

1.Chellapandian Vs. Respondent

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Court : Chennai

Decided On : Apr-04-2014

Judge : G.Chockalingam

Appellant : 1.Chellapandian

Respondent : Respondent

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 04.04.2014 CORAM THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM S.A.(MD)No.118 of 2006 1.Chellapandian 2.Srinivasagam : Appellants/Plaintiffs versus Gurumoorthy : Respondent/Defendant Prayer This second appeal filed under Section 100 of CPC against the judgement and decree passed in A.S.No.32 of 2002, dated 24.09.2005 on the file of the Sub Court, Ambasamudram, reversing the judgement and decree passed in O.S.No.345 of 1999, dated 26.03.2002 on the file of the Principal District Munsif, Ambasamudram.

!For Appellants : Mr.D.Nallathambi ^For Respondent : Mr.A.Arumugam :

JUDGMENT

Challenge in this second appeal is to the judgment and decree, dated 24.09.2005 passed in A.S.No.32 of 2002 by the Sub Court, Ambasamudram, reversing the judgement and decree passed in O.S.No.345 of 1999, dated 26.03.2002 on the file of the Principal District Munsif, Ambasamudram.

2.The appellants herein as plaintiffs have instituted Original Suit No.345 of 1999 on the file of the trial Court praying for the relief of declaration of separate possession and permanent injunction, wherein the present respondent has been shown as defendant.

3.It is averred in the plaint that the suit properties were allotted to the share of the plaintiffs' father Mukka Thevar in the partition took place on 27.03.1959 and 20.07.1959 and the defendant is residing nearby the house of the plaintiffs and on 14.01.1998, the defendant attempted to flow the waste water through the plaintiffs house.

In this regard, 27.01.1998, a lawyer's notice was sent to the defendant and thereafter, also the defendant attempted to flow the waste water to the house of the plaintiffs.

Hence, the suit is filed for the reliefs as stated above.

4.In the written statement filed on the side of the defendant, it is averred as follows:- The suit filed by the plaintiffs is not maintainable in law.

The four boundaries given in the suit schedule are not correct.

The alleged documents executed on 27.03.1959 and 20.07.1959 were created for the purpose of filing of the suit.

The parties to the alleged two documents were not added to the present suit and therefore, the suit filed by the plaintiffs is not maintainable for non-joiner of necessary parties.

The house of the defendant is having 6 feet passage on the southern side and the defendant using the said passage as a way to run the waste water.

The alleged stone wall is a common wall.

Hence, the defendant prayed for the dismissal of the suit.

5.The trial court after considering the rival evidence adduced on either side has decreed the suit as prayed.

Against the judgment and decree passed by the trial court, the defendant as appellant has preferred the A.S.No.32 of 2002 on the file of the fiRs.appellate court.

The fiRs.appellate court, after hearing both sides and upon reappraising the evidence available on record, has allowed the appeal and thereby set aside the the judgment and decree passed by the trial court.

Against the judgement and decree of the fiRs.appellate court, this second appeal has been preferred at the instance of the plaintiffs as appellants.

6.At the time of admitting the present second appeal, the following substantial questions of law have been formulated for consideration:- (1)Whether the respondent is entitled to claim flow of water of into the appellant's land as easementary right?.

(2)Whether the lower appellate court has mislead the admission and came to a wrong conclusion and hence, the same has to be interfered with under Section 100 CPC?.

(3)Whether the judgement and decree of lower appellate court is liable to be set aside since the lower appellate court has not stated any reason how the judgement of the trial court is wrong?.

7.It is argued on the side of the learned counsel for the appellants that the fiRs.appellate court, without considering the evidence available on record and documents and the commissioner's report, erroneously come to the conclusion that in the suit property, there is no passage and it does not belong to the plaintiffs and the fiRs.appellate court was wrong in coming to the conclusion that the southern side of the well is of the defendant and the defendant also purchased the same and utilised the space for maintaining the wall are all entirely false and the defendant has no property on the south of his eastern wall and the the fiRs.appellate court was wrong in coming to the conclusion that the suit property

i.e., passage does not cover under Exs.A1 and A2 sale deeds, by applying wrong principle of law and therefore, the judgment and decree of the fiRs.appellate court is liable to be set aside and the second appeal has to be allowed.

8.In support of his contention, the learned counsel for the appellants/defendants relied upon the following judgments:- 01.(2001).MLJ13(SC) in the case of Sarawati and another versus S.Ganapathy and another.

