



S.A.No.717 of 2002

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.717 of 2002

1.Govindasami Mudaliar
2.Arunagiri

... Appellants

Vs.

1.Venkatachala Mudaliar (died)
2.Visalakshi
3.Palanisami
4.Shanmugavel
5.Sankarasubramanian
6.Saravanan
7.Meera
8.Kalavathi
9.Lalitha
10.Padmavathi

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11.Malarkodi

... Respondents

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[Respondents 2 to 11 brought on record as Lrs of the deceased sole respondent Viz. Venkatachala Mudaliar vide Court Order dated 26.07.2021 made in C.M.P.No.90 and 91 of 2007 in S.A.No.717 of 2002 (AQJ)]

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgement and decree dated 05.02.2001 in A.S.No.44 of 1998 on the file of the Principal District Court, Cuddalore preferred against the judgement and the decree dated 13.02.1998 in O.S.No.210 of 1997 on the file of the Principal District Munsif's Court, Cuddalore.

For Appellants : M/s.A.Nilaphar

For Respondents : M/s.Kingston Jerold [R.2 to R.6, R.8,
R.10 & R.11]

: R.1 [Died]

: R.7 & R.9 [Given up]

JUDGMENT

The unsuccessful defendants before the Courts below have filed this Second Appeal which has been admitted on the following substantial questions of law:-



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“ 1. Whether in law have not the Courts below failed to examine the relevant evidence on record which has directed bearing on the disputed issue and consequently the judgement and the decree of the Courts below are perverse vide (2000)1 CTC 359 SC ?

2. Have not the Courts below misconstrued Exs.A.1, A.2, A.13, A.19 to A.22 and omitted to note that the appellants' house was referred to in all these documents? ”

2. In order to appreciate the grievance of the defendants/appellants it is necessary to touch upon the facts which have given rise to the above Second Appeal and while so narrating, the parties are referred to in the same ranking as before the Trial Court.

3. The plaintiff had filed the suit OS.No.210 of 1997 on the file of the Principal District Munsif, Cuddalore to declare that the property marked as (A, B, C, H, I, J) in the plaint plan belongs to the plaintiff and to restrain the defendants from interfering with the plaintiff's peaceful possession and



enjoyment of the same. The entire property has been described as (A, B, C, D, E, F, H, G, I, J) in the plaint plan and the said property measures east-west 111 feet and north-south 26 feet bearing old Door No.7 and new Door No.9. It is the case of the plaintiff that this property had been purchased under two sale deeds by his father Narayana Mudaliar. The plaintiff's father had purchased an extent of 111 feet east-west and 13 feet north-south from one Manickam Mudaliar under a registered sale deed dated 27.02.1936. The remaining 111 feet east-west and 13 feet north-south was purchased under a Court auction in OS.No.795 of 1933 on 03.10.1935. Possession of this portion was taken on 24.11.1935. Both these properties put together constitutes the entire property which is described as (A B C D E F G H I J).

4. It is the plaintiff's further case that his father Narayana Mudaliar died 50 years prior to the institution of the suit and the plaintiff and his son have been in possession and enjoyment of the said property since then. The plaintiff would submit that the area marked as (B C H I) is the southern mother wall of the plaintiff's house and there are no rafters upon it. He would submit that if this wall is damaged or disturbed then the entire house would collapse. It is also his further case that beyond this wall there is a vacant site



measuring 1 feet 9 inches into which the rain water drains. This in the local parlance is called the '*narasam*' which is described as (A B I J) in the plaint plan. The defendants have their house property on the south of this portion. The defendants are taking steps to demolish their existing structure and put up new construction and while doing so they are making a claim to the plaintiff's property up to the points (C H) in the plaint plan. Therefore, left with no other alternative the plaintiff is constraint to file the above suit.

5. The defendants had filed a written statement in which they had contended that the plaintiff had purchased the property immediately north of the defendant's property which is the portion purchased by the plaintiff's father in a Court auction sale. In the Court auction sale what was purchased was only a small house referred to in the vernacular as "*Othai Sari Veedu*". The sale deeds are silent about the wall. The defendants would contend that the plaintiff is entitled only to the house situate on the north of the suit property. The defendants had also contended that the plaintiffs have not described the property and without having any right whatsoever was attempting to claim a non-existent right upon the suit property. Therefore, they sought for a dismissal of the suit.



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6. The Trial Court had framed the following issues which when translated from the vernacular would read as follows:-

1) Whether the contents of the auction sale certificate was correct?

2) Whether the defendants have perfected title to the suit property by adverse possession?

3) Whether the plaintiff is entitled to the declaration as prayed for?

4) Whether the decree for injunction could be granted against the defendants?

5) To what other relief the plaintiff is entitled to?

7. The plaintiff had examined himself as PW.1 and one Singaram as P.W.2. He had marked Ex.A.1 to Ex.A.22. On the side of the defendants, the 1st defendant was examined as D.W.1 and one Jambulingam as D.W.2. They had examined the Advocate Commissioner as D.W.3. The defendants have marked Ex.B.1 to Ex.B.29. The Commissioner's Report and plan has been marked as Ex.C.1 to Ex.C.6.



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8. The Trial Court had decreed the suit which was confirmed in appeal and it is aggrieved against this concurrent judgement and decree the defendants are now before this Court.

