



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	05.01.2022
Pronounced on	27/01/22

THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN

S.A.No.1287 of 2010 &
M.P.No.1 of 2010

Ramamoorthy ... Appellant/Appellant/Defendant

Vs.

Subramanian ...Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 Civil Procedure Code against Judgment and Decree dated 29.11.2007 made in A.S.No.45 of 2003 on the file of the Additional District Judge (Fast Track Court) Ariyalur confirming the Judgment and Decree dated 25.07.1996 made in O.S.No.78 of 1995 on the file of the learned Additional District Munsif, Ariyalur

For Appellant : M/s.B.N.Sivagamasundari

For Respondent : Mr.P.Valliappan

J U D G M E N T

The Second Appeal is focussed as against the Judgment and Decree dated 29.11.2007 passed in A.S.No.45 of 2003 by the learned Additional District Judge (Fast Track Court, Ariyalur) in confirming the Judgment and Decree dated 25.07.1996 passed in O.S.No.78 of 1995 by the learned Additional District Munsif, Ariyalur.

2. The suit is for declaration, declaring that the plaintiff is the absolute owner to the ABCD Land, for consequential injunction restraining the defendant in not interfering with the plaintiff's peaceful possession and for mandatory injunction to remove roof protrusions. The appellant is the 1st defendant [2nd defendant is the mother of the 1st defendant and she is not before this Court] and the respondent is the plaintiff before the trial court. The parties, for convenience sake, are



referred to herein according to their litigative status before the trial court.

3. The laconic averments filed by the plaintiff are as follows:-

(i) A plaint plan is appended with the plaint, wherein the suit property was shown as 'A.G.H.C'. In the suit property, southern and western side lane belongs to the plaintiff, who had purchased for a good and valuable consideration by means of a sale deed dated 01.10.1972. After the said purchase, the plaintiff is in possession and enjoyment of the suit property. The plaintiff had prescribed title to the suit property by adverse possession. The defendants are having their house respectively in western and southern side of the plaintiff's house. The first defendant is constructing a new house on the western side land. The first defendant protruded into the ABCD portion, which belongs to the plaintiff and unlawfully put up the roof. The ABCD lane exclusively belongs to the plaintiff. The plaintiff, through ABCD lane, would reach the south side DEFH lane, thereby, he would reach the backside of his house. The defendants have no right over the said lane.

(ii) While constructing the house, till the roof level, the defendants have not encroached any of the portion of the plaintiff and the plaintiff constructed a wall within AC.Land. When the plaintiff was away for a week, on account of his official duty, at that time, the first defendant protruded into the property of the plaintiff and completed the constructions. As soon as the plaintiff returned from the out of station, questioned the defendants, as to why you had committed such an act, the defendants justified their act. Hence the suit in O.S.No.78 of 1995 has been filed for declaration, injunction and for mandatory injunction.

4. The gist of the written statement filed by the defendants are as follows:-

(i) The particulars noted in the plan is not correct and the plaintiff is not in the possession of the suit property. The plaintiff's plan does not disclose correct measurements. The vendor of the plaintiff, Thangavel and his wife Mullaiammal had purchased the eastern side of the suit property by means of a sale deed dated 25.06.1959 from one Rangaraj and Thangaponnuammal. Thereafter, he constructed a house in the year 1965. While at the time of constructing a house, the said Thangavel without leaving a lane constructed a wall on his area and hence the 1st defendant's father requested the plaintiff's



father not to put any window in the said wall, therefore, there was no window in the western side wall and there was no drainage on the western side.

(ii) When the plaintiff begin to construct wall on the first floor, four years back, while at the time, the defendants were away from the village, the plaintiff put up a window in the first floor of the western side wall, which was stoutly objected by the defendants. The plaintiff accepted to close all the window. The sale deed dated 25.06.1959 stands in the name of the plaintiff, does not disclose about the lane. The suit ABCD property exclusively belongs to the defendants, including the suit lane, which is integral portion of the defendants' house and the same belongs to the ancestors of the defendants. The defendants are in possession and enjoyment of the suit property along with their house for more than 100 years. The 1st defendant's father while constructing a thatch in the front portion of the house, has laid 3 feet lane in the western side and constructed a house. Hence the suit filed by the plaintiff is liable for dismissal.

5. Based on the above averments, the trial court framed necessary issues and tried the suit. On the side of the plaintiff, P.Ws.1 and 2 examined and three documents have been marked as Exs.A.1 to A.3. On the side of the defendants, D.W.1 was examined and sixteen documents were marked as Ex.B.1 to B.16. Apart from those documents, the report and plan submitted by the Advocate commissioner was marked as Ex.C.1 to C.4.

