



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.04.2022

CORAM

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

**S.A No.1528 of 2004 & SA(MD)No.726 of 2010
and
CMP No.12061 of 2004**

in SA No.1528 of 2004 : -

1.Subbulakshmi (died)

2.Kumarasamy (died) ... Defendants/Respondents/Appellants

3.K.Saravana Santhi

4.K.Shanmugapriya ...Appellants 3 and 4

(Appellants 3 and 4 are suo motu impleaded
as LRs of the deceased appellants 1 and 2
vide Court order dated 11.04.2022)

Vs.

1.B.Susila

2.S.Rajendran ...Plaintiffs/Appellants/Respondents

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the decree and judgment of the Subordinate Judge, Srivilliputhur made in A.S No.50 of 2001 dated 26.11.2002 reversing the decree and judgment passed in O.S No.318 1999 dated 29.08.2001 on the file of the Principal District Munsif, Srivilliputhur.



in SA(MD)No.726 of 2010 : -
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1.Subbulakshmi (died) ... Appellant/Appellant/Plaintiff

2.K.Saravana Santhi

3.K.Shanmugapriya ... Defendants/Respondents/Appellants

(Appellants 2 and 3 are suo motu impleaded
as LRs of the sole appellants vide
Court order dated 01.03.2022)

Vs.

1.B.Susila

2.S.Rajendran

3.Kaliammal ... Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S No.97 of 2007 on the file of the Subordinate Judge, Srivilliputhur dated 24.02.2010 as partly confirming the judgment and decree passed in O.S No.52 of 2005 on the file of the Additional District Munsif Court, Srivilliputhur dated 31.10.2007.

in both appeals :

For Appellants : Mr.M.P.Senthil

For Respondents : Mr.M.Thirunavukkarasu for R1 & R2



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COMMON JUDGEMENT

Since these second appeals are inter-connected, they are taken up and disposed of together. B.Suseela and S.Rajendran are sister and brother. B.Seseela is having her house in T.S No.2433 and her house bearing Door No. 27. Her brother Rajendran is also having his house in the very same T.S No. 2433 and his house bears Door No.27/1. To the north of their house, the house of K.Subbulakshmi is situated. She is now no more. Her house is located in T.S No.2430. Between the house of Subbulakshmi on the one hand and that of Suseela and Rajendran on the other, there is a lane running across. It is alleged that Subbulakshmi put up some construction which constituted an encroachment on the said lane. The matter was mediated by the local elders. On 26.05.1999, an agreement was arrived at. The said agreement contemplated the following acts to be performed :

a) Since the area of encroachment committed by Subbulakshmi measures 106 sqft and since both the parties sought right over the same, Subbulakshmi was to part with 53 sqft of land on the southern side.

b)To the west of Rajendran's property, there runs another lane. Rajendran is having share measuring 9 inches east-west on the north side and 1 $\frac{3}{4}$ " east-west on the south side. It is said to be a common lane. But he has put up



pial in excess of what he is entitled to. Rajendran has to slice off and remove the encroachment and confine the pial to the land that belongs to him.

2.The grievance of Suseela and Rajendran is that Subbulakshmi and her husband did not act in terms of the agreement. They therefore filed O.S No. 318 of 1999 before the Principal District Munsif, Srivilliputhur. The defendants, namely, Subbulakshmi and Kumarasamy filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues. On the side of the plaintiffs, Suseela and one Muniyasamy were examined as witnesses. Exs.A1 to Ex.A23 were marked. Thiru.Kumarasamy the husband of Subbulakshmi examined himself as DW.1. Exs.B1 to B8 were marked. An Advocate Commissioner was appointed and his report and plan were marked as Exs.C1 and C2. The survey sketch and extract of the town survey register were marked as Exs.C3 and C4.

3.After considering the evidence on record, by judgment and decree dated 29.08.2001, the trial court dismissed the suit. Aggrieved by the same, Suseela and Rajendran filed A.S No.50 of 2001 before the Sub Court, Srivilliputhur. By the impugned judgment and decree dated 26.11.2002 the



first appellate court reversed the decision of the trial court and decreed the suit as prayed for. The defendants in the suit were directed to execute a sale deed conveying 53 sqft of land in terms of the said agreement dated 26.05.1999 in the fourth schedule. The defendants were also directed to remove the bathroom that was on the 3 feet common lane. Aggrieved by the same, the defendants filed SA No.1528 of 2004. The second appeal was admitted on 23.07.2004 on the following substantial questions of law :

“1.Whether the lower appellate court is right in decreeing the suit for both the prayers when the plaintiffs themselves elected any one of the prayers?

2.Whether the lower appellate court is right in deciding the appeal without formulating the points for consideration as per Order 41 Rule 31 CPC?

3.Whether the lower appellate court is right in relying on Ex.A12 which is against law?”

