

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.01.2020

Date of Verdict :28.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.Nos.1518 & 1519 of 2005

Ambikeswari

... Appellant/Respondent/
Plaintiff in S.A.No.1518 of 2005

...Appellant/Appellant/
Plaintiff in S.Ad.No.1519 of 2005

Vs.

1.V.Krishnamoorthy

2.K.Kalavathy

... Respondents/Appellants/
Defendants in S.A.No.1518 of 2005

... Respondents/Respondents/
Defendants in S.A.No.1519 of 2005

Common Prayer: Second Appeals filed under Section.100 of C.P.C. to set aside the judgement and decree made in A.S.Nos.7 & 30 of 2004 on the file of the Principal District Court, Coimbatore dated 29.07.2004 reversing the judgment and decree made in O.S.No.116 of 1996 on the file of the Third Additional District Munsif Court, Coimbatore, dated 21.03.2003.

For Appellant : Mr.Palani Selvaraj

For Respondents: Mr.P.Valliappan

..in both SAs

COMMON JUDGEMENT

These second appeals are preferred as against the judgement and decree dated 29.07.2004, passed in A.S.Nos.7 & 30 of 2004 on the file of the Principal District Court, Coimbatore, confirming the judgment and decree dated 21.03.2003 passed in O.S.No.116 of 1996 on the file of the III Additional District Munsif Court.

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 suit is filed for mandatory injunction and permanent injunction. Originally, the suit property along with the other property belonged to Thirumathi Andal. She sold out the property admeasuring 955 ½ square feet of property on its eastern side in favour of the husband of the plaintiff, by the registered sale deed dated 11.06.1986. Thereafter, she put up terraced building on the western side portion of her remaining property. The western side property facing the Sathyamoorthy Road and the front side admeasuring north to south. Thereafter, she sold out the said western portion admeasuring 695 square feet along with terraced building built up thereon to one Srinivasa Rao in the year 1993, retaining the portion namely, the suit property of her own. The suit property described as A, B, C, D, E, F, G, as shown in the rough sketch annexed with the plaint. Thereafter, she sold out the suit property to the plaintiff by registered sale deed dated 21.02.1994, admeasuring 1068 square feet land together with the building, marked as A, B, C, D, E, F, G, in the rough sketch annexed along with the plaint. Even while purchasing the said property, there was structures over the area shown as A, B, F, G, of the suit property and it was agreed by vendor and the said Srinivasa Rao to remove the same at the earliest. When the plaintiff insisted him to remove the super structure projecting from her property, though he admitted to remove the said portion, he sold out the entire property admeasuring 695 square feet together with the buildings to the defendants by two different sale deeds in the month of November 1994. Therefore, defendants are entitled to only the property admeasuring 695 square feet of land together with built up area and they do not have any right over the property which marked as A, B, F, G, and structures projecting into the said open space area from their property and as such, it is liable to be removed as agreed by their vendor. In the month of December 1995, again the defendants attempted to put up further structure in the portion marked as A, B, F, G, and as such filed suit for permanent injunction for the same portion, restraining the defendants from putting up any structures and also not to allow the rainy water flow which fall over the entire suit property.

4. The defendants resisting the plaintiff's case and filed the written statement stating that the said Thirumathi Andal sold out a house comprised in S.F.No.35, and in Survey No.9/279 and New Survey No.9/23/3, site No.5 in P.Rangaswami Naidu layout in favour of one K.V.Srinivasan. In turn, he sold out the said property in favour of the defendants by the registered sale deed

dated 18.11.1994. The defendants are husband and wife. The plaintiff purchased the suit property on 21.02.1994 from the said Thirumathi Andal and after purchase the plaintiff did not put up any construction in the said property. The suit property in its entirety is open and uncovered meant for common usage. Further, stated that the suit is bad for non-joinder of parties namely, Thirumathi Andal and Srinvasa Rao. It is also clear that the plaintiff has purchased the property by knowing the existence of the alleged projections in A, B, F, G, in the rough sketch and even the plaintiff admitted that the Srinivasa Rao has not removed the projecting structure and without removing the same, sold out the said property to the defendants. Therefore, at the time of purchasing the suit property, projections are there and the plaintiff kept quiet till 12.01.1996 and filed the suit thereafter. If at all, the plaintiff had any grievance, she has to file appropriate suit as against the vendor of the plaintiff as well as the defendants. Therefore, the plaintiff is estopped from filing a suit against the defendants and prayed for dismissal of the suit.

