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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :01.12.2020

Pronounced on :09.12.2020

CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1625 of 2010 & S.A.No.14 of 2011
and
M.P.No.1 of 2010 and M.P.No.1 of 2011

S.A.No.1625 of 2010:

1.E.S.Vadivel Chettiyar
2.V.Sridhar
3.V.Vishwanathan

.. Appellants/Respondent/Defendant

//versus//

Arumugam

.. Respondent/Appellant/Plaintiff

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.09.2009 in A.S.No.31 of 2009 on the file of the Sub Judge, Thiruchengodu, reversing the judgment and decree dated 15.10.2003 in O.S.No.254 of 1995 on the file of the learned District Munsif, Thiruchengodu.

For Appellants :Mr.M.Sivavarthanan

For Respondent :Mr.N.Manokaran

S.A.No.14 of 2011:

1.E.S.Vadivel Chettiyar
2.V.Sridhar
3.V.Vishwanathan

.. Appellants/Appellants/Plaintiffs

//versus//

Arumugam

.. Respondent/Respondent/Defendant

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.09.2009 in A.S.No.32 of 2009 on the file of the learned Sub Judge, Thiruchengodu, reversing the judgment and decree dated



15.10.2003 in O.S.No.131 of 1995 on the file of the learned District Munsif, Thiruchengodu.

For Appellants :Mr.M.Sivavarthanan

For Respondent :Mr.N.Manokaran

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COMMON JUDGMENT

(The case has been heard through Video Conferencing)

S.A.No.1625 of 2010: This second appeal is against the judgment in first appeal in A.S.No.31/2009 reversing the judgment of the trial Court passed in O.S.No.254/1995. The said suit was filed for permanent injunction by P.Arumugam, S/o Perumal Chettiar, against E.S.Vadivel Chettiar and his two sons.

2.According to the plaintiff, the suit property, which is more fully described in the plaint schedule is house and vacant site around it. The plaintiff and his 2 brothers purchased the suit property and other properties for valuable consideration from one Kolundai ammal, under a registered deed dated 07/05/1972. Subsequently, his eldest brother sold his 1/3rd share to him and other brother. Thus, he and his immediate elder brother became the absolute owner of the entire property. On 10/03/1994, under a registered partition deed, the plaintiff and his brother partitioned the property. The suit property was allotted to the plaintiff. Even at the time of partition, there was a titled house assessed to tax. After partition, the assessment was transferred from his elder brother name to his name. The plaintiff sunk a borewell in the vacant portion of the suit property. On the southwestern corner of the suit property, he constructed two attached bathrooms-cum-lavatories and a store room. A overhead tank on the ceiling of the rooms to store water drawn from the borewell. On 24/06/1995 when the plaintiff attempted to provide outlet pipes from the two bathrooms across the suit property along its southern boundary to reach the Panchayat Board road on the east and the main road further south of the Panchayat Road, the defendant E.S.Vadivelu Chettiar and his men are obstructing the plaintiff from laying underground pipeline on the southern side of his land from the point 'CD' shown in the plaint sketch.

3.According to the defendants, who are the father and sons, the vendor of the plaintiff nor the plaintiff have no right in the suit property. The description of the suit property shown as 'B' schedule in the partition deed between the plaintiff and his brother on 10/03/1994 is not correct and true. The construction



of bathroom cum lavatories and overhead tank in the suit property are admitted. But, the claim of the plaintiff that he has already laid pipe line along 'ABC' points is denied. The whole portion marked as 'ABCD' is the portion encroached upon the defendants property. It is true that when the plaintiff tried to put up underground pipeline, it was prevented by the defendants not by violence as averred by the plaintiff, but only objected orally for the unlawful encroachment of the plaintiff in the defendants land. As a matter of fact, the defendants had filed O.S. 131/1995 for grant of declaration of title and permanent injunction from interfering with their possession and enjoyment. Also for a mandatory injunction for demolition of the plaintiff's house portion build in the defendants vacant site. After knowing the filing of the suit in O.S 131/1995 and obtained ad-interim injunction in I.A 509/1995, the subsequent suit is filed with untenable and false claim.

4. Before the trial Court, the Suits in O.S.No.254/1995 and O.S.No.131/1995 were taken for trial simultaneously. Apart from the depositions of witnesses and exhibits marked in this case, the Commissioner Report filed in O.S.No.131/1995 was taken into consideration to understand the physical feature of the property in dispute.

