



S.A(MD)No.419 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 10.06.2022

CORAM:

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

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1.Ramamoorthy ... 1st Appellant/1st Respondent/
1st Defendant
Sankaralingam(died) ... 2nd Appellant/2nd Respondent/
2nd Defendant

2.S.Kala

3.S.Kannan

4.Minor.S.Manikandan

.... Appellants

(Cause title accepted Vide order dated 06.06.2011 made in M.P(MD).No.1
of 2022 in SA(MD).No.SR18493 of 2010)

Vs.

1.Raja ... 1st Respondent/Appellant/Plaintiff
2.Ramalakshmi
3.Saraswathi ... Respondents 2 & 3/Respondents
3& 4/ Defendants 3 & 4

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 11.12.2009 in A.S.No.87 of 2007 on the file of the Subordinate Court, Valliyoor reversing the judgement and decree dated 27.09.2006 in O.S.No.97 of 2001 on the file of the Additional District Munsif Court, Nanguneri.

For Appellants : Mr.H.Arumugam
For Respondents : Ms.D.Geetha



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J U D G M E N T

The first defendant and the legal heirs of the deceased second defendant in O.S.No.97 of 2001 on the file of the learned District Munsif Court, Nanguneri are the appellants herein.

2. The suit was laid for declaring certain easementary right claimed by the plaintiff over the property of the defendants and also for mandatory injunction to remove certain construction made in their property. The suit was dismissed by the trial court but came to be allowed by the First Appellate Court in A.S.No.87 of 2007.

3. The case of the plaintiff is that the plaintiff's mother Arputhamani Ammal purchased a plot having an extent of 1482/5sq.ft in R.S.No.828.5 with residential houses therein under Ex.A.1 sale deed dated 08.01.1980. This property is described as I schedule property in the plaint. It is abutted on the west and south by a road and a street. The property to the immediate east of the I schedule property belong to the relatives of the vendor of Ex.A.1. This is described in the plaint as a vacant plot measuring 8.5ft east-west 77ft



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north-south. According to the plaintiff, the property comprised of 3 residential buildings with windows and each of the houses having the windows in the eastern wall. The plaintiff further goes to plead that in II schedule of property which belong to the defendants, they have put up a bathroom and toilet which according to them obstructs the right of air and light. He also pleads that he needs right of access over II schedule of property to maintain his eastern wall. After the demise of Arputhamani Ammal in 1977, the property covered under Ex.A.1 devolve equally on the plaintiff and his two brothers. While so, under Ex.A.2 dated 03.12.1999 the plaintiff's brothers had executed a deed of release relinquishing their right over their share in the property in favour of the plaintiff. The plaintiff thus became the absolute owner of I schedule of property.

4. He has also sought with a prayer to remove the toilet and other construction put up by the defendants 1 and 2/the appellants herein from the II schedule of property.

5. The third defendant had filed a written statement, which came to be adopted by other defendants. The core contention of the defendants is that



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there are four houses in the property of the plaintiff and three windows on the eastern wall. While so, on 07.03.1995, Vide Ex.B.2, Arputhamani Ammal, the mother of the plaintiff and Packiyathammal, the mother of the defendants 1 and 2 had entered into a registered agreement by which the eastern wall of the plaintiff's house was agreed to be treated as a common wall and in lieu of that, Packiyathammal had paid a sum of Rs.2,000/- (Rupees two thousand only) as consideration. While so, a few months prior to the institution of the suit, cracks developed on the northern and southern portions of the common wall and the plaintiff has demolished and constructed a new wall. But in that process, the plaintiff has encroached into II schedule of property. The defendants took exception to that and the plaintiff evaded it. The middle portion of the common wall even now continued to remain in the old wall. The suit is laid only to deflect the dispute which the defendants have taken up with the plaintiff vis-a-vis the encroachment made later in II schedule of the property belongs to the defendants.

6. The dispute went to trial before which the plaintiff examined himself as P.W.1. Besides them, he examined three other witnesses as P.W.2 to P.W.4.



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He had produced Ex.A.1 to Ex.A.8 and Ex.A.1 to Ex.A.2 have been entered earlier. However, the first defendant examined himself as D.W.1 and they examined three other independent witnesses as D.W.2 to D.W.4. They have produced Ex.B.1 to Ex.B.8, of which, Ex.B.2 is an agreement between Arputhamani Ammal and Packiyathammal referred to above. Besides, the defendants have produced nine original documents from the concerned Sub-Registrar Office to prove the genuineness of Ex.B.2 (it may have to be stated that in the printed copy of the judgment of the trial court of which this Court now relies the list of exhibits are given terribly wrongly).

7. On appreciating the evidence before which the trial court chose to dismiss the suit. This line of reasoning is pertained to Ex.B.2 and Ex.A.5 which are the copy of the agreement and building plan approval produced by the plaintiff, wherein no windows were marked on the common wall and its left inter space. The trial court also has taken exception to the conduct of the plaintiff suppressing Ex.B.2 agreement. On the point of law, the trial court relied on the authority reported in ***Official Trustee, Bombay Vs. Sarebhai Sarafully*** [AIR 1926 Bombay 328] and has held that except under Section 13 of the Indian Easements Act, co-sharers cannot claim right of easement.



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8. Aggrieved by the decree of the trial court, the plaintiff preferred A.S.No. 87 of 2007 before the Sub Court, Valliyur. The First Appellate Court came to a different conclusion and allowed the appeal and thus decreed the suit and it rested its reasoning on its finding that Ex.B.2 is not adequately proved and that the original of Ex.B.2 was not produced.