5. On the side of the plaintiff, P.W.1 to P.W.3 were examined and five documents were marked as Ex.A.1 to Ex.A.5. On the side of the defendants, they examined D.W.1 and D.W.2 and nineteen documents were marked as Ex.B.1 to Ex.B.19. The Advocate Commissioner's Report and rough sketch were marked as Ex.C.1 and Ex.C.2. The Engineers blue print was marked as Ex.C.3. Based on the materials placed on record, both the oral and documentary evidences adduced by the respective parties and the submissions made by the learned counsel, the trial Court dismissed the suit (A) prayer namely the mandatory injunction and decreed the suit insofar as the (B) prayer namely the permanent injunction. Aggrieved by the same, both the plaintiff as well as the defendants preferred Appeal Suits in A.S.Nos.30 and 7 of 2004 respectively. The first Appellate Court dismissed the appeal filed by the plaintiff in A.S.No.30 of 2004 insofar as the suit (A) prayer is concerned namely the mandatory injunction. The first Appellate Court allowed the appeal in A.S.No.7 of 2004 preferred by the defendants in so far as the suit prayer (B) is concerned namely, permanent injunction. Aggrieved by the same, plaintiff preferred these two appeals as against A.S.Nos. 30 & 7 of 2004 in Second Appeal Nos.1518 and 1519 of 2005 respectively.

6. At the time of admission of these Second Appeals, the following substantial questions of law were formulated by this Court for consideration:

"A) Whether the Lower Appellate Court erred in law in dismissing the suit into even in respect of the relief of permanent injunction as well in total ignorance of the admitted position that the suit

property "ABFG" belonged to Appellant's Vendor Andal from whom undisputed by the same was purchased under Ex.A.2 Sale Deed by the Appellant herein?

B) Whether the Lower Appellate Court erred in law reversing the finding of the Trial Court in respect of title to the suit property especially under the circumstances the defendants/respondents themselves have admitted that the same belonged to the Appellant's Vendor Andal?

C) Whether the Lower Appellate Court failed to render justice by not appreciating the Document under Exhibit A.1 Sale Deed executed in favour of the defendant's vendor wherein the suit property has been specifically retained by the vendor (Andal) from whom only subsequently the plaintiff/Appellant purchased the same under Ex.A.2?

D) Whether the Court below failed to appreciate the well established principle that any construction over or protruding over the property by any other persons than the Appellant will be illegal and the same is liable to be removed so long as the said property belongs to the said owner absolutely and such title having not been questioned or annulled so far?"

7. Heard Mr.Palani Selvaraj, learned counsel appearing for the appellant/plaintiff and Mr.P.Valliappan, learned counsel appearing for the respondents/defendants.

8. Admittedly, the suit property and the other property originally belonged to one Thirumathi Andal. There are three portions in which, eastern side portion of the property admeasuring 955 ½ square feet was sold out in favour of the plaintiff's husband by the registered sale deed dated 11.06.1986. The western side portion admeasuring 695 square feet was sold out in favour of one Srinivasa Rao in the year 1993, which was marked as Ex.A1 dated 30.04.1993. In the portion which was purchased by the said Srinivasa Rao, front side abutting the Sathyamurthy Road, 30 feet length north to south consisting of terraced portions. In the said sale deed, there is a recital that the vendor namely Thirumathi Andal has retained the remaining portion of the property namely, the suit property admeasuring 1068 square feet. Thereafter, she also sold out the remaining portion in favour of the plaintiff by the registered sale deed dated 21.02.1994 and registered as the Document No.815 of 1994 admeasuring 1068 square feet of land together with building which was marked as Ex.A.2. Thereafter, the said Srinivasa Rao executed sale deed in respect of the western side portion which he was purchased in favour of the defendants and

registered sale deeds which were marked as Exs.A.3 & Ex.A.4. The husband of the plaintiff was examined as PW.1 and their vendor Thirumathi Andal was examined as PW.2. Even according to the plaintiff, at the time of purchase, there were super structures over the area shown as A, B, F, G, marked in the rough sketch annexed with plaint in the suit property. Though, it is stated that the vendor of the defendants agreed to remove the same, even at the time of purchasing the said property, the super structures projected from the terraced portion into the area marked as A, B, F, G. At the same time, on perusal of the Ex.A.1, the vendor of the defendants were entitled only to the extent of 695 square feet alone and as such, he had no right or title over the portion which is marked as A, B, F, G, in the plan annexed to the plaint.

