



S.A.(MD)No.529 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.(MD)No.529 of 2008

- | | |
|-------------------------|---------------------------------------|
| 1.S.P.Azhagappan (Died) | ... Appellant/Appellant
/Plaintiff |
| 2.Alagu Valliammal | |
| 3.A.Subramanian | |
| 4.A.Arunachalam | ... Appellants 2 to 4 |

(Appellants 2 to 4 are brought on record as LR's of the deceased sole appellant vide order dated 31.01.2022 made in M.P(MD)Nos.1, 2 and 3 of 2013 in S.A(MD)No.529 of 2008 by RVJ)

-Vs-

- | | |
|--|--|
| 1.K.Mohammed Hussain | |
| 2.Subiah | |
| 3.Pudukottai Municipality through
its Commissioner,
Municipal Office,
Pudukottai Taluk,
Pudukottai District. | ... Respondents/Respondents/
Defendants |



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PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 31.08.2006 passed by the Subordinate Judge, Pudukottai in A.S.No.34 of 2005, confirming the judgment and decree dated 16.02.2001 passed by the District Munsif, Aranthangi in O.S.No.87 of 1991.

For Appellants : Mr.T.Antony Arulraj

For R1 : Mr. K.Balasundaram

JUDGMENT

The plaintiff in the suit is the appellant. The suit is for bare injunction restraining the respondents from raising any other compound wall or any other structure and thereby, interfere with his peaceful possession over the open space on immediately south of his property. The suit was dismissed by the trial Court and the findings of the trial Court was confirmed by the First Appellate Court. Aggrieved by the same, the appellant is before this Court.

2. According to the appellant, he is the owner of the house situated in town S.N.4019 and 4017 in south third street, Pudukottai Town. It was further stated that pending suit, he purchased a house in T.S.No.4020 also. It was averred



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in the plaint that on the back side of appellant's house, there was an open space with an extent of 5 feet running from east to west. The respondents' house is situated on further south of that open space. It was further averred that on the western side of the defendants house, there was a north south conservancy lane connected with east west open space mentioned above. It was averred by the appellant/plaintiff that the said space was reserved for common enjoyment for both the parties. It was further averred that the open space had been in existence for the past 50 years. During that time sewage water from plaintiff house had been drained through that open space. It was also claimed that the respondents, while re-constructing the house tried to annex the open space along with their property and hence, the appellant/plaintiff was constrained to file a suit for bare injunction.

3. The respondents herein filed a written statement and denied various averments found in the plaint. In the written statement, the respondents had averred that the description of the suit property was not correct. It was further averred in the written statement that the plaintiff's claim over the suit property had not been mentioned clearly. On one hand, the plaintiff had averred that the suit



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property was a common property of both the parties and on the other hand, the plaintiff had also claimed right of enjoyment by long user. It was also stated in the written statement that the appellant/plaintiff cannot claim easementary right over the suit property without accepting the title of the respondents/defendants. It was specifically averred in the written statement that the suit in respect of S.No.4018 belonged to the second defendant and he obtained sanction from Municipality for putting up constructions.

4. The trial Court on appreciation of oral and documentary evidence let in by both the parties came to the conclusion that the suit for bare injunction was not maintainable in the absence of prayer for declaration of appellant's easementary right over drainage of sewage water in the suit space. The trial Court also came to the conclusion that the Survey No.4018 belonged to the respondent/defendant and hence, appellant was not entitled to maintain a suit for bare injunction against the real owner and ultimately dismissed the suit. Aggrieved by the same, the appellant filed an appeal before the First Appellate Court. The First Appellate Court based on the admission of appellant as PW1 came to the conclusion that the open space on immediate south of appellant's



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houses was not in use for the past four years. The First Appellate Court also came to the conclusion that the appellant did not make necessary averments for claiming easementary right over the suit open space and hence, he was not entitled to seek easementary right over the suit property and consequently dismissed the appeal. Aggrieved by the same, the appellant is before this Court.

5. The learned counsel appearing for the appellants mainly submitted that the Courts below on the basis of evidence available on record and the Commissioner's Report ought to have found that the open space available on the southern side of the appellant's property is absolutely necessary for draining sewage water from his house. The learned counsel further submitted that though the appellant had not pleaded the ingredients of easementary right some kinds of allowance should have been given to the moffusil pleadings and the Courts below ought to have moulded the relief as per the evidence on record.

6.A reading of the pleading of the parties make it clear that the appellant sought the relief of bare injunction on the ground that the open space available on the southern side of his house was reserved as a common property for both the



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parties. Having approached the Court with a specific pleadings that the suit open space on the southern side of the appellant houses is a common property of the appellant and the respondents, it is not open to the appellants to abandon the said case and claim the right of easement. Both the Court below based on the evidence available on record came to the conclusion that the open space that lies in T.S.No.4018 belonged to the respondents. It is not the case of the appellant that the respondents have no right over the land in T.S.No.4018 wherein, the disputed open space is situated. Therefore, the plaintiff miserably failed to prove his case that he got right over open space and it is a common area reserved for enjoyment of the appellant and the respondents. Therefore, the findings of facts rendered by the Courts below does not require interference by this Court. As far as the contention raised by the learned Counsel for the appellants that the suit open space is absolutely necessary for drainage sewerage water, the said contention is based on the easementary right. In the plaint averments, the appellant has not claimed any easementary right over the suit open space by admitting the title of respondents over the same. Therefore, in the absence of necessary pleadings to support the claim of easementary right, the entitlement of the appellants to claim easementary right to drain the sewerage water into suit



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open space cannot be adjudicated upon in the suit. Therefore, this Court finds no reason to interfere with the findings rendered by both the Courts below.

7. Accordingly, the Second Appeal stands dismissed as no substantial question of law is involved. No costs.

02.02.2023

NCC : Yes/No
Index : Yes / No

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To

1. The Subordinate Judge,
Pudukottai.
2. The District Munsif,
Aranthangi.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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