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S.A.No.1336 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.07.2024

PRONOUNCED ON : .07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

S.A.No.1336 of 2010

1.K.Natesan @ Manickam
2.Rajasekar
3.P.Subramaniyan
4.S.Murugesan

...

Appellants

Vs.

1.S.Kandasamy Gounder (Died)
2.K.Ponnusamy
3.Jayalakshmi

...

Respondent

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 22.04.2009 made in A.S.No.93 of 2008 on the file of the Principal Sub Court, Salem, reversing the judgment and decree dated 26.03.2008 made in O.S.No.489 of 2001 on the file of the Principal District Munsif, Salem.



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For Appellants : Mr.T.Murugamanickam, Senior Counsel
for M/s.Zeenath Begam

For Respondents : Mr.T.Sezhian for M/s.R.Meenal (for R2 &3)

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JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 22.04.2009 made in A.S.No.93 of 2008 on the file of the Principal Sub Court, Salem, reversing the judgment and decree dated 26.03.2008 made in O.S.No.489 of 2001 on the file of the Principal District Munsif, Salem.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

3.The defendants in O.S.No.489 of 2001 on the file of the Principal District Munsif, Salem are the appellants herein.

4. The case of the plaintiffs, in brief, is that the properties in T.S.Nos.3, 4/4, and 5 are originally belongs to the plaintiffs, by way of purchase through two separate sale deeds. The defendants are the owners of the property, which is situated on the eastern side of the suit items 1 and 2 of the properties and they are also owners of T.S.No.6 situated on the southern side of T.S.No.5. There is a pathway on the eastern side of the T.S.Nos.3, 4 and 5 and the same belong to



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these defendants. There is a pathway on the northern side of T.S.No.6, which is also in continuation of the pathway on either side, as shown in the rough plan.

The portion of the pathway in T.S.No.6 is running on northern side of T.S.No.6 is intended to reach T.S.No.5 and T.S.No.4/4. It is the only means to reach the plaintiff's property in T.S. Nos.5 and 4/4. The 2nd plaintiff constructed compound wall on the eastern side of T.S.No.3. At the time, for the convenience to reach the pathway in T.S.No.2, the father of the defendants requested the plaintiffs to leave some space and reciprocally the defendants permitted to use the said pathway. Accordingly, the plaintiffs putting up compound wall by leaving some space on the eastern side of T.S.No.3. Whilso, the defendants 3 to 5 during the absence of the plaintiffs, encroached the four feet pathway by putting up bath room and toilet. The same was objected by the plaintiffs. Due to the dispute, defendants had not allowed the plaintiffs to use the pathway. So, the plaintiffs also decided to put up compound wall in their properties. However, the same was prevented by the defendants. To prove his title and the extent of the property, the Commissioner was appointed and facts have been proved through the Commissioner Report and plan. Thus, he filed a suit.



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5.The defendants contested the suit, denied the allegations in the plaint and filed a written statement and denied the reciprocal agreement as alleged by the plaintiffs, in respect of usage of the pathway in T.S.No.2.The plaintiffs have not left any space for usage on the eastern side of their properties in T.S.No.3 and only upto their portions, they have constructed a compound wall. That apart, the defendants also denied the plaintiffs' right over the four feet pathway on the northern side of T.S.No.6. The defendants submitted that the vendor of the plaintiffs have not conferred any right to the said pathway. Therefore, plaintiffs have no right over the pathway. The commissioner failed to measure the property properly. Thus, prays for dismissal of the suit.

6.On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

“1) Whether the plaintiffs left some space on the eastern side in T.S.No.3, T.S.No.4/4 and T.S.No.5 and put up a common wall away from the boundary and there is any reciprocal agreement as alleged?

2) Whether the plaintiffs left some space on the southern side of T.S.No.5 as alleged?

3) Whether rough plan is correct or not?



