



S.A.(MD)No.92 of 2005

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.08.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD).No.92 of 2005

and

C.M.P(MD)Nos.859 & 860 of 2005

Rajagopal Pillai (Died)

... Appellant

2.R.Indirani

3.R.Kumari Venbu

4.R.Muthulakshmi

(Appellants 2 to 4 are bring on record
as legal heirs of the deceased sole
appellant vide Court Order
dated 20.09.2018)

.VS.

1.Kadar Beevi

2.Sikkandar Batcha

3.Samsudeen

4.Bather Nissa

5.Meera Mahaideen

6.Sahul Hameed

7.Nagoor

8.Shajahan

9.Mumtaz Begum

... Respondents



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PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree made in A.S.No.12 of 2004 on the file of the Sub-Court, Sivakasi, dated 18.10.2004 in confirming the judgment and decree of the District Munsif, Sattur in O.S.No.67 of 2000, dated 15.12.2003.

For Appellants : Mr.S.Kadarkarai
For R1,R3 to R6
& R8 : No appearance
For R2 : Dismissed
For R7, R9 : No appearance

J U D G M E N T

The respondents 1 to 8 are the plaintiffs. The appellant is the first defendant and the 9th respondent is the second defendant. The respondents 1 to 8/plaintiffs filed a suit in O.S.No.67 of 2000, on the file of the District Munsif Court, Sattur against the appellant and the 9th respondent for declaration and mandatory injunction.

2. The case of the plaintiffs/respondents 1 to 8 is that the first schedule house had originally belonged to one Lohambal Anni, who had



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owned a match factory. Towards recovery of arrears of sales tax from her, the Commercial Tax department brought the property for auction in which, one Nagalinga Mudaliar was the successful bidder and the property was handed over to him on 21.01.1966 and he was in possession and enjoyment of the same till 18.02.1980. On 18.02.1980 the said Nagalinga Mudaliar had settled the property (1st schedule house) in favour of minor Sivagami, daughter of Arunachalam Mudaliar. The gift/settlement was accepted on behalf of the minor by her mother Neelambal. The Sivagami after attaining the majority sold the same to one Abbas Ali and his wife, Kadar Beevi (1st plaintiff) by way of a registered sale deed, dated 17.07.1991. Abbas Ali passed away during 1996 leaving behind the plaintiffs and the second defendant as his legal heirs. The plaintiffs and the second defendant were enjoying the property without any interference. When the Abbas Ali and his wife purchased the 1st schedule property on 17.07.1991, the 2nd schedule lane existed on the western side thereof as a common lane of them. Through the lane, the eastern wall of the first schedule property had been maintained and this position continues even now. All of a sudden, the first



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defendant had erected a gate at the southern tip of the lane preventing the plaintiffs' access to the land for maintaining the eastern wall. The eastern house (east of the lane) appears to have been purchased by the first defendant. The eastern Wall (3rd schedule) of the 1st schedule house is the exclusive wall of the plaintiffs and the second defendant, in which, the first defendant has no right whatsoever. While so, when the plaintiffs were away on 01.05.2000, the first defendant had raised a construction to an extent of 17 feet x 1-1/2 feet x 3.25 feet on the northern end of the eastern wall (3rd schedule property). This constructed portion is described as the plaint 4th schedule. Therefore, the plaintiffs have filed a suit for the following reliefs:-

i) Declaration that the 3rd schedule wall (eastern wall of the 1st schedule house) is a common wall belonging to the plaintiffs and the second defendant with a prohibitory injunction against interference by the first defendant of their enjoyment as such.



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ii) Declaration that the second schedule lane is a common lane of the plaintiffs and the defendants with a consequential injunction against interference.

iii) Mandatory injunction against the first defendant to remove the gate erected on the southern tip of the 2nd schedule lane.

iv) Mandatory injunction directing the second to clear off the 4th schedule construction (wall) at his costs.

v) Costs of the suit from the first defendant with any other deserving relief or reliefs.

3. The first defendant filed a written statement and stated that based on the agreement, dated 05.04.1957 between Lohambal Anni and Kathirvelammal, half of the length of the eastern wall (Plaint 3rd schedule) is a common wall of the plaintiffs and the first defendant. The claim that the plaintiff second schedule is a common lane is pointedly denied by the first defendant. According to him, the plaintiff second schedule is not a lane but a



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pathway serving as a means of an access to his (D1's) house from Pillaiyarkoil Street on the south. The second defendant is a non-contesting party in the suit. She is one of the owners of the first schedule house and prayed for dismissal of the suit.

