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S.A.No.823 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.03.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.823 of 2013 &
Cross Objection No.117 of 2013

Nataraj

... Appellant

-Versus-

D.S.Jayapal

... Respondents

Appeal filed under Section 100 of C.P.C. against the judgement and decree dated 08.07.2009 made in A.S.No.52 of 2008 on the file of the Subordinate Judge Court, Dharapuram reversing the judgment and decree of the Trial Court dated 21.10.2008 in O.S.No.204 of 2002 on the file of the District Munsif Court, Dharapuram.

*For Appellant In : Mr.A.K.Sridharan
S.A.No.823 of 2013 & for
respondent in
Cros.Obj.No.117 of 2013*

*For Respondent in : Mr.T.Murugamanickam,
S.A.No.823 of 2013 & for Senior Counsel for
Cross Objector in Ms.K.Ponmani and
Cros.Obj.No.117 of 2013 Ms.Jeenath Begam*



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COMMON JUDGEMENT

This second appeal arises against the judgment and decree of the court of Subordinate Judge at Dharapuram in A.S.No.52 of 2008 dated 08.07.2009. The appeal before the learned Subordinate Judge, Dharapuram was filed against the Judgment and Decree of the learned District Munsif at Dharapuram in O.S.No.204 of 2002 dated 21.10.2008.

2. The appellant before me is the defendant in the suit.

3. For the sake of convenience, the parties shall be referred to as per their ranks in the original suit.

4. The plaintiff came forward with O.S.No.204 of 2002 for the relief of declaration, prohibitory injunction and mandatory injunction. He alleged that the defendant had encroached upon his property and had put up construction. The plaintiff had purchased the property on 07.03.1998. The extent of the property purchased was 2270 sq. ft. The plaintiff's vendor had retained 1510 sq.ft. As per the sale deed, a passage was provided from the Dharapuram Municipal road to have access to the plaintiff's property. The extent of the



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passage was 47 feet North-South and 7½ feet in breadth (East-West). The defendant is none else than the neighbour of the plaintiff. Since he had put up construction encroaching upon the southern compound wall of the plaintiff and on the east-west wall to an extent of 31½ feet, the plaintiff was constrained to file a suit for the aforesaid reliefs.

5. The defendant being served with the summons, entered appearance and pleaded that the compound wall was within the boundary line of the defendant. As per the document, the plaintiff is entitled to only 6 feet and in fact, the owner, Karuppasamy, who had alienated the property in favour of the defendant had retained 1 ½ feet. Since the plea was that the plaintiff had only 6 feet and the compound wall was 7 ½ feet i.e., 1 ½ feet into the property of the defendant, the defendant pleaded that he has got every right to repair, maintain and white wash the wall. He further pleaded that there is no encroachment and prayed for dismissal of the suit.

6. On the basis of the above pleadings, the trial court framed the following issues:

“1. தாவாவில் வாதி கோருகின்ற பரிகாரங்கள் வாதிக்கு கிடைக்கக்கூடியதா?

2. தாவா சுவற்றில் வாதிக்கும் மற்றவர்களுக்கும் எந்த ஒரு பாத்தியமும்



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கிடைப்பாது என்று பிரதிவாதி கூறவது சரியா?

3. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் என்ன?”

7. The plaintiff entered the witness box and examined himself and one other witness on his side. The defendant alone entered the witness box in order to substantiate his case. The plaintiff filed Ex.A1 and Ex.A2 and the defendant filed only one document i.e., Ex.B1. Finding that the case requires report and plan by a Commissioner, an Advocate Commissioner was appointed for the purpose of inspection of the suit property. After inspection, he submitted the plan under Ex.C1 to Ex.C6.

8. After a detailed analysis of the merits of the case, the trial court came to the conclusion that the boundaries had been distinctly demarcated by the construction of the compound wall and there is no question of encroachment by the parties. Therefore, it granted the relief of declaration in favour of the plaintiff, but denied the injunction relief. However, it did not give a finding on the ownership of the wall. The relief of prohibitory injunction and mandatory injunction having been denied by the learned trial judge, the plaintiff preferred an appeal in A.S.No.52 of 2008.

9. It is pertinent to point out here that, though the defendant could have preferred an appeal against the declaration, he did not do so. Therefore, that



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portion of the decree has attained finality. The appellate court granted the relief of prohibitory injunction, but dismissed the relief of mandatory injunction.

Aggrieved by the same, the defendant is on appeal before me. As against the denial of mandatory injunction, the plaintiff had preferred cross objection in Cross Objection No.117 of 2013.