2.M.Abdul Wahab versus Natarajan made 9.On the other hand, the learned counsel for the respondent/defendant argued that the fiRs.appellate court, after applying the correct provision of law and evidence adduced on the side of the plaintiffs and PW1 and the entire documents filed on behalf of both sides, come to the conclusion that the suit property mentioned in the plaint does not contain any passage, which is in existence as per sale deeds of the plaintiffs and therefore, the plaintiffs have not come to the court with the clean hands and hence, the fiRs.appellate court has correctly granted the relief to the defendant and therefore, the judgement and decree of the fiRs.appellate court need not be interfered with and the second appeal has to be dismissed in toto.

10.Further, the learned counsel for the respondent argued that the suit property is not covered as per the documents produced by the plaintiffs and hence, the declaration and injunction granted by the trial court is liable to be set aside and there is no reason or illegality or infirmity of the judgment and decree of the fiRs.appellate court and on that ground also, the judgment and decree of the fiRs.appellate court has to be confirmed.

11.It is admitted by both parties that the plaintiffs has submitted a plaint plan showing the particulars of disputed property, which was marked as Ex.A3.

It is further admitted that in this case, an Advocate Commissioner was appointed and the Advocate Commissioner, after giving notice to both parties and in the presence of both parties, visited the suit property and filed a report and plan, which were marked as Ex.C1 and Ex.C2.

12.Further, in order to prove their case, the plaintiffs filed a suit specifying the following property as mentioned in the plaint, which reads as follows:-
mk;ghrKj;jpuk; jhY].f;fh.

\$kPd; rp';fk;gl;o fpuhkk;.

g\$idklk; bjUtpy; fhyp kid vUj;Jgpiwf;F vy;iy ghy;njth;.

Kj;Jg;ghz;o njth; Mfpnahh; kidf;F fpHf;F.

rl;lehj njth;.

thjpfs; t PL kw;Wk; brhe;j Klf;fpw;Fk; tlf;F.

uhikah njth; kf;fs; Fkhurhkp.

rl;lehjd; Mfpnahh; vUj;Jgpiwf;Fk;.

kidf;Fk; nkw;F.

gpujpthjp tPl;Lf;Fk; bjw;F.

,jw;Fl;gl;l fpHnky; j/K/11 , bjd;tly; 12-1/2 j/K/ cs;s kida[k; mijpy; ,Uf;Fk; vUj;J gpiw
tpguk; rhp/ 13.Further, it is relevant to point out some portion in the
Commissioner's report, which are as follows:- 13/gpujpthjp kw;Wk; f PH;jsj;jpy;
cs;s tPl;Lf;F bjw;F RtUf;F bjw;nf fpH nkyhf Klf;F cs;sJ vd gpujpthjp jug;gpy;
Twg;gLfpwJ.Mdhy; i& V V1 gp bjw;F RtUf;F bjw;nf thjpfspd; khl;Lj;bjhGf;fs; fhyp
kidfs; cs;sd/ m';F fkpc&dh; tiuglj;jpy; fhl;lg;gl;Ls;sJ nghy; V vg;.

V1.

O1.

gprp vd;w Kd;W fy;fl;L fhk;gt[z;L Rth;fs; ,Ug;gijna fhz KofpwJ.Klf;F vija[k;
fhzKoatpy;iy/ 14/gpujpthjp kw;Wk; f PH;jsj;jpy; cs;sth;fSf;Fg; ghj;jpagl;l bjw;F Rtiu
ngQqtjw;F gpujpthjpf;F jgrpy; fhyp kid jtpu ntW ,lk; fpilahJ.Mdhy; gpujpthjp jdJ
bjw;F RtUf;F bjd; gf;fk; tUtjw;F thjpf; tPl;L thry; tHpahf tUtij jtpu ntW ghij
fpilahJ.15/i& V V1 gp Rth; jiukl;lj;jpypUe;J kl;lg;gh tiu cauk; 19 mo 3 m';Fyk; MFk;/

i& RtUf;F bjd;gf;fk; Vzp itj;J bts;saof;f 2 my;yJ3mo fhypaplk; ,y;yhtpl;lhy; Vzp itf;f KoahJ vd;gJ th!;jtk;/ 14.Further, in this case PW1 in his cross examination admitted that:- gpuhJ jgrpy; brhj;ij 2 gj;jpu';fs; ::K:yk; fpiuak; th';fpapUf;fpnwhk;/ gpuhjpy; fpHnky; 11-1/4.

bjd;tly; 12-1/2 jr;R KGk; jgrpyhf fhl;lg;gl;Ls;sJ.gpuhJ jgrpy; Twg;gl;Ls;s fpHnky;.