9. Ms. Nilaphor, learned counsel appearing on behalf of the defendants/appellants would submit that the order of the Courts below granting an exclusive title to the area marked as (B C H I) wall is contrary to the documentary evidence since the Advocate Commissioner's Report, Ex.C.1 would clearly show that the rafters of both, the defendants' house as well as the plaintiffs' was resting on this wall and the Courts below after holding that the area marked as (A C I J) portion did not extend beyond the common wall has erred in granting the decree as prayed for. The learned counsel would submit that once the Courts below had held that the portion which has been demarcated as (A B I J) and which has been described as a 'Narasam' is not in existence, the Courts below ought to have dismissed the relief with reference to that portion at least. However, both the Courts below have proceeded to decree the suit as prayed for.



10. The Courts below have now granted a relief in respect of a property which is not in existence. She would submit that the Advocate Commissioner's Report clearly shows that the rafters of the defendants' house has extended beyond the portion marked as (A B I J) and is resting on the wall marked as (B C H I). She would further submit that by granting a decree for injunction in respect of the portion which is no longer in existence the Courts below have committed a grave error. She would also draw the attention of the Court to the fact that Ex.A.1, A.2, A.13, A.19 and A.22 would show that the defendant's house is the southern boundary of the plaintiff's property. She would submit that by not considering the evidence on record the Courts below have committed a grave error. She would rely upon the judgements of the Hon'ble Supreme Court reported in **(2000) 1 SCC 434 - Ishwar Dass Jain (dead) through Lrs. Vs. Sohan Lal (Dead) by Lrs** in support of her argument that where the Courts below have misconstrued the evidence and come to a perverse conclusion, the High Court sitting in the Second Appeal under Section 100 of the CPC can interfere with such judgement and decree.

11. Per contra, M/s.Kingston Jerold, learned counsel appearing on



behalf of the respondents/plaintiffs would submit that Ex.A.1 and Ex.A.2 clearly show that the plaintiff is entitled to an extent of 111 feet east-west and 26 feet in north-south. The 26 feet north-south is the extent from the point E to A. He would submit that the Courts below have taken into account the said documents and has rightly arrived at a conclusion that the plaintiff is entitled to the decree as prayed for.

12. He would further submit that the Advocate Commissioner's Report, Ex.C.1 clearly shows that the rafters of the plaintiff's house rests on the wall which has been described as A, A.1 and B, B.1 in the Commissioner's Report, Ex.C.2. He would further submit that the appellants have not made out any substantial question of law and therefore the Second Appeal deserves to be dismissed.

13. Heard the learned counsel on either side and perused the records.

14. A perusal of the Commissioner's Report and Plan, Ex.C.1 to C.4 would clearly show that the portion which has been described as (A B I J) in



the plaintiff plan is not in existence since the defendant's rafters have extended up to the southern wall of the plaintiff (BCHI) and rests on it. The plaintiffs have purchased the property under the sale deed of the year 1936 and the auction sale certificate of the year 1935, Ex.A.1 and Ex.A.2 respectively. The Advocate Commissioner has submitted his report and plan Ex.C.1 & C.2 respectively in which he has stated that the rafters of the defendant's house rests upon the plaintiff's wall that would clearly show that the contention of the plaintiff that they are entitled to an extent of 1 feet and 9 inches beyond the wall which is described as (A B I J) is not in existence.

15. The defendants has not given any details as to when his house has been constructed. Ex.A1 which is dated 27.02.1936 indicates the existence of the plaintiff's house built up of stone wall. This wall is a part of the wall of the plaintiff's house. Therefore, this wall appears to be the exclusive wall of the plaintiff. The defendants by resting the rafters of their house on this wall cannot claim a joint ownership of the wall. Till such time as the plaintiff and the defendants' house remained in its original state he is entitled to rest his rafter on the said wall.



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16. It is the plaintiff's contention that the defendants are about to demolish their house and is proposing to construct a new building and for which purpose they are claiming a common right over the wall. In the Commissioner's Report it is clearly shown that the area described as (A B I J) is not available at site and I see no reason to set aside the order of the Courts below in so far as it relates to the portion (A B I J). However, the wall described as (B C H I) is declared as the exclusive wall of the plaintiff over which the defendants have not any right except to rest the rafters of the defendants' house as it now stands. Once the defendant demolishes his existing house he is not entitled to extend his new construction onto this wall described as (BCHI). The Courts below have totally ignored the categorical observation of the Advocate Commissioner that the portion demarcated as (A B I J) is not in existence and they have also ignored the fact that Ex.A.1 clearly shows the existence of the plaintiff's house even as early as in the year 1936.

17. Therefore, the Substantial question of laws No.1 and 2 are answered in favour of the defendants. Consequently, the Second Appeal is



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partly allowed. The judgement and decree of the Courts below in so far as it relates to the area described as (A B I J) (Narasam) in the suit plan is set aside. As regards the judgement and decree of the Courts below in so far as it relates to the wall (B C H I) is confirmed. No costs. Consequently, the connected Miscellaneous Petition is closed.

24.01.2023

Index : Yes/No
Internet : Yes/No
Neutral Citation :Yes/No
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To

- 1.The Subordinate Judge, Tirupattur,
- 2.The District Munsif, Tirupattur.

P.T. ASHA, J,

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