10. This Court originally ordered notice regarding admission in the matter on 12.09.2013. Ms.Zeenath Begam entered appearance on behalf of the respondent. Thereafter, upon hearing both sides, the second appeal was admitted on 22.03.2022 on the following substantial questions of law:

“a) Whether the lower appellate court, while reversing the findings of the trial Court, insofar as the relief of permanent injunction is concerned, had assigned cogent reasons for differing with the findings of the trial Court as mandated under Order 41 Rule 31 of CPC?

b) Whether the lower appellate court was right in granting the relief of permanent injunction in favour of the plaintiff when the reasons assigned for not granting the relief of mandatory injunction will equally apply while considering the relief of permanent injunction also?

c) Whether the findings of the lower Appellate Court can be termed as perverse due to improper



appreciation of the oral and documentary evidence and the Commissioner's Report that was available on record?"

11. Mr.Sridharan would submit that the lower appellate court had not assigned any reason for granting the relief of prohibitory injunction, because of an improper appreciation of oral and documentary evidence, especially the Advocate Commissioner's report. This requires me to look at Ex.B1 on the basis of which the defendant had purchased the property.

12. Under Ex.B1, the schedule reads north by the house of the plaintiff and the east by six feet passage. Apart from that, the advocate commissioner's reports Ex.C1 to Ex.C6 when perused show that the possession of the plaintiff tallies with the property that he has purchased over the property. Under Ex.C3, it is noted that the defendant has fixed PVC tubes coming from the toilet, which had been constructed on the northern side of his property annexing the wall of the plaintiff as a boundary. Therefore, this makes it clear that the plaintiff is entitled for a declaration on the basis of the sale deed that had been executed in his favour and the prohibitory injunction that had been granted does not require any interference with. Consequently, the judgment and decree in A.S.No.52 of 2008 stands confirmed.



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13. Now let me turn to the Cross Objection. Though the courts below found that the wall as well as the extent under occupation of the plaintiff is justified, it had denied the relief of mandatory injunction on the ground that the plaintiff had not made any police complaint prior to the presentation of the plaint. It is not necessary in all cases that the party should approach the police for the purpose of resolving disputes. This is proved in the case of civil disputes.

14. Having come to the conclusion that the boundaries will prevail over the extent, the court below ought to have granted the relief of mandatory injunction directing the removal of roof, which rests on the plaintiff's wall and the pipeline that had been laid by the defendant on the wall.

15. This is very obvious that if there is a sewage leak from the pipeline, it would result in an unbearable nuisance to the plaintiff. It is not the business of one neighbour to create a situation, whereby his sewage goes into other neighbours' property. If such a situation occurs, then the latter is entitled to seek for a mandatory injunction to ensure the nuisance abates.



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16. Therefore, I am of the view that the denial of mandatory injunction after having granted declaration and prohibitory injunction is not justified. Consequently, cross objection No.117 of 2013 stands allowed. The denial of the portion of mandatory injunction is set aside. Consequently, the suit shall stand decreed as prayed for.

17. At this stage, Mr.A.K.Sridharan submitted that his client, if given sufficient time, will remove the pipeline as well as the roof, which rests on the plaintiff's compound wall. The request seems to be reasonable. I am not inclined to push the parties immediately for the purpose of execution. On instruction from his client, who is present before the court, Mr.A.K.Sridharan undertakes to remove the roof and pipeline within a period of three months from the date of receipt of a copy of this Order. The said undertaking is recorded.

18. The respondent in the cross objection is granted three months time to ensure the encroachments made by him on the wall belonging of the plaintiff are removed. In case, it is not done so within a period of three months, the plaintiff will be at liberty to move an executing court to ensure the encroachments are removed.



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19. In the result, of the above discussion, the judgment and decree of the court of Subordinate Judge, Dharapuram in A.S.No.52 of 2008 modifying the judgment and decree of the learned District Munsif Court at Dharapuram in O.S.No.204 of 2002 dated 21.10.2008, insofar as the portion granting the relief of declaration and prohibitory injunction, stands confirmed. Since the cross objection has been allowed, the denial of mandatory injunction is set aside. Consequently, the suit shall stand decreed as prayed for. Three months time is granted to the defendant to remove the offending structure.

20. In fine, the second appeal is dismissed and the cross objection is allowed. As the parties are neighbours, I am not inclined to impose any costs.

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Index : yes / no

Neutral Citation : yes / no

Speaking / Non Speaking Order



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To

- 1.The Subordinate Judge Court, Dharapuram
- 2.The District Munsif Court, Dharapuram.



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V.LAKSHMINARAYANAN, J.

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