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4) *Whether the plaintiffs are entitled for the injunction relief as to the construction of compound wall eastern side of the T.S.No.3, T.S.No.4/4 and 5?*

5) *Whether there is any common way in T.S.No.6 and the plaintiffs are entitled for the same as alleged?*

6) *Whether the defendants encroached the common pathway in T.S.No.6 also in the land in T.S.No.5 to the extent of 21' length and 8' width as alleged?*

7) *Whether the plaintiffs are entitled for mandatory injunction?*

8) *Whether the plaintiffs are entitled for injunction relief relating to the alleged encroachment on the common pathway in T.S.No.6 and T.S.No.5?*

9) *Such other relief if any?"*

7. Before the Trial Court, in support of the plaintiff's case, PW 1 was examined and 7 documents were marked as Ex.A.1 to Ex.A.7. On the side of the defendants, DW1 to DW3 were examined and Ex.B1 to Ex.B11 were marked. Ex.C1 to Ex.C5 were also marked.

8. Upon considering the evidence and documents, the trial Court



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dismissed the suit.

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9. Aggrieved over the same, the plaintiffs had filed A.S.No.93 of 2008, before the Principal Subordinate Judge, Salem. The First Appellate Court, after considering the entire materials and evidence on record, reversed the Judgment and Decree of the trial Court and allowed the appeal. Aggrieved by the same, the defendants have filed the present second appeal.

10. The second appeal has been admitted on the following substantial questions of law:

“1. Whether the judgment of the lower appellate Court is vitiated that, it has granted a decree based on the Commissioner's report, without referring to document's of title?

2. Whether the lower appellate Court was in error in holding that the plaintiffs have derived a right of way under Ex.A1 sale deed, whereas their vendor did not possess any such a right when obtaining partition under Ex.A7?

3. Whether the judgment of the lower appellate Court is vitiated in that, being a fact it has



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not assigned reasons for reversing the findings of the trial Court?

4. To what relief? ”

11.The learned counsel appearing for the appellants submitted that the First Appellate Court erred in granting the decree based on the Commissioner's report, without placing any reliance on the document of the title deeds by both parties and also failed to see that DW1 had only admitted that the title of the respondent herein for T.S.No.3, 4 and 5, but at the same time denied the extent and measurements. He further submitted that, the Lower Appellate Court overlooked the fact that there is a difference of measurement in the Settlement Deed. Further, Ex.A3 and the plan Ex.A4 and Sale Deed Ex.A6 proved that the plaintiffs/respondents herein have constructed the excess of 1 ft 9 inches, which proves the pleading that they have left space on the eastern side is a false one. Further, the First Appellate Court overlooked the fact that the 2nd respondent/plaintiff herein filed the suit in O.S.No.2611 of 1981, which is evidenced as Ex.B.1. In which, he gave a clear measurement of the suit property being 118 ft and 9 inches on the northern side and 102 ft and 3 inches on the southern side. There is no pathway as claimed by the plaintiffs. Based upon the Commissioner's report, the First Appellate Court allowed the appeal,



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which is erroneous and have to be set aside and reiterated the other grounds raised in the grounds of appeal.

12.The learned counsel for the appellants relied upon the judgment in the case of ***B.V.Nagesh and another Vs. H.V.Sreenivasa Murthy*** reported in **2010 (5) CTC 719** and further contended that the First Appellate Court, while relying upon the judgment of the trial Court, had not given sufficient reasons and not answered the issues properly. The First Appeal is a valuable right. Therefore, the First Appellate Court must address the issues of law and decide it by giving reasons in support of the findings. However, the First Appellate Court failed in this regard. Thus, pleaded to allow the second appeal.

13.The learned counsel appearing for the respondents supported the judgment of the First Appellate Court and further contended that the Commissioner measured the disputed property with the help of surveyor and filed a detailed report in Ex.C1 and C2, which reflects that the plaintiff left some space on the eastern side of T.S.No.3. The trial Court simply ignored the report and plan. The First Appellate Court rightly appreciated and granted the claim of the plaintiffs with regard to common pathway situated in T.S.No.6 and southern portion of T.S.No.5. This pathway right has been given at the time of



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purchase by Ex.A1 Sale Deed. The defendants 3 to 5 put up a construction by encroaching 1 ½ ft 21-3/4 ft by putting up toilet and bathroom. The First Appellate Court by relying upon the Sale Deed Ex.A1 and the partition deed Ex.A7 conferred the right upon the plaintiff to his pathway. Therefore, there is no ground to interfere with the findings of the First Appellate Court. There is no irregularity and no substantial question of law involved in this case. There is no merits in the Second Appeal and thus, pleaded to dismiss the Appeal.