bjd;tly; mst[fSld; Toa brhj;J v';fSf;F th/rh/M/ 1 kw;Wk; 2 fpiua Mtz';fs; vGjpf;bfhLj;j egh;fSf;F ghj;jpag;gl;oUe;jJ vd;gij fhl;Lk; Mtz';fs; vd;dplk; ,;y;iy/ ////////////// gpuhJ brhj;jpw;F tlg[wk; fpHnky; KLf;F vt;tst[Jhuk; tiu ,Ue;jJ vd;gij fhl;Ltjw;fhf th/rh/M/9 Mtzk; jhf;fy; bra;Js;nsd;/ th/rh/M/9y; gf;fk; 3y; fz;Ls;s fpHnky; 7 bjd;tly; 12 cs;s kidapy; ghjp brhj;ij eh';fs; th/rh/M/2 :Kyk; fpiuak; th';fpapUf;fpnwhk;/ th/rh/M/1.

2 gj;jpu';fs; xnu eguhy; vGjpf; bfhLf;fgl;l gj;jpu';fs;/ th/rh/M/1.2 vGjpf; bfhLj;j egh;fspy; xUtuhd uhikahj; njth; mjpy; fz;L mtuJ kidtp gpukhr;rpak;khSf;F vGjpf;bfhLj;j brl;oy;bkz;l; gj;jpuk; jhd; th/rh/M/9 ////////////// 15.Further, on the entire reading of the plaint, the entire suit property figured as that:- fpHnky; j/K/11 , bjd;tly; 12-1/2 j/K/ cs;s kida[k; mjpy; ,Uf;Fk; vUj;J gpiw tpguk;/ 16.As per the admission of PW1 in his deposition that Exs.B1 and B2 are their prior title deeds, parent documents, in which it is stated as follows:- ".....nkw;go fpukhj;jpy; i& 4tJ map[l;l tPl;L bghJ KLf;Ff;Fk; bjw;F.

Rg;gpukzpa njth; ghf bjhK kidf;Fk; nkw;F.

r';fuyp';fj;njth; tifawh kid tPl;Lr; RtUf;Fk; tlf;F.

MWKfj; njth; bjhGtpw;Fk; fpHf;F bjhG fhyp & kid jr;RKHk; fpHnky; 7.

bjd;tly; 12 cs;s kida[k;".

18.As admitted by PW1 in the parent documents which are dated 1946 and 1959 (Ex.B1-21.09.50 and Ex.B2-10.02.46).it was stated that northern boundary is specifically mentioned as 'bghJ Klf;fpw;F bjw;F/ 19.So, according to Exs.B1 and B2, on the northern side of the plaintiffs' property, there was a common lane was specifically mentioned.

According to the plaintiffs, they purchased that property concerned Exs.B1 and B2 by Sale Deeds Exs.A.1 and A.2.

20.In Ex.A1 sale deed, it is stated as follows:- rp';fk;gl;o f!;gh fpuhkk; gps;isahh; nfhtpy; eLj;bjUtpy; v';fs; iftrkpUf;fpw fhyp kidf;Fk; (nk).j';fs; kidf;Fk; uhikahj; njth; kidf;Fk;(t).r';fu rpt Rg;gpukzpaj; njth; fp/ Rg;giahj; njth; tifawh ,th;fs; kidf;Fk; (fp).r';fu rptRg;gpukzpaj; njth; tPl;Lr;RtUf;Fk; (bj).khd kidr;jr;RKHK; fpHnky; 7- 1/2 bjd;tly; 12-1/2 a[s;s fhyp kida[k; // 21.In Ex.A2, it is stated as follows:- rp';fk;gl;o \$kPd; f!;gh fpuhkk; gps;isahh; nfhtpy; eLj;bjUtpy; v';fs; iftrkpUf;fpw fhyp kidf;F (nk).j';fs; kidf;Fk; (t).j';fs; fpiua kidf;Fk; (fp).r';furpt Rg;gpukzpaj;njth; tPl;Lr; RtUf;Fk; (bj) khd kidr;jr;RKHK; fpHnky; 3- 3/4 bjd;tly; 12-1/2 a[s;s kida[k; // 22.Even as per Exs.B1 and B2 of the year 1950 and 1946, the plaintiffs vendors purchased only the property south of the common lane and it was not mentioned in Ex.A2.

but it was wrongly mentioned even though it was stated in the documents of the year 1940-1950 that the plaintiffs vendors purchased only the property south of the common lane, but it was wrongly mentioned as r';fu rptRg;gpukzpaj; njth; tPl;Lr;RtUf;Fk; (bj)./ Even though existence of common lane mentioned in Exs.B1 and B2, it was wrongly mentioned in Exs.A1 and A2 as r';fu rptRg;gpukzpaj; njth; tPl;Lr;RtUf;Fk; (bj).23.Further even though, the suit property also specifically stated as per the document Exs.A1 and A2 suit schedule is mentioned in the plaint.