5. The plaintiff contention was that the defendant property ends with his house wall on North. No vacant land is available for the defendant beyond the northern wall. Whereas, in the sale deed Ex.A-1 relied by the plaintiff, the southern boundary of the plaintiff property is shown as the compound wall of the Rajamanikam Chettiar vagaiyara (defendants predecessors), Rangammal and Yasodammal. Like wise in Ex.A-2, also the property of the plaintiff is shown on the north of Vadivelu (first defendant), Yasodammal and Rangammal compound wall. In the cross examination, the plaintiff has admitted that, the house wall and compound wall of the defendants are separate. There is a compound wall running East to West on the north of Yasodammal property and Rangammal property, who are on the west of the defendants property. The said compound wall was constructed 60 years ago and there is vacant land between the compound wall and the house wall of the Rangammal and Yasodammal.

6. Therefore, the trial Court held that the plaintiff property is on the north of compound wall. The vacant site in between the compound wall and the northern wall of the defendants belongs to the defendant. Hence, dismissed the injunction suit in O.S 254/1995 filed by P.Arumugam.



7. On appeal in A.S.No.50/2004, the first appellate Court reversed the trial Court judgment and granted the relief of injunction. The first appellate Court, held that the property purchased on 07/05/1972 by the plaintiff Arumugam along with his brothers Chandrasekar and Sundaram under Ex.A-1 and the sale deed Ex.A-2, dated 10/02/1994 executed by one of the brother Chandrasekar in favour of the plaintiff and the partition deed between the plaintiff and other brother Sundaram proves 'B' schedule property was allotted to the plaintiff Arumugam. From the deposition of the DW-1(the first defendant-Vadivelu Chettiar), it appears, there is no land for the defendants beyond his wall on the north. Therefore, the defendants cannot stake claim over the vacant land beyond the north of his wall. From the admission of the defendants, it appears, he has opened the northern wall by 3 to 3 ½ feet to have access to the vacant land just prior to the visit of the Advocate Commissioner appointed in the connected suit in O.S.No.131/1995 filed by the defendants against the plaintiff in O.S.No.254/1995. Referring the Patta Ex.A-4 in the name of Plaintiff Arumugam in respect of S.No.365/9, the first appellate Court has concluded that, the 1st defendant in his cross examination has admitted that the vacant land on the south of the plaintiff house in S.No.365/9 belongs to the plaintiff and his land and house is in S.No.365/13. Referring the Commissioner's Report wherein he has noted a opening in the northern wall of the defendant, held that it was newly created by the defendants to have access to the open land further north of his wall. Hence, reversed the finding of the trial Court and granted injunction restraining the defendants from obstructing the plaintiff from laying underground pipe line in the vacant land on the south of the plaintiff house and north of the defendants house wall.

8. Being aggrieved by the reversal judgment, the 1st defendant Vadivel Chettiar and two others have preferred the second appeal in S.A.No.1625/2010.

9. S.A.No.14 of 2011

This second appeal is against the judgement in first appeal A.S.No.32/2009 reversing the judgment of the trial Court passed in O.S.No.131/1995. The suit was filed for declaration of title and consequential permanent injunction; and mandatory injunction for demolishing the portion of the defendant's house constructed encroaching upon the item II of the suit property. The plaintiffs in this suit are Vadivelu Chettiar and his two sons. The defendant is P.Arumugam S/o Perumal Chettiar.

10. According to the plaintiffs, the suit property, which is more fully described as item I and II in the plaint schedule, are vacant land in old S.F.No.220/1: New S.No. 365/13 marked as



"ABCGEF" in the plaint sketch and the building in the portion "CDEG" constructed by the defendant to an extent East -West: 28 feet on the North, 26 feet on the South and North-South: 9 feet on the East and 7 feet on the West.