6. Having considered the materials placed before him, the learned Additional District Munsif, Ariyalur came to the conclusion that the plaintiff has proved his case and thereby granted decree in his favour. In the appeal preferred by the 1st defendant, the said finding arrived at by the trial court was confirmed. Feeling aggrieved over the same, the 1st defendant is before this Court with this present Second Appeal.

7. When the Second Appeal is came up for admission, this Court has formulated the following substantial questions of law:-

"1. Whether or not the court below is correct in disposing of the appeal without formulating the point for determination in the appeal as provided under Order 41 Rule 31 CPC?

2. Whether the court below is right in not following the settled law reported in 2007 (1) Law Weekly 893 and 2008 (1) CTC 778, wherein the Hon'ble Supreme Court has held that points for determination



should be framed as contemplated under Order 41 Rule 31 CPC?

3. Whether or not the courts below have failed to advert Ex.B.1 and Ex.B.2, the earlier documents on the subject matter?"

8. Heard the learned appearing on either side and perused the documents placed on record.

9. It is the case of the plaintiff that before made purchase by the plaintiff, the suit schedule property is vested with one Mullaiaimmal. The said Mullaiaimmal had purchased the same as a vacant site through sale deed dated 25.06.1959 and the same was marked before the trial court as Ex.A.2. On going through the schedule of the property, which was purchased by the said Mullaiaimmal, it would appear that the suit schedule property has been purchased by her as a vacant land measuring an extent of 30 human prints east west side and 58 human prints in north south side.

10. It is also not in dispute that after made purchase on 25.06.1959, the said Mullaiaimmal constructed a house in the said vacant land. Only thereafter, on 01.10.1972 vide Ex.A.3 the said Mullaiaimmal and her husband, Thangavelu along with their children sold the said land and house to the plaintiff. In the sale deed dated 01.10.1972 the recitals are seems as follows:-

“எங்களால் கட்டப்பட்டு நாங்கள் அனுபவித்துவருவது கீழ்மேலான வீதிக்கும் தெற்கு வடிவேல் நயினார் வீட்டுக்கும் தோட்டத்துக்கும் கிழக்கு செல்லபெருமாள் தனக்கும்மைனர்களுக்கும் G.Thangavelu முல்லை (6) வகையருவீட்டுக்கும் தோட்டத்துக்கும் வடிவேல் நயினார் வீட்டுக்கும் வடக்கும் மருதாம்பாள மனைக்கும் மேற்கு இந்த தாங்கெல்லைக்குள்பட்டதில் கீழ்மேல் ஜாதி அடி 25 தென்வடல்ஜாதி அடி 48 1/2 உள்ள மெத்தைகட்டு கோப்பு வீடும் கீழ் பூமியும் மேல்புரம் தென்புரம் உள்ள சந்து உள்படவும் கிணர் லெட்டின் பாத்ரம்.....”

Now, on comparing the schedule of property mentioned in Ex.A.3 with the schedule of property found in Ex.A.2, it seems that after leaving some area in the northern and western side, the vendor of the plaintiff constructed a house in the suit schedule property. Though the details of the land, which was marked in Ex.A.3, is not described properly, the details of measurement directed in those documents would clearly specify that the suit lane was left out by the vendor of the plaintiff.

11. Here it is a case the learned counsel appearing on either side fairly conceded that dispute is only in respect to the lane situated on the western and southern side of the property owned by the plaintiff. In this regard, it is the case of the 1st defendant that in the suit lane, in the northern side



three feet belongs to him, in the land situated at the western side of the plaintiff's house, one feet belongs to them. Of course, on comparing the description of property found in Exs.A.2 and A.3, it is apparent that the vendor of the plaintiff constructed the house after leaving the portion in the northern and western side as a lane.

12. In this occasion on the side of the defendant, the title / documents in respect to the suit schedule stands in the name of the predecessor of the vendor of the plaintiff was marked as Exs.B.1 and B.2. Now, on seeing the same through Ex.B.2, one Ranganayaki Ammal sold the portion of the suit property to one Thangaponnu, who in turn sold the plaintiff's land to the vendor of the plaintiff. In the said document, the width of the property, sold to Thangaponnu in the east west was noted as 21 human prints, on the other hand, in the sale deed, executed by one Mullaiaammal, the length of east west is mentioned as 30 feet, therefore, in this regard, the measurements cited in documents, Exs.B2 and A.2 are entirely different and the same will create a confusion over the case of the plaintiff. However, being the reason that the suit is in respect of the lane situated at the north and western side of the plaintiff's house, it would not be necessary to see the difference of length found in Exs.B2 and A.2.