14.I have considered the matter in the light of the submissions made on either side and perused the materials on records as well as the Judgments passed by the Courts below.

15.On perusal of the materials on record, it is seen that the plaintiff/respondent herein filed the suit against the defendants for permanent injunction and mandatory injunction.

16.The 1st plaintiff is the father, 2nd plaintiff is the son. The 1st plaintiff purchased item 1 of the plaint schedule properties. It covers two survey numbers namely T.S.No.4/4 and T.S.No.5. T.S.No.4/4 was purchased from Chinnapa Gounder and son Shanmuga Gounder by registered Sale Deed dated



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02.04.1968. It is evidenced by Ex.A2. T.S.No.5 was purchased from Sellapa Gounder by way of registered Sale Deed dated 09.01.1956. It is evidenced by Ex.A1.

17.Both the properties are adjoining to each other. The 2nd plaintiff purchased the 2nd item of the plaint schedule properties, which is T.S.No.3. It was originally purchased by the 2nd plaintiff's mother namely Kandayammal from Velayutha Gounder and son, by way of Sale Deed dated 22.01.1958. It is evidenced in Ex.A6. Subsequently, it was settled in favour of the 2nd plaintiff on 17.08.1980, by way of registered settlement Deed. It is evidenced in Ex.A3. Therefore, the 2nd plaintiff claims that they are the owners of the above said plaint schedule properties in T.S.No.2 , which is on the eastern side of the item Nos. 1 and 2 of the plaint schedule properties. It is explained in the plaint plan. In the plaint plan, ABCDEF reflects the 1st item of the property and QRST reflects the 2nd item of the property.

18.The claim of the plaintiff is that there is a pathway on the eastern side of the property in Survey Nos.3, 4 and 5, which belongs to the defendants. Further, there is a pathway on the northern side of T.S.6, which is in continuation of the pathway on either side of it, as shown in the plaint plan. The



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pathway is 4 ft. broad.

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19.The admitted fact is that the plaintiffs are the owners of properties in T.S.Nos. 4/4, 5, 3. The defendants are the owners of the properties in T.S.4/2 and 6. It is not disputed by the defendants. On perusal of the Sale Deed in Ex.A1 and Ex.A2 and Ex.A4, Field map, it is noticed that there is a difference in the measurement between the Exs.A1 and A2 and Ex.A4 field map. Further, on perusal of the evidence, it is noticed that the plaintiffs failed to prove the averment in the plaint that, there is a reciprocal agreement between the plaintiffs and the defendants, with regard to usage of pathway on the eastern side of their property, which is at the defendants side. Further, the plaintiffs also failed to prove that they have left some vacant space on the eastern side their properties in T.S.No.3, 4/4 and 5. Therefore, the trial Court declined to grant injunction to construct the compound wall on the eastern side, as prayed by the plaintiffs. Further, on evidence, it is noticed that, there is a pathway on the northern side of T.S.No.6 to reach the rajavaikal. But there is no evidence to establish that the plaintiffs have a common way in T.S.No.6. On evidence, it was found that the pathway did not run on the property in T.S.No.6. Further, it is not established that the plaintiffs left any space on the southern side of T.S.No.5 of the property and also failed to prove that the defendants



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encroached the pathway in T.S.No.6. It is also noticed that there is no evidence to show that in which survey numbers, the pathway is running. Further, on perusal of Ex.B11, partition deed, it is noticed that no pathway right is given to Sellappa Gounder, vendor of the plaintiffs. Therefore, the trial Court dismissed the suit.

20.On perusal of Sale Deed, Ex.A6, by which the 2nd plaintiff's mother Kandayammal purchased the property from Velayutha Gounder and his son, in which the measurement is mentioned as “..... வடபுறம் கிழமேல் 180 லிங்க்ஸ், தென்புறம் கிழமேல் 150 லிங்க்ஸ்.....”