9. The Advocate Commissioner was appointed to note down the physical features of the suit property and his report and rough sketch were marked as Ex.C.1 and Ex.C.2. Engineers blue print was marked as Ex.C.3.

10. The second defendant was examined as DW.1 and she deposed that the marked portion A, B, F, G, is common pathway for all, to prove the same they did not mark any documents. Further, the sale deed executed in favour of the defendants' vendor and the sale deed executed in their favour did not disclose anything about the portion which is marked as A, B, F, G, as common pathway. Whereas, the sale deed executed in favour of the plaintiff which was marked as Ex.A.2, in which categorically mentioned the A, B, F, G, portion and the entire property marked as A, B, C, D, E, F, G, admeasuring 1068 square feet. Further, A to C portion admeasuring 77.6 feet, G to F portion admeasuring 41.6 feet, A to G portion admeasuring 6 feet length facing Sathyamurthy Road and F to E portion admeasuring 16.9 feet. Therefore, the suit property has shown in the plan annexed in the plaint was purchased by the plaintiff. It is also clear that except the 6 feet breadth pathway facing Sathyamurthy Road, no other way to reach their house. In fact, the defendants property is also facing Sathyamurthy Road and they are having separate door to their house. There is a compound wall dividing the property shown as A, B, G, F, and the defendants property. Therefore, the plaintiff categorically proved their title over the portion marked as A, B, G, F, by their sale deed which was marked as Ex.A.2.

11. Even at the time of purchasing the suit schedule property, there were structures over the areas shown as A, B, G, F, of the suit property. Though the vendor of the defendants agreed to remove the same, it is not binding on the defendants. Admittedly, the defendants house is a terraced house and part of the terrace projected in the portion marked as A, B, G, F. The

photographs produced by the defendants were marked as Ex.B.1 to Ex.B.11 clearly shows that the concrete structure rested on the compound wall, which is marked as A, B, F, G, in the plan annexed to the plaint. There is a pathway down the concrete structure to reach the house of the plaintiff and that is covered by the separate gate. Whereas, the said concrete projection used as staircase to reach the first floor portions belonged to the defendants. If the said structure removed, the defendants cannot reach their first floor. Even without removing the said structure, the plaintiff can very well use to reach their house. In fact, the plaintiff as well as the defendants examined PW.3 and DW.2. The engineer deposed that if the portion is removed, there would be damage to the building. Therefore, the trial Court rightly dismissed the suit in respect of prayer (A) namely to remove the structure put up in the suit property which is marked as A, B, G, F, in the plan annexed to the plaint.

12. If the defendants put up any more structure in the marked portion A, B, F, G, it is clear obstruction to the plaintiffs to reach their house since, it is seen from the photographs that only portion namely A, B, G, F, is the pathway for the plaintiffs to reach their house. This portion is categorically mentioned in the sale deed, which was marked as Ex.A.2. Therefore, the trial Court rightly allowed the suit insofar as the prayer (B) is concerned by restraining the defendants from putting up any structures over A, B, F, G, portion marked in the plan annexed to the plaint and also not to allow the rainy water to flow and fall over the entire suit property.

13. The learned counsel for the defendants cited the judgement reported in 2016 (3) MWN (Civil) 740 in the case of T.Kanchanadevi vs Dr.P.Balachander, held that second prayer is not maintainable when the first prayer is rejected. Accordingly, this Court held as follows:

"..Rule 11 of Order 7 does not justify rejection of any particular portion of plaint - Rejection of plaint should be whole of it only - Even when portion of plaint alone needs rejection, whole of it has to be rejected - Lower Appellate Court having found that relief (a) & (b) had merged with Order passed in Writ Petition and in absence of specific averment with regard to prayer (c) relating to permanent injunction, should have confirmed Order passed by Trial Court - plaint liable to be rejected - Impugned Order set aside - Second Appeal allowed."

This Court held in respect of the matter related to rejection of plaint, whereas the case on hand, part of the prayer was allowed after trial and as such, the above judgement

is not applicable to the case on hand and it is not helpful to the case of the defendants.