4. After completing the pleadings and framing of issues, on the side of the plaintiffs, two witnesses were examined as P.W.1 & P.W.2 and eight documents were marked as Ex.A1 & A8. On the side of the defendants, D.W.1 was examined and 2 documents were marked as Ex.B1 & Ex.B2. Further, the Court documents C.W.1 and C.W.2 were marked.

5. On considering the above said oral and documentary evidence, the trial Court decreed the suit in favour of the plaintiffs granting the relief of declaration that the plaintiffs and the second defendant are entitled to AG Wall as mentioned in Ex.C2, permanent injunction was granted against the first defendant not to disturb the enjoyment and possession of the same and declaration that AGJE Common lane as mentioned in Ex.C2 belongs to



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plaintiffs and defendants and permanent injunction restraining the first defendant or his men not to disturb the possession and enjoyment of the above said common lane by the plaintiffs and mandatory injunction was granted directing the first defendant to remove the gate mentioned as EA in Ex.C2 within a period of one month and mandatory injunction was granted directing the first defendant to remove the compound wall in the first floor within a period of one month and that the parties shall bear their own costs with a further direction that Ex.C2 shall form part and parcel of the decree.

6. Aggrieved by the said judgment and decree of the trial Court, the first defendant has filed an appeal before the Sub-Court, Sivakasi. The Sub-Judge has taken the appeal on file in A.S.No.12 of 2004. On hearing the arguments, considering the entire materials and re-appreciated the oral and documentary evidence, the appellate Court dismissed the appeal and confirmed the judgment and decree passed by the trial Court. Further, the appellate Court has directed the appellant/D1 to remove the gate at the southern tip of the plaint 2nd schedule lane (at the points AE in the Exhibit-



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C2) on or before 30.11.2004. The appellant/D1 shall take off the construction made between the points PD in the plaint 3rd schedule Wall (AD line in the Exhibit-C2) on or before 30.11.2004.

7. Aggreived by the said judgments and decrees, the appellant/first defendant has filed the present appeal.

8. At the time of admitting the present second appeal, this Court had framed the following substantial question of law for consideration:

"1) Whether the Courts below are correct in decreeing the suit with regard to the land on the basis of Ex.A1 and A2 when the appellant is not the party to the said documents?

9. The learned counsel appearing for the appellant/first defendant would submit that the Courts below had not considered the Ex.B1 dated 10.07.1957 where the plaintiffs' vendor's vendor and one Kathirvelu Ammal



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had agreed to treat the suit third schedule property as a common wall and the Kathirvelu Ammal had the exclusive right immediately in the eastern side of the wall and the Lohambal Ammal had the right only in the western side the wall and as such, the present suit filed by the plaintiffs claiming the exclusive right of the wall which is the subject matter in Ex.B1 is without any merits and the suit should have been dismissed by the Courts below.

10. He further submitted that the boundary recital as found in Ex.A8 do not tally with boundary recitals as given in Ex.A1 and Ex.A2 and the trial Court has failed to note that no lane as detailed in item 2 of the schedule property has been mentioned on the eastern side of the plaintiff's house in Ex.A8 and the measurements given in the 1st schedule measures, East-West 24 feet and North-South 86 feet only whereas, in Ex.A8 it is stated as 8 Yards x 48 Yards on 24 Feet x 144 feet. On the other hand, the Commissioner's Report under Ex.C1 read with Ex.C2 says it is only 9 feet 3" x 89 Feet 5 inches and there is a wall all along AGPOD as shown in the Commissioner's Report. The Courts below failed to see that the lane



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AGFIKJE is the exclusive lane of the appellant/1st defendant herein and it is the only way of egress and ingress for the appellant/1st defendant's house from the street on the southern side and the respondents/plaintiffs can have no right over the said lane which exclusively belonged to the appellant/1st defendant herein by adverse possession also. The measurements of the property described in the schedule under Ex.A1 shows only 24 Feet East-West and 44 Feet North-South whereas, a larger extent has been shown under Ex.A-2 viz., 24 Feet and 86 feet and so the measurements given in Ex.A8 followed by Ex.A1 and A2 are only imaginary and non-existence on ground. The Exhibits A1 and A2 in their boundary recitals are showing that the Northern portion of the property was given to one Ramakrishnan and had sold the same to the first respondent/1st plaintiff and Late Abbas Ali Rowther and those documents were neither produced nor any oral evidence let in by the respondents/plaintiffs. The Courts below had failed to note that the Western Wall of the appellant/1st defendant's house is the suit third schedule wall which is in existence for more than the statutory period and it has been enjoyed as a common wall by the respondents/plaintiffs and the



