, the plaintiff also, adjacent to the coconut trees planted by the defendant, planted 15 coconut trees. Therefore, those trees shadow also equally affects the cultivation of crops in the land belongs to the defendant. Therefore, the trial court rightly directed the defendant to cut down the branches of the coconut trees insofar as the coconut trees numbered as 7, 10 and 12 alone.

10. Normally, the branches of the coconut trees would fall down after its life time. Though the trial court directed the defendant to cut down the branches of those coconut trees, it is not possible to cut down all the branches of trees. Whatever the branches about to fell down can be cut down and avoid the shadows. Therefore, without considering the same, the first appellate court mechanically directed the defendant to cut down the entire coconut trees numbered as 7, 10 and 12. Further, the learned counsel for the defendant also agreed to cut down the branches of the coconut trees numbered as 7, 10 and 12.

11. The learned counsel for the defendant, in support of his contention, has relied upon the judgment in the case of Putraya Vs. Krishna Gota reported in 1935 AIR (Madras) 31, wherein this Court has held as follows:

"2. It is well settled that an owner or occupier of land has no right to allow his trees to overhang his neighbour's lands and he cannot acquire such a right by [prescription. It is also established that a person has a right to abate, the nuisance himself and if the neighbour's trees overhang his lands he is entitled to cut the branches away to the line of the boundary and he can do so without notice if he could do so without entering upon the neighbour's lands. It is therefore clear here that that remedy is open to the plaintiff should he wish to exercise it. But it has been stated in arguing this appeal, that this is not a practical remedy as it will be impossible to cut them away without entering upon the respondent's lands. Lammon v. Webb (1895) A.C. 1, the leading authority upon this, does not deal with this particular point. An action is certainly open, for either' damages or an injunction

where damage has been caused. *Smith v. Giddy* (1904) 2 K.B. 448, in *India Lakshmi Narain v. Tara Prosanna* (1904) 31 Cal. 944 and *Hari Krishna v. Shankar Vithal* (1895) 19 Bom. 420. On the other hand he is not entitled to an action where the danger to his land is merely prospective. It was held in *Ram Lal v. Dalgamjan* (1883) 5 All. 369 a case where trees had been planted close to his boundary and did not, as I understand, overhang it, a claim for the removal of the same was not granted and that there was no such remedy open to the plaintiff'. The matter however appears to me to be concluded by the decision of the Bombay High Court in *Vishnu Jagannath v. Vasudeo Raghunath* 1918 Bom. 68, This was an action for cutting off portions of the trees which overhung the plaintiff's lands and for an injunction to remove the overhanging portion and for damages. The damage was not proved; but the injunction was granted and the granting of the injunction was upheld on appeal. There it was held that as it was found that the trees were likely to cause damage the injunction could be granted. In this Court Pandalai, J., has held in *Guru Sami v. Perumal Raja* 1929 Mad 815, that injunction is the proper remedy where money compensation is not the appropriate relief. I am therefore clear that there is a reasonable apprehension of damages and the owner of the land may compel his neighbour by an injunction to cut away the overhanging branches of the trees on the northern boundary. As I find that there is such a reasonable apprehension of damages, I grant the injunction prayed for and allow this appeal to that extent with proportionate costs throughout."

12. In the similar circumstances, this Court has held that there is a reasonable apprehension of damages and the owner of the land may compel his neighbour by an injunction to cut away the overhanging branches of the trees on the northern boundary. In the case on hand, according to the Advocate Commissioner's report, the branches of the trees numbered as 7, 10 and 12 are overhanging towards the land belongs to the plaintiff. Therefore, the above judgment squarely applies to the case on hand and instead of cutting the full tree, the defendant is directed to cut away the overhanging branches of the coconut trees numbered as 7, 10 and 12.

13. Therefore, the reasonings and findings rendered by the first appellate court are perverse and against the evidence and they are liable to be interfered with. Accordingly, the substantial question of law formulated in this appeal is answered in favour of the defendant and as against the plaintiff.

14. In view of the above discussion, this Second Appeal is allowed and the judgment and decree dated 30.07.1996 passed in A.S.No.97 of 1995 on the file of the I Additional District Judge and Chief Judicial Magistrate, Coimbatore, are hereby set aside and resultantly, the suit filed by the plaintiff in O.S.No.2036 of 1990 is allowed by restoring the judgment and decree 23.02.1995 passed in O.S.No.2036 of 1990 on the file of the III Additional District Munsif of Coimbatore. Consequently, connected miscellaneous petition is closed. No costs.

s/d-
Assistant Registrar(CS V)

True Copy

Sub-Assistant Registrar

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To

1. The I Additional District Judge and
Chief Judicial Magistrate,
Coimbatore
2. The III Additional District Munsif,
Coimbatore.
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1 CC to Mr.V.Nochoolas, Advocate sr 8989.

S.A.No.445 of 1998

SSV(CO)
SP(12/08/2020)