9. It is the turn of the defendants 1 and 2 to feel aggrieved and hence, they are before this Court with this Second Appeal.

10. This Second Appeal is admitted for considering the following substantial questions of law:

i) When the first respondent is the co-owner of the eastern wall of the 1st schedule property, along with the appellants whether he is entitled to claim easementary right as against the other co-owners namely appellants?

ii) When the appellants have proved that they are the absolute owners of the 2nd schedule property, whether the lower appellate Court is right in granting the decree of declaration, injunction and mandatory injunction as against the appellants by reversing the judgment of the trial court when absolutely there is no



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evidence on part of the respondent and he has not claimed any title also?

Iii) When the appellants have categorically proved the common wall agreement namely Ex.B.2 whether the lower Appellate Court is right in reversing the judgment and decree of the trial court without properly appreciating the Ex.B.2 and hence, warrants interference? And

iv) When the 1st respondent has not proved the continuous enjoyment of the easementary right for more than 20 years as contemplated under the Indian Easements Act and trial court also dismissed the suit by giving a finding that the right of easement has not proved whether the lower appellate court is right in reversing the judgment and decree of the trial court without assigning the reason as to how the trial court was wrong?

11. Critical to the case of the appellants is the substantial question No:2, it does not involve the ownership of the plaintiff over II schedule of property, and the finding required on Ext.B-2 pertains only to the extent of title the plaintiff has in eastern wall of his building.

12. The learned counsel for the appellant argued that a Commissioner has visited the property which was not referred to or relied on by any of the



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courts which shows that the toilet and bathroom have been built by the defendants 1 and 2/appellants along the northern boundary of II schedule of property. So far as the claim of right of the plaintiff to have a wall repair is concerned, Vide Ex.B.2, the defendants will have the right to maintain their half of the wall and no right is vested on the plaintiff to do that.

13. The learned counsel for the first respondent/plaintiff supported the line of reasoning of the First Appellate Court, more particularly its finding suspecting Ext.B-2.

14. Whether the defendants/appellants entitled to part of the eastern wall supporting the buildings of the plaintiff in terms of Ext.B-2? The first appellate court suspected Ext.B-2, because its scribe D.W.3 has not produced the register that he claimed he maintains as concerning the documents he scribes and registered. This Court cannot appreciate this line of reasoning. Given the context of the case any such register will only be a corroborative piece of evidence, and its non-production by itself cannot discredit the value of a registered document. Now, Ext.B-2 on the face of it creates a cloud over the title of the eastern wall of the plaintiff's house, and



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inasmuch as it states that plaintiff's mother had executed it, the plaintiff ought to have challenged it. That was not done. Necessarily the Court cannot reject Ext.B-2 based on the testimony of D.W.3.

15. If Ex.C.1 and Ex.C.2 the Commissioner's report and sketch are analyzed, the defendants have constructed a bathroom and toilet along the northern boundary, which is far away from the three windows in the eastern wall of the plaintiff's house.

16. So far as the right of easement over air and light is concerned, now this is governed by Town Planning Rules which prescribes inter space that ought to be there in between space. Indeed, it prescribes that the extent that may have to be left vacant from the edge of the boundary of the vacant plot. This is in the context may have to be understood. This will now define the extent to which an easementary right to light and air can be enforced. Therefore, the plaintiff will only have limited right to insist the defendants to have their construction, if any, to put up in accordance with the Town Planning Rules or building Rules as the case may be. However, since there is no case that the defendants are attempting to put up any construction in II schedule of



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property in violation of the Building Rules, there is no cause of action for the same now. So far as the removal of construction is concerned, this Court considers that it is appreciation of piece of prayer as it directly interferes with the defendants' right to their property. Even on facts, the toilet and bathroom are constructed far away from the northern window of the plaintiff's property and along the northern boundary of the defendants' property. The plaintiff appears to be over reacting, if not, reacting with motivation of these constructions.

17. Finally comes plaintiff's prayer for declaration of his right to maintain the wall in dispute. This Court has already found that Ext.B-2 deserves to be acted upon, which will now imply that the plaintiff is only the part owner of the wall, with the defendant having right over the eastern half of the said wall. Inasmuch as this wall is a common wall there must be co-operation between both in maintaining it. This would imply that the defendants will have the right to maintain the eastern half of the wall, but it also implies that if they fail to maintain it, it will affect the plaintiff's right over the other half. The plaintiff has the right to repair it in case it is required to be done. In such case, the plaintiff is required to give advance notice to the defendants



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to carry out any specific work of maintenance of the wall that they are under an obligation to maintain, and if they default, the plaintiff will have the right to do but after giving due notice to the defendants which the defendants shall not refute or dispute. The plaintiff shall not do anything more than maintaining the wall and shall not encroach into II schedule property and shall enter into II schedule property just minimum time necessary for that purpose.

18. In conclusion, this Second Appeal is partially allowed. The relief of mandatory injunction as granted by the First Appellate Court is hereby set aside. So far as declaration is concerned, it is allowed to the extent indicated in last paragraph of this judgment. To this extent, the judgment of the First Appellate Court dated in A.S.No.87 of 2007 on the file of the Subordinate Court, Valliyoor is modified to that extent. No costs.

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Index : Yes/No

Internet: Yes/No

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To

1.The Subordinate Judge, Valliyoor.

2.The Additional District Munsif, Nanguneri.

3.The Section Officer,

VR Section,

Madurai Bench of Madras High Court,

Madurai.



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N.SESHASAYEE, J.,

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