

**Subramanian and Another Vs. K. Mohan**

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**Court :** Chennai Madurai

**Decided On :** Dec-19-2016

**Judge :** S.S. Sundar

**Appeal No. :** Second Appeal (MD) No. 404 of 2011

**Appellant :** Subramanian and Another

**Respondent :** K. Mohan

**Judgement :**

(Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.17 of 2004 on the file of Subordinate Judge, Sankarankovil, dated 14.02.2007 confirming the judgment and decree passed in O.S.No.350 of 2000 on the file of Principal District Munsif Court, Sankarankovil, dated 07.10.2003.)

1. The plaintiffs 2 and 4 in the suit in O.S.No.350 of 2000 on the file of the Principal District Munsif Court, Sankarankovil, are the appellants in this Second Appeal.

2. The suit was originally filed by the plaintiffs 1 and 2. However, during pendency of the suit, the first plaintiff died. The second plaintiff is also the son of first plaintiff. However, the plaintiffs 3 and 4 were also impleaded as the other legal representatives of the first plaintiff. The suit is for declaration that the suit third schedule belong to the plaintiffs 2 to 4 exclusively and for permanent injunction

restraining the defendants from encroaching into the suit third schedule either by putting up any construction or by other means so as to interfere with the enjoyment of the plaintiffs 2 to 4. The suit is also for a mandatory injunction to remove the construction of defendant encroaching into the suit third schedule.

3. The case of the appellants in the plaint are as follows:-

3.1. The suit first schedule property originally belonged to the first plaintiff by virtue of a partition deed dated 30.04.1976 between the first plaintiff and his brothers. The suit first schedule property is a house belonged to the first plaintiff and the second schedule which is a vacant site on the eastern side of the plaintiffs' house. The entire suit second schedule is shown as vacant land lying on the east of plaintiffs' house and the second schedule also form part of the first schedule.

3.2. The property on the eastern side of the suit first schedule was purchased by the defendant from one T.M.Kanhasamy Mudaliar, son of Muppidathi Mudaliar. The defendant purchased a portion of the suit second schedule from the plaintiffs 1 and 2 by a sale deed dated 07.08.1991. The property sold to the defendant is only a portion having a width of 1 feet and 71 feet. After the portion, that was sold in favour of the defendant, the plaintiffs have retained the remaining portion of the second schedule which is described as the suit third schedule. Over the suit third schedule, the defendant was given a right of easement only for the purpose of whitewashing and carry out repair works in connection with the western wall of the defendant.

3.3. However, when the plaintiffs 1 and 2 were away from the village, on 15.06.1999, the defendant put up the western wall of his building encroaching into the third schedule illegally. The defendant while putting up the wall encroaching into the suit third schedule, the defendant has also put up windows and sun shades apart from drainage pipe in the wall on the western side of the defendant's property. Though the defendant promised to remove the offending construction within a month, he did not remove the encroachment despite enough time was given by the plaintiffs 1 and 2. Hence, the plaintiffs issued legal notice dated 07.09.2000 for which the defendant sent a reply on 11.09.2000 containing false averments. The defendant is trying to encroach into remaining portion of the third

schedule and hence, the plaintiffs were constrained to file this suit.

4. The suit was contested by the defendant disputing the alleged encroachment. It is the specific case of the defendant that the defendant has put up a construction only in the land belonged to the defendant by virtue of the sale deed dated 04.06.1990 and the sale deed executed by the plaintiffs themselves on 07.08.1991. The defendant further stated that the construction was put up in the year 1994-95 and that the plaintiffs were not objected to the construction at that time. Further, it was also contended by the defendant that the defendant has left even a small vacant space on the further west of his property and hence, the suit filed by the plaintiffs is misconceived. It was also the case of the defendant that he has obtained electricity service connection for the building from 1995 and that the suit is liable to be dismissed.

