



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.04.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)Nos.740 & 741 of 2010

WEB COPY

(i) in S.A. (MD)No.740 of 2010

1. Mymoon Beevi
2. Mohammed Rabeek
3. Sakla
4. Hussain Rahuman
5. Abdul Nizam
6. Aaral
7. Mumtaj

... Appellants / Appellants /
Defendants 2 to 8

Vs.

Parithal Sulbihar

... Respondent / Respondent /
Plaintiff

Prayer: Second appeal filed under Section 100 of C.P.C., to set aside the Judgment and Decree of the lower appellate Court dated 06.01.2010 made in A.S.No.9 of 2009 on the file of the Principal Subordinate Judge, Tirunelveli, confirming the Judgment and Decree of the trial Court dated 06.08.2008 made in O.S.No.368 of 1994 on the file of the Principal District Munsif, Tirunelveli and to allow the second appeal.

For Appellants : Mr.A.Arumugam,
for M/s.Ajmal Associates.

For Respondent : Mr.Ananth C.Rajesh,
for Mr.M.S.Jawaharlal.

* * *

(i) in S.A. (MD)No.741 of 2010

1. Mymoon Beevi
2. Mohammed Rabeek



3. Sakla
4. Hussain Rahuman
5. Jakanarah

6. Mumtaj

... Appellants / Appellants /
Plaintiffs

Vs.

1. Parithal Sulbihar
2. A.Nallamuthu
3. Mummy Fathima
4. Abdul Nizam
5. Mariyam Beevi

... Respondents /
Respondents 1 to 4 & 7 /
Defendants 1,2,4,5 & 7

Prayer: Second appeal filed under Section 100 of C.P.C., to set aside the Judgment and Decree of the lower appellate Court dated 06.01.2010 made in A.S.No.11 of 2009 on the file of the Principal Subordinate Judge, Tirunelveli, confirming the Judgment and Decree of the trial Court dated 06.08.2008 made in O.S.No.367 of 2001 on the file of the Principal District Munsif, Tirunelveli and to allow the second appeal.

For Appellants	: Mr.A.Arumugam, for M/s.Ajmal Associates.
For R-1	: Mr.Ananth C.Rajesh, for Mr.M.S.Jawaharlal.
For R-3 & R-5	: Mr.M.Mohamed Sherfudeen, for Mr.A.Hajamohideen.
For R-2	: No appearance.

* * *

C O M M O N J U D G M E N T

These two second appeals are interconnected. O.S.No.368 of 1994 was filed by the first respondent herein, namely, Parithal Sulbihar on the file of the III Additional District Munsif, Tirunelveli, seeking the following reliefs :-



“(a) for a permanent injunction restraining the defendants 2 to 8 their men and agents from putting up any construction encroaching upon the plaintiff's exercised of the right of easements to go over to the north of A B A1 B1 wall through the access E in the plan or touching the wall A B A1 B1 or resting upon it.

(b) for a mandatory injunction directing the defendants to remove the offending structure touching the A B A1 B1 wall between the points G H in the plan and J shown in the plan. ”

2. O.S.No.367 of 2001 was filed by the appellants herein for declaration that the suit A B wall is common to both the parties and for consequential reliefs of permanent injunction and mandatory injunction. Both the suits were originally dismissed on 03.08.2004. Aggrieved by the same, both the parties filed A.S.No.189 of 2004 and A.S.No.82 of 2005. They were disposed of on 05.08.2005 and the decision of the trial was set aside and the matters were remitted to the file of the trial Court. On the side of the plaintiffs, five witnesses were examined and Ex.A.1 to Ex.A.18 were marked. On the side of the defendants, two witnesses were examined and Ex.B.1 to Ex.B.35 were marked. The reports and plans of the Advocate Commissioner were marked as Ex.C.1 to Ex.C.6. After consideration of the evidence on record, by judgment and decree dated 06.08.2008, O.S.No.368 of 1994 was partly decreed, while O.S.No.367 of 2001 was dismissed. The trial Court decreed that the suit wall A B A1 B1 belongs to the plaintiffs and that the first respondent herein has a right to whitewash and maintain the same. The appellants herein were also restrained from putting up new construction beyond 49 feet north-south. The constructions touching A B wall as indicated in Ex.C.4 plan were ordered to be removed. Aggrieved by the same, the appellants herein filed A.S.No.9 of 2009 and A.S.No.11 of 2009 before the Principal Sub Court, Tirunelveli. By the impugned judgment and decree dated 06.01.2010, the decision of the trial Court was confirmed and both the appeals were dismissed. Challenging the same, these second appeals came to be filed.