During the pendency of the second appeal, both Subbulakshmi and Kumarasamy passed away and their legal heirs have been brought on record. In the meanwhile, Subbulakshmi filed O.S No.52 of 2005 on the file of the Additional District Munsif Court, Srivilliputhur seeking the relief of declaration and for removal of encroachment committed by the defendants. Written statement was filed controverting the plaint averments and based on the same, the trial court framed necessary issues. Subbulakshmi examined



herself as PW.1 and one Sivasamy as PW.2. Exs.A1 to A24 were marked.

B.Suseela examined herself as DW.2. Exs.B1 to B6 were marked. An

Advocate Commissioner was appointed and his report and plan were marked as C2 and C3. The sketch issued by the surveyor was marked as Ex.C1.

After consideration of the evidence on record, the trial court by judgment and decree dated 31.10.2007 dismissed the suit. Aggrieved by the same,

Subbulakshmi filed A.S No.97 of 2007 before the Sub Court, Srivilliputhur. By judgment and decree dated 24.02.2010, the first appellate court modified the

decision of the trial court and partly decreed the suit and gave declaration as sought for. Injunction was granted subject to the outcome of SA No.1528 of

2004. The plaintiff was however held entitled to use the second schedule pathway. The second schedule is none other than the lane running across T.S

No.2422. However, mandatory injunction for removal of encroachment whatever in form in respect of T.S Nos.2422 and 2434 was declined.

Aggrieved by the same, SA(MD)No.726 of 2010 was filed. Though it was filed in the year 2010, only notice was ordered and it was on the last occasion, I

framed a substantial question of law that whether the courts below were justified in denying the relief of mandatory injunction for removal of

encroachment in TS No.2422 when the defendants themselves have agreed to remove the same.



4. The learned counsel appearing for the LRs of the original appellants reiterated all the contentions set out in the memorandum of grounds and wanted this Court to answer the substantial question of law in favour of the appellants and give a disposal accordingly and set aside the impugned judgment and decree and allow the second appeal. On the other hand, the learned counsel appearing for the respondents submitted that the impugned judgment and decree do not call for any interference.

5. I carefully considered the rival contentions and went through the materials on record. That the contesting parties entered into an agreement on 26.05.1999 is beyond dispute. In fact, to enforce the said agreement, the respondents herein filed O.S No.318 of 1999. As rightly contended by the learned counsel appearing for the appellants, the said agreement contains reciprocal promises. While Subbulakshmi would acknowledge that she had committed encroachment in the lane running between T.S No.2430 and T.S No.2433, she had undertaken to compensate for the same by executing a sale deed in favour of Suseela to an extent of 53 sqft in TS No.2434. Likewise, her brother Rajendran had also acknowledged that the pial put up by him on the western side in T.S No.2422 extends beyond his entitlement and he had also agreed to remove the encroachment. Thus, this agreement contained reciprocal promises. One who wants an agreement to be enforced must also



be ready to perform his part of the contract. He cannot seek selective enforcement of the agreement without fulfilling his part of the obligations.

Unfortunately, the trial court failed to note that the agreement cannot be selectively enforced and it has to be enforced in toto. Likewise, the first appellate court which allowed A.S No.50 of 2001 committed grievous error. Subbulakshmi had agreed to execute a sale deed in favour of Suseela only by way of compensation for her act of encroachment. The first appellate court delivered a double whammy. It not only directed Subbulakshmi to execute sale deed but also to remove the encroachment committed by her. The first appellate court failed to note that the sale deed was executed to atone the act of encroachment.

6.The courts below erred in denying the relief of mandatory injunction on the ground that it was hit by limitation. No doubt, mandatory injunction has to be sought within three years from the date when the cause of action arose. In this case, the cause of action is founded not on the act of encroachment but on the agreement entered into between the parties. I have also pointed out that the agreement contained reciprocal promises. The respondents herein continues to insist that the agreement has to be enforced. In these circumstances, denial of mandatory injunction is not in order. The first substantial question of law framed in SA(MD)No.726 of 2010 is answered in favour of the appellants.



7.The impugned judgment and decrees are modified and both the second appeals are partly allowed. The appellants are directed to execute a sale deed conveying 53 sqft of land in favour of Suseela in T.S No.2434. Rajendran has to remove the encroachment committed in T.S No.2422 which is in excess of his entitlement (9 inches east west on the north and 1 ¾ feet east west on the south). The area to be conveyed by the appellants in favour of Suseela will have to abut the property of Suseela in T.S No.2434. The dimensions would be 37 feet north south and 1.5 feet east west. The report of the Advocate Commissioner made in O.S No.318 of 1999 will form part of the decree. Time for performance is three months. No costs. Consequently, connected miscellaneous petition is closed.

27.04.2022

Index : Yes / No
Internet : Yes/ No
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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 Sub Judge, Srivilliputhur.
- 2.The Principal District Munsif, Srivilliputhur.



3.The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court, Madurai.

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G.R.SWAMINATHAN, J.

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**S.A.(MD)No.1528 of 2004
& SA(MD)No.726 of 2010**

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