11.As per the plaint, the first plaintiff Vadivelu Chettiar is the son of Sengoda Chettiar. Plaintiffs 2 and 3 are sons of first plaintiff. The house and the vacant space in S.F.No.220/1 of Elachipayalam, Agaram Village was allotted to the Sengoda Chettiar under the partition deed dated 16/02/1943, entered between the Sengoda Chettiar and his brother Varathappa Chettiar. On 02/09/1977 the other sons of Sengoda Chettiar relinquished their right in the property in favour of the first plaintiff. The plaintiffs are in possession and enjoyment of the property. Patta No.433 dated 02/01/1995 issued in the name of the first plaintiff assigning new S.No.365/13. The house in the said property is assessed to tax and the plaintiffs are paying the tax regularly. The plaintiffs have left a vacant space in the shape of a triangle on the North of the house property for the purpose of future utility. On further North of the plaintiffs property, the defendant Arumugam is having vacant site and house adjoining the plaintiffs house and vacant site. About 3 years back, the defendant encroaching upon the vacant site had build his house adjoining the North-Eastern corner of the plaintiffs vacant land. The encroached portion is marked as "CDEG" in the rough sketch and it is the II item suit schedule property. The plaintiffs, when objected for constructing the building encroaching their portion of land, the defendant promised to restore the status quo ante. However, he failed to honour the said promise. Further, he is making preparation to build additional construction in item I of the suit property marked as "ABCDEF". On 27/03/1995, the defendant attempted to lay foundation in the vacant space belonging to the plaintiffs. The same was prevented with the help of neighbours. Quoting the said incident as cause of action, the suit is filed for the reliefs mentioned above.

12.The defendant Arumugam in his written statement, denied the averments found in the plaint. According to the defendant, the II item property shown in the suit schedule is owned by him. He purchased the property through three sale deeds dated 07/05/1973, 10/02/1994 and 10/03/1994. The building is constructed in the land owned by him. He sunk a borewell in his property and to carry water he laid pipeline. To carry effluent water from his bathroom to the Panchayat road, he dug the soil in his land. To some length he laid the pipeline but before completing, the plaintiff thwarted it claiming the said portion belongs to them. The 'AF' wall shown in the plaint sketch is the boundary of the plaintiffs. They don't have any land beyond that. There is no access to the vacant land on the North of 'AF' wall. After filing counter by the defendant in I.A.No.509/1995,



the plaintiffs had created an opening at a height of 2 feet from the ground level in the 11 feet 'AF' wall to show as if they have access to the vacant site on the north of 'AF' Wall. The defendant constructed his house in the year 1977, even if it was constructed encroaching upon the plaintiffs, the relief of mandatory injunction to remove the construction is barred by limitation. In the additional written statement, plea of non-joinder of the brothers of the plaintiffs in the declaration suit was also raised.

13.The trial Court, on considering the Ex.A-1 and Ex.A-2, held that the plaintiffs have proved their title over the item I of the suit property. From Ex.B-2 and Ex.B-3 deeds, there is no reference about house in the property sold to the defendant. In Thoraya site patta, Ex.B-4 dated 03/07/1994, there is reference about a tiled house. The house tax receipts between 1988 - 1993 in the name of Chandran (Chandrasekaran) the brother of the defendant marked as Ex.B5 (series) mentions the door number of the house as 7-88, but in the sale deed Ex.B2 executed by him in favour of the defendant there is no hint about the house bearing door number 7-88 in the property sold. Therefore, there is no indication that the tax receipts relates to the house in the suit property. Regarding the plea of non-joinder of necessary parties, the trial Court relying upon the release deeds executed by the brothers of the first plaintiff and the proceedings of the Settlement Special Thasildar, held that their suit is not hit by non-joinder of necessary parties. The trial Court did not give much credence to the inscription of the number "1977" on the wall of defendant house, to believe that the house was constructed in the year 1977. The trial Court observed that Inserting the number subsequently cannot be ruled out. Therefore, held that the offending portion of building in II item is on the land of the plaintiff. So the plaintiffs are entitled for the decree of declaration and mandatory injunction to demolish the offending portion and injunction restraining the defendant Arumugam from disturbing the enjoyment of the plaintiffs in the suit property.

14.On appeal, the first appellate Court reversed the trial Court finding. It held that in the plaint, it is admitted that the offending portion was constructed in the year 1992. The relief for mandatory injunction is sought after 3 years in the year 1995. There are evidence to show that the defendant house was in the property since 1977. Before the Advocate Commissioner, the plaintiffs had failed to identify the additional construction made by the defendant in the year 1992 or in 1994. So, the first appellate Court disbelieved the averment in the plaint that the defendant encroached the plaintiffs vacant land only in the year 1992 and put up



construction. Further, on comparing the patta Ex.A-3-the Thoraya Patta in the name of Vadivelu Chettiar and the FM Sketch for the S.No.365 marked as Ex.X-4 through the Revenue Inspector of Elachipalayam, the first appellate Court has concluded that in the patta given to the respondent Arumugam for SNo.365/9, south of the house vacant land is shown. Whereas in S.No.365/13, there is no indication of vacant site on the north of the Vadivelu house.