21.The same Kandayammal settled the property in favour of the 2nd plaintiff by way of settlement deed Ex.A3. On perusal of Ex.A3, it is noticed that,

“..... இதன் மத்தியில் கிழமேலடி வடபுறம் 118.9 தென்புறம் 102.3.....”

22.It is noticed from Ex.A4 field map maintained by the Corporation Authority and Commissioner plan Ex.C2, the measurement of T.S.No.3 is shown as 120 ft in east west direction in northern side and 104 ft southern side. For this much extent, how the 2nd plaintiff is entitled is not evidenced by any



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document. Further, it is noticed that, there is a difference in the measurement, with regard to the property in T.S.No.3. It is noticed from Exs.A3 , A4 and A6. Since, Ex.A4 field map shows more than what the plaintiff had purchased through Sale Deed, much reliance cannot be placed on Ex.A4. The Commissioner report reflects Ex.A4 measurement. For that extent, there is no supporting document in favour of the plaintiffs.

23.With regard to T.S.No.4/4, in the Sale Deed Ex.A1 in favour of the 1st plaintiff, the measurement is mentioned as follows,

“.....வடபுறம் கிழமேல் 36 தென்புறம் கிழபுறம் 36.....”

24.The trial Court discussed and considered the evidence. For better appreciation, it is reproduced herein under:-

“19.According to the measurement in Ex.C2 relating to the T.S.No.4/4 in the east-west direction in southern side in 45' and northern side is 46'. The plaintiffs constructed a portion in T.S.No.4/4 by leaving 1' in the 'T' point and 1-1/2' in the other edge and 2-1/4' in the 'y' point. The corresponding records for the T.S.No.5 is Ex.A1 which has been purchased by the first plaintiff from one Sellappa gounder in the year of 1956. According to that document.

“.....வடபுறம் கிழமேல் 36 தென்புறம் கிழபுறம் 36.....”



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The plaintiffs constructed a portion of house in T.S.No.5 in the southern side in east-west direction is 34-3/4' and as per Ex.A1 he left only 1.3' in the 'F' point and he constructed a portion of house in T.S.No.5 in the northern side in east - west direction is 32' and he left 1½ away from the boundary line as in Ex.A1. Actually he possess 36'; after leaving a portion of 1-1/4', there is a missing portion of 2½' feet in the northern side of T.S.No.5. This is also inconsistent with the Ex.A4. But relating to this point, the plaintiffs did not plead that how much feet they left away from the boundary relating to the T.S.No.4/4 and 5. The plaintiffs did not categorically denote the space they left in T.S.No.4/4 and 5. The corresponding record relating to the S.No. 4/4 is Ex.A2 which was purchased by the first plaintiff from Chinnu gounder. In that document also the measurement has been shown. This measurement also inconsistent with the case of the plaintiffs. There is no hesitation for this court to come to a conclusion that the plaintiffs failed to prove that they left some space away from the boundary line of T.S.No.3, 4/4 and 5 as alleged.

20. Even assuming they left such a portion as alleged in their plaint and they built compound wall as alleged in the pleadings it is not suffice for them to construct compound wall. The commissioner report seems as if the plaintiffs have left some portion away from the boundaries



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of T.S.No.3, 4/4 and 5. But they seems as that the plaintiffs have constructed the buildings for the purpose of 'Vasthu'. The 'ST' and 'DEF' portion is not a straight line and considering this fact, the plaintiffs have constructed a house. They are saying that there is a reciprocal agreement with the plaintiffs. That is not accepted by this court. The Second plaintiff examined himself as P.W.1 and narrated the fact of reciprocal agreement but he did not produce any evidence to substantiate the reciprocal agreement between both parties. As discussed above for 'Vasthu' purpose only he straightened the line and constructed the house portion. That is why in the commissioner report there is s a space 1' in 'T' point 6' in 'S' point. If there is any reciprocal agreement there would be an equal space leaving in eastern side of the suit properties. From the physical features of the Ex.C2 there is no such uniform space was left. So this court can hold that there is no reciprocal agreement. of there is no substantial evidence relating to the reciprocal agreement as alleged by the plaintiffs.