3. S.A.(MD)No.740 of 2010 arises out of O.S. No.368 of 1994, while S.A.(MD)No.741 of 2010 arises out O.S.No.367 of 2001.

4. Though the second appeals were filed in the year 2010, only notice was ordered and they have not been admitted till date.

5. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds. He also filed written notes. The learned counsel called upon this court to frame substantial questions of law and admit the second appeal and then take them for disposal. After reiterating all the contentions set out in the gist of arguments and written notes, the learned counsel called upon this Court to interfere with the



impugned judgments and decrees.

6. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgments and decrees do not call for any interference.

7. I carefully considered the rival contentions and went through the evidence on record.

8. The learned counsel appearing for the appellants would point out that the first respondent herein has not been consistent. While in O.S.No.368 of 1994, right of easement was sought over the area lying to the north of the suit wall, in the written statement filed in O.S.No.367 of 2001, the first respondent claimed title. These two claims are clearly contradictory to each other. The first respondent herein is having the property to the south of the suit wall. Even according to the first respondent, she owns 13 feet north-south as per Ex.B.13. The property to the north thereafter belongs to the appellants herein. By claiming easement right, the first respondent herein had admitted that what is lying to the north of the suit wall is the property of the appellants herein. He would further point out that while the appellants herein are the plaintiffs in one suit, the first respondent herein is the plaintiff in another suit. In fact the first respondent herein first filed suit. The specific stand of the first respondent is that the suit wall is her wall. Therefore, the burden lay primarily on her. According to the learned counsel, the first respondent had miserably failed to prove her claim. He also commented that the report of the Advocate Commissioner is unhelpful. He would point out that apart from the appellants, there are quite a few others who are in occupation of the northern side. The first respondent herein had not impleaded them. Therefore, the suit has to fail for non-joinder of necessary parties. He would also point out that the relief of the mandatory injunction has been sought for, but the details have not been furnished. The learned counsel would point out that even if the Court comes to the conclusion that the appellants have not proved their case in O.S.No.367 of 2001, that cannot automatically run in decreeing of the suit filed by the first respondent in her favour.

9. Though the suit filed by the first respondent is earlier in point of time, the fact remains that the appellants filed a comprehensive suit by including declaratory prayer. The appellants have marked their title documents (Ex.A.1, Ex.A.2 and Ex.A.3). Ex.A.2 is the sale deed standing in the name of Muthulakshmi. The said Muthulakshmi sold her property in favour of Sahul Hameed, husband of the first plaintiff under Ex.A.1 dated 13.02.1974. A perusal of the two documents would show that the property purchased by the appellants measures 17½ carpenter cubic feet north-south on the western side; this is equivalent to 48.12 feet. In other words, the appellants cannot have any claim beyond the said 48.12 feet on the southern side. Ex.C.6 is the last plan of the Advocate



Commissioner drawn on 07.04.2006. It can be seen therefrom that the property of the appellants is bounded on the north by Pitchuvana Street. In fact in Ex.A.1 also, the northern boundary is mentioned as east-west street. In the western side also, there is a north-south common path way. The property of the first respondent has been shown as A B C D. C D is the suit wall. The distance between D point and northern most end of the appellants on the western side measures 52.9 feet. That is why, the Courts below rightly came to the conclusion that the appellants ought not to put up any construction beyond their north-south dimension of 49 feet on the western side. The Courts below have carefully analyzed the measurements set out in the respective documents of both the parties and also decided the suits with reference to the Advocate Commissioner's reports and plans. No substantial question of law arises for consideration.

10. These second appeals are dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Principal Subordinate Judge, Tirunelveli.
2. The Principal District Munsif, Tirunelveli.

COPY TO:

The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai. (2 COPIES)

+2 CC to M/s.AJMAL ASSOCIATES, Advocate (SR-20804,SR-20803[F] dated 25/04/2022)
+2 CC to M/s.M.S. JAWAHARALAL, Advocate (SR-21129,SR-21128[F] dated 26/04/2022)

S.A. (MD) Nos.740 & 741 of 2010
22.04.2022

_RD(03.06.2022) 5P 9C