



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.02.2022

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.552 of 2010

1.Parvathiammal
2.Anandan
3.Minor Saravanan ... Appellants/Appellants/Plaintiffs

*(Minor 3rd appellant is through his mother and
next friend 1st appellant Parvathiammal)*

Vs.

1.Sivalingam
2.Shanmuga Sundari
3.Jeya Chithra ... Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.04.2009 passed in A.S.No.95 of 2006 on the file of the Sub Court, Thoothukudi, confirming the judgment and decree dated 15.02.2006 passed in O.S.No.172 of 2004 by the Additional District Munsif Court, Thiruchendur.

For Appellants : Mr.C.Dhanaseelan
For Respondents : Mr.M.C.Swamy for R1 & R2
No appearance for R3

JUDGEMENT

The unsuccessful plaintiffs in O.S.No.172 of 2004 on the file of the Additional District Munsif Court, Thiruchendur are the appellants in this second appeal. The said suit was filed by them seeking the relief of declaration and mandatory injunction. According to the plaintiffs, 3rd suit schedule is a common courtyard belonging to the plaintiffs and the defendants 1 and 2. Since the first defendant had put up a wall in between the plaintiffs' property and the suit 3rd schedule, the plaintiffs wanted the same to be removed. The defendants 1 and 2 filed written statement controverting the plaint averments. Based on the divergent pleadings, the Trial Court framed the necessary issues.

2.The first plaintiff/Parvathiammal examined herself as P.W.1. Exs.A1 to A6 were marked on the side of the plaintiffs. The first defendant/Sivalingam examined himself as D.W.1. Exs.B1 and B2 were



marked on the side of the defendants. An Advocate Commissioner was appointed and his report and plan were marked as Exs.C1 and C2 and the surveyor's sketch was marked as Ex.C3.

3.After consideration of the evidence on record, the Trial Court by the impugned judgment and decree dated 15.02.2006 dismissed the suit. Aggrieved by the same, the plaintiffs filed A.S.No.95 of 2006 before the Sub Court, Thoothukudi. By the impugned judgment and decree dated 30.04.2009, the decision of the Trial Court was confirmed and the appeal suit was dismissed. Challenging the same, this second appeal came to be filed.

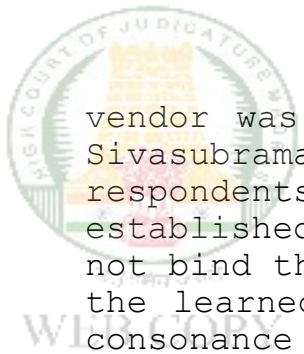
4.Though the second appeal was filed way back in the year 2010, only notice of motion was ordered and it has not been admitted till date. The learned counsel for the appellants reiterated the contentions set out in the memorandum of grounds and called upon this Court to admit this second appeal after framing substantial question of law and take it for disposal later.

5.Per contra, the learned counsel for the contesting respondents submitted that the impugned judgment and decree do not warrant any interference.

6.I carefully considered the rival contentions and went through the evidence on record. The learned counsel for the appellants submitted that the properties belonging both the parties including suit schedule originally belonged to a common ancestor. The plaintiffs had purchased their property under Ex.A2 dated 30.09.1986 from one Sudalai Muthu Pillai and Ulaganatha Pillai. The vendors who executed Ex.A2 had purchased the property under Ex.A1 dated 08.08.1973 from one Sivasubramaniya Nadar. The learned counsel drew my attention to the four boundary description set out in Exs.A1 and A2. The northern boundary is described as common courtyard. It is this that has been described as suit 3rd schedule. The learned counsel would submit that this description is consistent with the description set out in Ex.B1 dated 25.10.1952. The contesting defendants also trace their title under Ex.B1, in which their property has been shown as lying to the south of east-west street and to the north of common courtyard belonging to the vendor's family. The learned counsel for the appellant also would emphasize the fact that in Exs.A3 and A4 which are official records, the property in question has been described as public lane.

7.As rightly pointed out by the learned counsel for the contesting respondents, if the plaintiffs had been able to demonstrate that the predecessor-in-title of both parties was a common ancestor, then certainly the description in Ex.A2 of the northern boundary as a common courtyard would definitely be binding on the respondents also. But unfortunately the plaintiffs have not been able to trace their title to a common ancestor. The vendor of

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vendor was one Sivasubramaniya Nadar. The predecessor-in-title of Sivasubramaniya Nadar was not the predecessor-in-title for the respondents. Since commonality or common source has not been established, the description of the northern boundary in Ex.A.2 will not bind the respondents. I do not also agree with the contention of the learned counsel for the appellants that this description is in consonance with the description found in Ex.B1. It is true that in Ex.B1, the southern boundary is mentioned as common courtyard. But then, there is a significant adjective to that expression. The executant of Ex.B1 stated that southern boundary is a common courtyard belonging to their vagaiyara (group).

8.The Courts below have also found that the plaintiffs seeking the relief of mandatory injunction must specifically set out as to when the offending wall was put up. Those particulars are absent. These are pure issues of fact and exercising jurisdiction under Section 100 of CPC, I do not want to disturb the said finding. Be that as it may, I do find that there is some merit in the contention of the learned counsel for the appellants anchored on Exs.A3 and A4. In Exs.A3 and A4 as well as in the commissioner's report and plan, there is material to show that the disputed property is a lane. The plaintiffs came out with a specific case that the dispute property should be declared as common courtyard that belongs to the plaintiffs and the defendants 1 and 2. Exs.A3 and A4 completely undermine this claim. As rightly pointed out by the learned counsel for the contesting respondents, the plaintiffs having come to the Court with a specific case must either succeed or fall on that basis. I hold that no substantial question of law arises for consideration in this second appeal and the second appeal is dismissed and the decisions of the Courts below are confirmed.

Sd/-

Assistant Registrar (CS-II)

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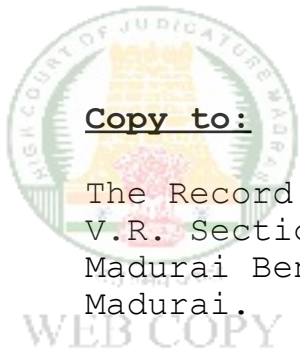
Sub Assistant Registrar(CS)

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To:

1.The Sub Judge,
Thoothukudi.

2.The Additional District Munsif,
Tiruchendur.



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The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
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+1 CC to M/s.G.RAJARAMAN, Advocate (SR-9306[F] dated 01/03/2022)
S.A. (MD)No.552 of 2010
28.02.2022

SS (CO)
GC (11.03.2022) 4P 6C