21. For the foregoing reasons this court come to a conclusion that the plaintiffs failed to prove that they left some space on the eastern side in T.S.No.3 4/4 and 5 and put up a common wall away from the boundary and there is a reciprocal agreement as alleged and Ex. A1 rough plan is correct thus this issue.”



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25. With regard to T.S.No.5, on perusal of the Sale Deed Ex.A1, in north-west direction in east side is 46 ½' and south side is 39'. The plaintiffs constructed a portion in T.S.No.5 in south-west direction in the eastern side is 46' and left ½ ft only. In the western side, 39 ½' ft is excess of ½ ft. the plaintiffs have constructed house excess than the measurement in the Sale Deed Ex.A1. As per the Commissioner's report and Ex.A4, field map, the north-west measurement in the eastern side is 52' and northern side is 43-1/2'. It is more than the measurement in the Sale Deed Ex.A1. Therefore, in T.S.No.5 also, the plaintiffs had not left any space on the southern side of the property. Therefore, the trial Court rightly held that he is not entitled for injunction to construct compound wall on the side of the T.S.No.3, 4/4 and 5.

26. With regard to common pathway in T.S.No.6, the defendants admitted in their written statement that there is a pathway on the northern side of T.S.No.6. But denied the plaintiff's right over the pathway.

27. The property originally belong to one Kandasamy Gounder and Rangasamy Gounder to the extent of 245 acres in S.No.104/1. The said



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Kandasamy Gounder had two sons namely Ponnusamy and Nadesan @ Manickam. Rangasamy Gounder had two sons namely Sellappa Gounder and Velayutha Gounder. Velayutha Gounder sold his undivided share to one Chinnu Gounder, S/o. Sengoda Gounder. In the partition, 122.1/2 acres of land was allotted to Kandasamy Gounder and 122.1/2 acres of land was allotted to Sellappa Gounder in the year 1951, which is evidenced by document Ex.A.7. In that document 21 links length and 6 links width pathway was allotted for the use of the parties. For better appreciation, the relevant portion is reproduced as follows,

“.....வடக்கு 21 லிங்க்ஸ் நிலத்தில் 6 லிங்க்ஸ் அகலத்தில் கிழமேலாக
பி செட்யூல் சம்மந்தப்பட்டவர்கள் ஆடு, முாடு முதலியவைகள்
போவதற்கும், நடந்து கொள்வதற்கு நடபாத்தியமும்.....”

28.This portion is situated on the northern side of the property in T.S.No.6 and southern side of the property in T.S.No.5 and the right was given to Sellappa Gounder and Chinnu Gounder. After the partition deed, Chinnu Gounder and Sellappa Gounder again partitioned their properties in the year 1955, which is evidenced by Ex.B.11, in which, 'A' schedule portion was allotted to Chinnu gounder and 'B' schedule portion was allotted to Sellappa Gounder. In the partition deed Ex.B11, right for the pathway was not given to Sellappa Gounder. The plaintiff purchased the property from Sellappa Gounder



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as per Ex.A.1. In the absence of any right given to the plaintiff's vendor, namely Sellappa Gounder for the pathway on the northern side of T.S.No.6, he cannot convey such a right to his purchaser by way of Sale deed Ex.A.1. Therefore, upon the strength of Ex.A.1, Sale Deed, the plaintiff cannot claim any right over the pathway on the northern side of T.S.No.6. Therefore, the trial Court rightly dismissed the claim of the plaintiffs. But the First Appellate Court, by relying the Commissioner's report Ex.C1 and C2, granted such right which is unsustainable and erroneous and liable to be set aside.

29. In view of the above, the Judgement and Decree dated 22.04.2009 made in A.S.No.93 of 2008 on the file of the Principal Sub Court, Salem is set aside. The the judgment and decree dated 26.03.2008 made in O.S.No.489 of 2001 on the file of the Principal District Munsif, Salem is restored. The substantial questions of law formulated in the second appeal are accordingly answered.

30. Accordingly, this Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.



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Neutral Citation : Yes/No

To

1. The Principal Sub Court, Salem
2. The Principal District Munsif, Salem

V.SIVAGNANAM, J.

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Pre-Delivery Judgment made
in S.A.No.1336 of 2010

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