But the parent documents show that a common lane was in existence on the northern side of the plaintiffs property and no explanation is offered on the side of the plaintiffs that the common lane was mentioned in Ex.B1 and B2 and how the property acquired and what way it was merged, no explanation was offered on the side of the plaintiffs.

Hence, the argument of the learned counsel for the respondent that the plaintiffs have not come to the court with clean hands is acceptable one.

24.Further, it was admitted by PW1 in his cross examination that he has no objection to way the waster in the southern side.

25.Further, PW1 admitted that:- gpujpthjp FoapUf;Fk; t PL Fuf;fl;lhd; njthpd; mg;gh uhkrhkpj; njth; fhyj;jpy; fl;lg;gl;l t PL.

uhkrhkpj; njth; ,we;j 100 tUlK; Mfyhk; vd;W brhd;dhy; ,Uf;fyhk;/ 26.Further, on the side of the plaintiffs, one Kumarasamy examined as PW2.

27.PW2 in his cross examination admitted that:- Fuf;fl;lhj; njthpd; jfg;gdhh; uhkrhkpj; njth; fl;oa fl;olj;jpd; bjd;g[wk;.

jth brhj;jpd; tlgl[wKk; fpHnkyhf xU KLf;F cs;sJh vd;gij fhl;l th/rh/M/10 jhf;fy; bra;ag;gl;Ls;sJ vd;why; rhpjhd;/ th/rh/M/10 i& KLf;F cs;sJ vd;gJ Jy';Fk;/ Mdhy; jw;nghJ me;j KLf;F ,y;iy/ i& KLf;F MWKfj; njth;.

;;uhikahj; njth;.

Rg;gpukzpj;njth; MfpnahUf;F ghj;jpag;gl;IJ vd;W Fwpg;gplg;gl;Ls;sJ.me;j KLf;F uhkrhkp njth; fhyj;jpy; nghlg;gl;IJ.FWf;fhl;lhj; njth; fhyj;jpy; KLf;F nghlg;gl;IJ vd;W brhd;dhy; rhpay;y/ FWf;fl;lhj; njthpd; jfg;gdhh; uhkrhkpj; njth; fl;oa fl;olj;jpd; bjw;F Rthpd; bjd;gFjpia bts;isaof;f ntz;Lk; vd;why; me;j bjw;F Rthpd; bjd;g[wk; cs;s fhyp ,lj;jpy; epd;W jhd; bts;isaof;f ntz;Lk;/ i& fl;olj;jpd; bjw;F Rthpd; bjw;F gFjpia th/rh/M/10y; fpHnkyhf ghijfhl;lgg;gLs;s ,lj;jpy; epd;W jhd; bts;isaof;f ntz;Lk;/ kuhkj;J ntiyfisa[k; ghh;f;f ntz;Lk;/ uhkrhkpj; njth; fhyj;jpypUe;J ,d;W tiu bts;isaoj;Jk; kuhkj;J bra;Jk; tUfpwhh;fs; vd;W brhd;dhy; rhpjhd;/ 28.Hence, as per the admission of PW2, on the side of the plaintiffs, it is proved that there was a lane south of the defendant's property and the defendant's southern wall and the defendant using the southern wall to maintain repair and white washing work and therefore, the defendant has shown sufficient records.

But in the plaint schedule, it was mentioned that the northern side property is the wall and the defendant's property is contrary to the document.

Hence, since the plaintiffs have not come to the court with clean hands and suppressed the existence of the east-west wall and southern side of the defendant wall, this court is of the view that the suit was filed without mentioning proper boundaries.

29. Further, the judgment and decree of the trial court is that the suit schedule was specifically described and therefore, the plaintiffs are entitled for declaration and the relief as prayed is liable to be set aside and the fiRs.appellate, after analysing the entire materials on record has come to the correct conclusion that the suit schedule has not clearly mentioned the existence of a lane on the southern side of the defendant's property.

30. Hence, the plaintiffs have not come with clean hands and not described with the correct boundaries, no relief can be granted to the plaintiffs.

Hence, this court is of the view that the fiRs.appellate court has correctly come to the conclusion and no illegality or irregularly found in the findings of the fiRs.appellate court and the second appeal is liable to be dismissed.

31. Accordingly, the substantial questions of law answered.

32. In the result, the second appeal is dismissed and the judgement of the fiRs.appellate is confirmed.

Both the parties are directed to bear their own costs.

er To, 1.

The Sub Judge, Ambasamudram.

2.

The Principal District Munsif, Ambasamudram.

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