14. The first appellate Court erroneously held that the plaintiff failed to establish her absolute title on the disputed A, B, F, G, portion and the super structure and its roof. Further, the defendants had been put up illegally after their purchase through the registered sale deed dated 18.11.1994. It is unfortunate to state that the Ex.A.2, the sale deed categorically mentioned about the entire suit property admeasuring 1068 square feet, belonged to the plaintiff. Whereas, as discussed above, even at the time of purchasing the suit property there were structures in the marked portion as A, B, G, F, projected from the concrete roof put up by the vendor's vendor namely Thirumathi Andar. Therefore, though the plaintiff is not entitled for the relief for mandatory injunction, she is entitled for permanent injunction against the defendants and the findings of the first Appellate Court are erroneous and against the evidence on record.

15. As such, this Court finds valid reason to interfere with the reasonings and findings rendered by the first Appellate Court for upholding the case of the defendants in respect of the suit prayer 'B' is concerned. Be that as it may, insofar as the Second Appeal No.1518 of 2005 is concerned, the substantial questions of law formulated by this Court are accordingly answered in favour of the plaintiff and against the defendants. Insofar as the Second Appeal No.1519 of 2005 is concerned, the substantial questions of law formulated by this Court are answered accordingly in favour of the defendants and against the plaintiff.

16. In fine, the Second Appeal No.1518 of 2005 is allowed and set aside the judgement and decree passed by the first Appellate Court in A.S.No.7 of 2004 and restored the judgement and decree passed in O.S.No.116 of 1996 on the file of the III Additional District Munsif Court, Coimbatore.

17. The Second Appeal No.1519 of 2005 is dismissed and confirmed the judgement and decree passed by the Courts below. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

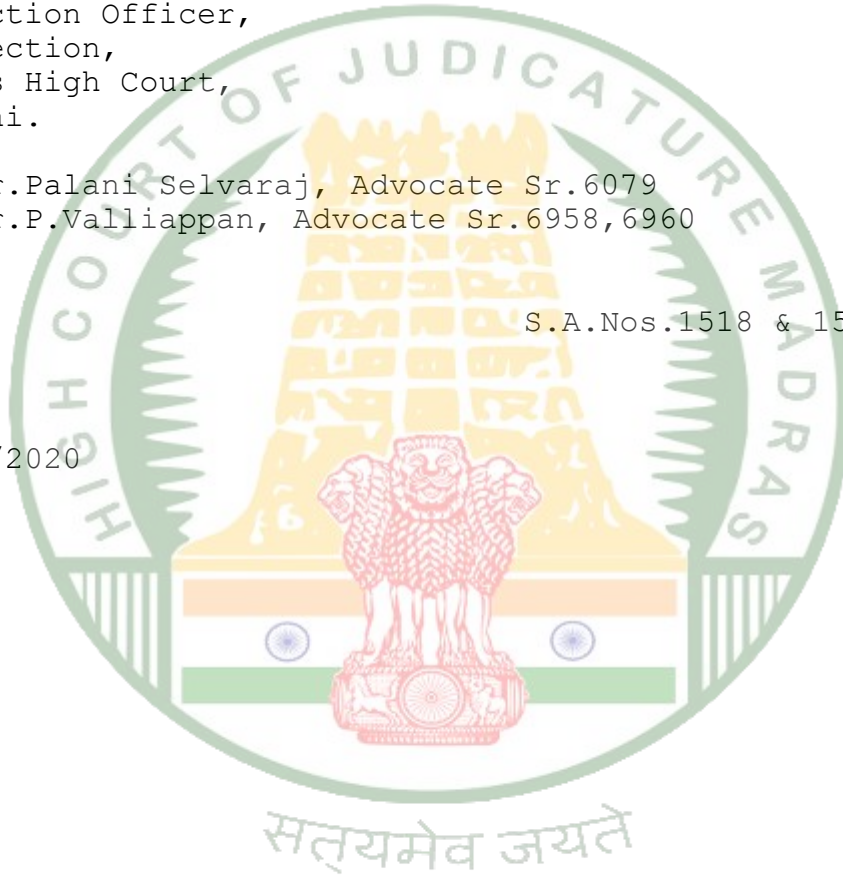
To:-

1. The Principal District Court,
Coimbatore.
2. The Third Additional District Munsif Court,
Coimbatore.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+2cc to Mr.Palani Selvaraj, Advocate Sr.6079
+3cc to Mr.P.Valliappan, Advocate Sr.6958,6960

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