15. Being aggrieved the plaintiffs Mr.P.Vadivelu and two others in the suit in O.S.No.131/1995 have preferred the second appeal in S.A.No.14 of 2011.

16. In these two second appeals in S.A.No.1625 of 2010 and S.A.No.14 of 2011, the appellants and the respondent are one and the same persons. The facts in both the appeals are intertwined with each other. Therefore, by consent of both the counsels, both the appeals were taken together and common argument advanced.

17. Appellants argument:

The learned counsel for the appellants contended that, the first appellate court failed to take note of certain vital facts. It has omitted to consider that the respondent filed the suit for injunction as a counterblast to the declaration suit filed by the first appellant in respect of the suit property. The cause of action arose when the earlier suit for declaration filed on 03/04/1995. However, the subsequent suit for permanent injunction for the very same property filed by the respondent alleging the cause of action only 24/06/1995. It is an invented cause of action for the purpose of a counter suit. On the ground of suppression of fact and misrepresentation, the first appellate Court ought to have confirmed the trial Court judgement and dismissed the appeal.

18. The first appellate Court erred in not appreciating the description of boundaries in the plaintiffs documents Ex.A-1 and Ex.A-2. Without considering the fact that the respondent's property lies to the north of the appellants compound wall, it has reversed the trial Court judgment contrary to the documentary evidence. The first appellate Court ignoring the fact that the opening on the northern wall of the appellants was in existence forever and they widened it recently and also failed to consider the admission of the respondent about the existence of the compound wall for more than 60 years. The first appellate Court erred in holding as if the opening was freshly created by the appellants and the same was admitted by the first



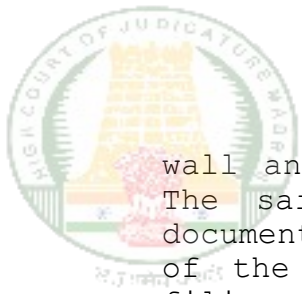
appellant. This is contrary to the evidence recorded and perverse.

19. The four boundaries in the documents Ex.A-1 and Ex.A-12 relied by the respondent, the patta Ex.A-4 issued by the Revenue Department to the plaintiffs and the Commissioner Report along with the FM sketch, marked as Ex.B-1 categorically indicates that the respondent had encroached upon the appellants land. Without assigning any reason, the first appellate Court has ignored the admission of the respondent that his land falls under S.No.365/9 as shown in the sketch of Thoraya Patta Ex.A-4 and the land south of his titled house belongs to the appellants herein and the appellants land is in S.No.365/13. The Commissioner in his Report annexed two sketches one as per the boundary and measurement found in the documents Ex.A-1 and Ex.A-2, another as per the Thoraya Patta given to the respective parties. He has categorically stated that the respondent had encroached upon the appellants land, 210 sqft as per their own title document and 180 sqft as per the Thoraya patta. When both the sketch established encroachment but only differs in extent, it is erroneous and perverse to hold that two different measurements of encroached portion in the Commissioner's Report will entitle the respondent the relief of permanent injunction resulting in validating the encroachment.

20. Similarly in the composite suit filed by the appellants for declaration and injunction, the first appellate Court erred in holding that the house was constructed in the year 1977. So, the relief of mandatory injunction is barred by limitation. The said finding is against the own admission of the respondent, who have pleaded that, he got the property to his shares from the partition among brothers only in the year 1994 and he sunk borewell and thereafter put up additional construction of two bathrooms and lavatories. The first appellate Court noticing certain discrepancies in the measurement in the title document of the appellants, erred by totally discarding the title documents.