13. At this juncture, the learned counsel for the appellant/defendant would contend that from the time immemorial, the appellant used the suit lane, as a drainage and only through the lane, the defendants drained the waste and the same is not objected by the plaintiff. Only now with enimical attitude the plaintiff filed this suit and thereby the suit filed by the plaintiff is not maintainable. Now, for considering the said submission, it would be necessary to see the physical features of the suit property, which existed. In fact, the trial court appointed the Advocate Commissioner and in view of the direction given by the trial court, the Advocate Commissioner, visit the suit property and note down physical features and filed a report and plan as Exs.C.1 to C.4.

14. Now, on going through the report filed by the Advocate Commissioner, it is seen that between the plaintiff and defendants' house, there was a lane in the width of 3 ½ feet found available on the western side of the plaintiff's house. In respect of the width of the lane found in the northern side of the plaintiff's house, unfortunately, the learned Advocate Commissioner has not mentioned the measurement. However, in the report submitted by him, he has mentioned that in the lane



15. Apart from that, in the same lane, plaintiff's has also set up another drainage for his use, it shows that as of now, the land situated at the northern side of the plaintiff's house, which is portion of the suit property, was enjoyed by both the plaintiff and the defendants. Here it is a case that the vendor of the plaintiff purchased the property measuring to the tune of 58 human prints in the south west. Afterwards, he had constructed a house to an extent of 48 human prints, leaving 10 human prints, which was of course, a lane found in the northern side of the plaintiff's property. Similarly, on the western side of the property purchased by the vendor of the plaintiff, he left out 5 human prints for the purpose of lane and constructed a house on the east west direction only to the length of 25 human prints. The said circumstances shows that the suit lane belongs to the plaintiff. However, before the courts below, the learned counsel appearing for the plaintiff would contend that the plaintiff is not having any objection to use the drainage by the defendant, which was found in the suit land. Further, argued before the trial court that the present suit is filed only for determining the right of the plaintiff in the suit lane and for removing the sunshade, which was put up by the defendants.

16. Accordingly, by considering the said submissions made before the trial court, the courts below, granted the relief of permanent injunction in favour of the plaintiff and also directed the defendant for removing sunshade put up by him in the suit lane. Since the plaintiff is not having any objection to drain the waste by the defendant in the suit lane, the said orders passed by the trial court is no way prejudice to the right having by the defendant in the suit lane, particularly in draining the waste. Further, the court below observed that the suit land measuring to an extent of 2 ½ X 48 ½ belongs to the plaintiff, of course, the said findings arrived at by the trial court is fully within the factual aspects narrated in the material documents produced by the plaintiff. In otherwise, it cannot be said that the said findings is without considering the evidence adduced by either side.

17. Since the Second Appeal is preferred against the concurrent findings of the courts below, it would be necessary to rely upon the Judgment of Hon'ble Apex Court reported in (2019) 7 Supreme Court Cases 641 [Gurnam Singh (Dead) by Legal representatives and Others Vs. Lehna Singh (Dead) by Legal



representatives] wherein, as per [Madamanchi Ramappa Vs. Muthaluru Bojjappa reported in AIR 1963 SC 1633), the Hon'ble Supreme Court held as follows:-

"In a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being : (i) Contrary to the mandatory provisions of the applicable law; or (ii) contrary to the law as pronounced by the Supreme Court; or (iii) based on inadmissible evidence or no evidence."

18. Here it is a case where the court below took a decision based on the sound principles already settled by various courts and it is seen that nothing was indicated on the side of the appellant that the court below has violated the mandatory provisions of the applicable law etc., etc.,. Though the courts below is not having the power to decide the issue on the basis of equity, this Court is empowered with said power and therefore, the differences of measurement found in Exs.B.1, B.2, A.1 and A.3 are all no way affect the case of the plaintiff. Applying the decision rendered by the Hon'ble Supreme Court mentioned supra to the case on hand, I am of the considered opinion that the Judgments rendered by the courts below found correct and the substantial questions of law are all answered as above. In fact, the courts below concluded the suit on the basis of equity and the same is approved by this Court.

In the result, the present Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

ssd

To

1. The Additional District Judge,
(Fast Track Court), Ariyalur.



2.The Additional District Munsif,
Ariyalur.

Copy to

The Section Officer,
Vernacular Records,
High Court, Madras-104.

+1cc to Mr.P.Valliappan, Advocate Sr.4815

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