5. During trial, an Advocate Commissioner was appointed and he has submitted his report and plan dated 20.04.2001. The suit property was measured with reference to the document of title deed relied upon by the plaintiffs as well as the defendant. On the basis of the Commissioner's report and plan, the trial Court found that the plaintiffs are in enjoyment of the suit property as per the title deed and that the third schedule property do not belong to the plaintiffs. The trial Court also has found that the defendant has put up construction without encroaching into the property of the plaintiffs. However, the trial Court found that the plaintiffs are entitled to the vacant land immediately on the western side of the defendant's construction. Hence, the suit was decreed declaring the plaintiffs' right upto the building that was constructed by the defendant. Aggrieved by the judgment and decree of the trial Court, the appellants preferred an appeal in A.S.No.17 of 2004 on the file of the Sub Court, Sankarankovil. The appellate Court also after relying upon the documents filed by both sides and the report and plan submitted by the Advocate Commissioner came to the same conclusion as that of the trial Court. Having regard to the specific measurement found in the document of title deed and the Commissioner's report regarding the existence of building put up by the defendant, the lower appellate Court has also found that the plaintiffs present enjoyment excluding the construction of building by the defendant is tallying with the property that belonged to the plaintiffs and that the plaintiffs are not entitled to

seek any relief in respect of the suit third schedule. Both the Courts have taken into consideration the title deeds relied upon by both sides and the Commissioner's report and plan. Aggrieved by the concurrent judgment and decree of the Courts below, the present Second Appeal has been filed by the plaintiffs.

6. At the time of admitting the Second Appeal the following questions of law were framed:

1. Whether the Courts below are right in law in not granting the relief sought for in the plaint in entirety especially the appellants as plaintiffs has substantiated their claim based on the positive and acceptable evidence under Ex.A-1, A-6 and A-7 corroborating the evidence of P.W.1 to P.W.3 and the very admissions of D.W.1 to D.W.3?

2. Whether the Courts below are right in law in not granting the decree for mandatory injunction and restraining the relief of declaration and injunction after accepting the rights granted to the respondent is only to the extent of the recitals under Ex.B-1?

(3) Whether the Courts below are right in law in restricting the relief on mere misinterpretation and miscalculation of the measurements mentioned under Ex.C-1 and C-2 without adverting to the same in entirety?

(4) Whether the lower appellate Court is right in law in not independently considering the oral and documentary evidences in a proper and perspective manner after framing proper points for consideration as contemplated under Order 41 Rule 31 of Civil Procedure Code?

7. All the questions of law are not pure questions of law but on the appreciation of evidence. In the judgment of the Hon'ble Supreme Court in the case of Hero Vinoth (Minor) v. Seshammal reported in (2006) 5 SCC 545, a clear distinction has been drawn between the mere questions of law and substantial questions of law apart from limiting the scope of the Second Appeal. The principle relating to Section 100 C.P.C. relating to the case before the Supreme Court had been

summarised in the following manner:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

8. The learned counsel for the appellants, on the basis of the above judgment, submitted that the Commissioner's report and plan has been misunderstood and misconstrued with regard to the measurements and that the plaintiffs are therefore entitled to get a decree as prayed for in the suit.

9. The trial Court as well as the appellate Court has granted the relief in favour of the plaintiff in respect of the entire vacant land that is now available upto the building that has now been constructed by the defendant. The suit came to be filed only on 19.10.2000 alleging that the construction was put up by the defendant only in the year 1999. However, it is the specific case of the defendant that the construction was put up by the defendant even in the year 1994-95 and that there is no objection by the plaintiffs when the construction was put up by the defendant. The trial Court has categorically found that the defendant has put up the construction in the year 1995 and that the building is also assessed to property tax from 1996. Hence, the plaintiffs are not entitled to the relief of mandatory injunction. Since the plaintiffs have not raised any objection to the construction during the relevant point of time, by applying the doctrine of acquiescence they cannot be given any relief. After considering the evidence both oral and documentary, the Courts below have concurrently held that the defendant has not encroached into any portion of the property of plaintiffs and that the plaintiff is not entitled to any relief. Hence, this Court find no reason to interfere with the findings of the Courts below and this Second Appeal is liable to be dismissed and accordingly, dismissed. However, there is no order as to costs.

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