21. Respondent argument:

The learned counsel appearing for the respondent submitted that, the appellants, who have claimed declaration of title, failed to prove their title over the disputed piece of land. In the absence of establishing the title, the weakness of the respondent cannot be a ground to grant relief to the plaintiff. The trial Court erroneously allowed the suit for declaration and mandatory injunction filed by the appellants on the ground that the existence of compound wall for more than 60 years admitted by the respondent and the vacant space between the said compound



wall and the house of the defendant belongs to the appellants. The said finding is not even supported by recital of the documents relied by the appellants. In fact, the recent opening of the northern side compound wall by the appellants, after filing of the suit and before the Commissioner visit, was clearly established by the respondent through evidence. It is admitted fact that except the said opening, there is no other access to the vacant site lying between the house of the respondent and the compound wall of the appellants. Therefore, the claim of the appellants that they were in enjoyment of the disputed portion, gets falsified.

22. In their plaint in O.S.No.131/1995 the appellants have admitted that additional construction was put up in the year 1992 and when they objected to it, the respondent promised to remove the structure. The said contention also found to be false by the first appellate Court, in view of the tax receipts for the house from 1988 and the inscription on the wall of the house indicating, the building was constructed in the year 1977. Having acquiescence to the construction, the suit for mandatory injunction after more than 3 year of the construction is hopelessly barred by limitation. Therefore, the learned counsel for the respondent submitted that, the entire case of the appellants regarding their title and enjoyment over the disputed portion of vacant land north of their wall failed and there is no Substantial Question of Law in this case to entertain the second appeal.

23. Finding of the Court:

The land in dispute was initially natham manavari poramboku. During the month of July, 1994, Thoraya natham patta was issued for the appellants in respect of S.No. 365/13 and for the respondent in respect of S.No. 365/9. The property of the appellants and respondent are contiguous land, divided by south-north. In between their land, existence of a compound wall of 13 feet height has been spoken in the documents as well as by the witnesses. The issue centres around, do the appellants have property north of the compound wall.

24. The Commissioner, who has measured the land both based on the title documents produced by the parties and based on the revenue documents such as FM sketch, thoraya patta, had prepared two sketch and placed before the Court for consideration. The opening on the northern wall by about 3 to 3 1/2 feet to have access to the disputed portion has also been noted in the Commissioner Report. In the plaint rough sketch, there is no whisper about the existence of the opening. This fact is relevant and crucial fact because had there any land left beyond the northern side compound wall, then there should have been



accessed to it. Unless there is opening in the wall, the access is not possible. The first appellate Court has therefore taken this as one of the factor to decide against the appellants.

25.Regarding the boundaries mentioned in the title documents of either side, it is to be noted that the measurements in these documents and boundaries are prior to issuance of natham patta for the parties. The actual portion under enjoyment of the respective parties is reflected in the patta and the Field Map sketch prepared by the Revenue Department. As pointed by the first appellate Court, the FM sketch marked as Ex.X-4, gives a clear picture that the northern boundary of the appellants in S.No.365/13 stops with the wall of their building, which have windows. The Commissioner had measured the property from the road on the south of the appellants land. Through evidence and Commissioner Report, we find that, the road once a panchayat road had been expanded subsequent to the grant of natham patta. Thus, it is clear that after 1943, the physical feature of the disputed land has changed and the measurements mentioned in those old documents with discrepancies in measurement and ambiguity in boundaries cannot be a decisive factor to declare title. More so, when those measurements refers to prior to re-survey and assignment of natham patta for the porambokku land, the measurements shown in the assignment patta gains more credibility.

26.The learned counsel for the respondent relying upon the judgment of the Hon'ble Supreme Court rendered in Nazir Mohamed -vs- J.Kamala and others reported in [2020(6) 320] submitted that, under Section 100 of the Civil Procedure Code, the High Courts are not supposed to entertain the second appeal, if there is no valid substantial question of law. Re-agitating facts or re-appreciation of evidence is not permissible. Though this proposition is not the hard and fast rule, in case, if the appreciation of evidence is gravely erroneous and perverse, the High Court is not denuded of its power to set aside the perversity and prevent miscarriage of justice. However, in this case, this Court does not find any such necessity.

27.Therefore, both the Second Appeals are dismissed. The first appellate Court judgments and decrees passed in A.S.No.32/2009 and A.S.No.31/2009 respectively are confirmed. No order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar



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To:

1.The Sub Court, Thiruchengodu.

2.The District Munsif Court, Thriuchengodu.

+1cc to Mr.N.Manokaran, Advocate SR.No.39764

S.A.Nos.1625 of 2010 and

S.A.No.14 of 2011

&

M.P.No.1 of 2010

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M.P.No.1 of 2011

AD(CO)

GMV(27/08/2021)