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appellant/1st defendant. The finding of the trial Court, that A G alone is the absolute wall of the respondents/plaintiffs, cannot be correct because that 50 feet long common wall can be only with respect to the appellant/1st defendant's house North-South length and which has not been measured. The Courts below having found and accepted the Ex.B1 agreement ought to have held that the construction of the wall over the terrace along P and D by this appellant, is within his rights and is entitled to put the same on the terrace portion of her house along G D at her costs to prevent nuisance caused by the respondents/plaintiffs and on that score, the lower court ought to have dismissed the plea for mandatory injunction in respect of the 4th schedule property. The plaintiffs have not produced any documents to show that it is their common lane. The Courts below failed to note that AGFE portion is the only way of ingress and egress for this appellant/1st defendant and he and his ancestors are in adverse possession of the same. The courts below ought to have dismissed the plea for mandatory injunction for removal of the Gate shown in the second schedule which is the only pathway of the appellant/1st defendant and which is enjoyed by him from



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time immemorial by himself and through his ancestors and enjoyed by them through adverse possession also and prayed for allowing the appeal.

11. No representation for the respondents.

12. It is seen that originally, the sale deed was executed on 17.07.1991 by one Sivagami to the first plaintiff and her husband. Ex.A1 is nothing but a title deed in favour of the plaintiffs' vendors. Ex.A1 is the settlement deed, in original, executed by Nagalinga Mudaliar to minor Sivagami. 'ABCD' is the 1st schedule house. 'AGFJE' is the second schedule lane. 'AD' line is the 3rd schedule Wall, which is the eastern wall of the house. The points 'PD' refer to the 4th schedule construction to remove which the plaintiffs seek mandatory injunction. In the lane, at the point 'AE' which is the southernmost end, the first defendant has allegedly erected a gate. The first defendant admits Lohambal Anni's original title to the 1st schedule house in his chief-examination. The description as to lie of the property therein is very relevant. There is no dispute with regard to



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the manner in which the property was located as per the document in Ex.C2 and the Advocate Commissioner's report was of the view that the Eastern Wall is a common wall. Very notable here is a reference in the Exhibit-B2 that the Kathirvelammal's house was the eastern boundary of the plaint 1st schedule house. Ex.B2 is the proceedings, dated 29.03.1971 of the Commercial Tax Department confirming the auction sale held on 21.01.1966 in favour of Nagalinga Mudaliar. The first defendant's oral evidence also goes to support the theory that it is a common lane. About the nature of the right as to the plaint 3rd schedule wall (AD line in the Exhibit-C2), the 1st defendant's (DW1's) evidence itself proves that it had been an exclusive wall of the plaintiff's predecessor in title of the plaintiffs.. Exhibit-B1 is the agreement about the said wall between Lohambal Anni and Kathirvelammal. This registered agreement was to the effect that in the 'AD' wall belonging to Lohambal Anni a length of 50 feet was to be treated as a common wall. The purpose of such agreement was restricted for Kathirvelammal to rest the wooden slabs of her east-west wall on the north-south 'AD' wall and to raise upper floor annexing or touching the AD line.



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As of now, the total length of the 'AD' line is 86 feet. Upto 50 feet of the length from the northern tip towards south, the wall is common in view of the Exhibit-B1. The remaining 36 feet ending with the southern tip is certainly an exclusive wall of the plaintiffs. The exhibit-B1 reveals the magnanimity of Lohambal Anni. She agreed to treat a part of her own wall as a common one with Karthivelammal.

13. With regard to the substantial question of law, this Court is of the view that from the schedule of Ex.A1, it is clear that the total length of the plaintiffs' property was 86 feet and the breadth 24 feet. However, the Commissioner's report puts the length as 89' 5" and the breadth 9' 3". The original title is traceable to the Ex.B2 dated 29.03.1971. As regards the breadth of the property, there is no dispute. The litigation is strictly confined to north-south length, particularly the 'AD' wall and the lane on the east of it. On the basis of the materials available and on the evidence, this Court is inclined to agree with the judgment and decree rendered by the Trial Court and the appellate Court. The Courts below have rightly decreed



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the suit with the land on the basis of Ex.A1 and A2, which needs no interference.

14. Accordingly, this second appeal is dismissed and the judgments and decrees of the courts below is confirmed. It is made clear that all the parties shall use the same as a common pathway and there shall not be any obstruction by either parties. No costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes / No

Speaking Order : Yes / No
am

12.08.2024



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To

- 1.The Sub-Court,
Sivakasi.
- 2.The District Munsif,
Sattur.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

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