

Thangamariamammal Vs. Padmavathi and Others

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Court : Chennai Madurai

Decided On : Sep-12-2016

Judge : S.S. Sundar

Appeal No. : Second Appeal (MD) No. 794 of 2005 & C.M.P.(MD)No. 5132 of 2005 & 119 of 2006

Appellant : Thangamariamammal

Respondent : Padmavathi and Others

Judgement :

(Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.235 of 2004 on the file of the Additional Sub Court, Dindigul, dated 28.07.2005 confirming the judgment and decree passed in O.S.No. 244 of 1994 on the file of the District Munsif Court, Nilakottai, dated 29.04.2003.)

1. The defendant in the suit in O.S.No.244 of 1994 on the file of the District Munsif Court, Nilakottai, is the appellant in this Second Appeal. The first respondent in this Second Appeal is the second plaintiff in O.S.No.244 of 1994. The first plaintiff is her husband. Since the first plaintiff died during the pendency of the suit, the respondents 2 to 4 herein were impleaded as plaintiffs 3 to 5 in the suit. The suit in O.S.No.244 of 1994 is for a declaration that the suit 'AB' wall exclusively belongs to the plaintiffs and consequently, for permanent injunction restraining the

appellant herein namely the defendant in the suit from in any way causing obstruction to the construction of plaintiffs' houses. The suit is also for a permanent injunction restraining the defendant from in any manner putting up any construction in the 2 feet space just on the southern side of the house property of the plaintiffs.

2. The case of the respondents/plaintiffs was that the suit 'AB' wall (East-West), having a length of 54 and width of 1 feet situate in between the houses of the respondents / plaintiffs and the appellant / defendant, is the exclusive wall of the plaintiffs and that the 2 feet lane on the further south of the exclusive wall of the plaintiffs is a common lane. The common lane is only a portion marked as 'CDEF' in the plaint plan. The respondents / plaintiffs claimed title to this property on the basis of a registered sale deed dated 11.03.1994. According to the respondents / plaintiffs, the appellant / defendant has no manner of right over the suit wall and the common lane marked as 'CDEF' is not the exclusive property of the appellant / defendant. Since the appellant / defendant started constructing a latrine in her house touching the south wall of the respondents / plaintiffs house, it was alleged that the respondents / plaintiffs were constrained to file the said suit. The suit was contested by the appellant / defendant by stating that the suit wall is a common wall belong to the respondents / plaintiffs and the appellant / defendant. It was also stated by the appellant / defendant that the respondents / plaintiffs have no right on the further south of the common wall. It is the specific case of the appellant / defendant that the suit second item, namely, the portion which is marked as 'CDEF' in the plaint plan is part of a construction put up by the appellant / defendant with wooden roof and that it is not a lane or much less a common lane as alleged by the respondents / plaintiffs. It was also reiterated by the appellant / defendant that the respondents / plaintiffs were never in enjoyment of this common lane as the respondents / plaintiffs never had any entry into this common lane and the suit second item is exclusive property of the appellant / defendant. The trial Court granted a decree in favour of the respondents / plaintiffs for a declaration declaring exclusive right of the suit 'AB' wall in favour of the respondents / plaintiffs and for consequential injunction as prayed for. Though the trial Court found in favour of the respondents / plaintiffs regarding the title over the second item, namely, the common lane described as 'CDEF' in the plaint plan, dismissed the

suit insofar as the second item is concerned on the ground that the respondents / plaintiffs were not enjoying this common lane for several years and that the respondents / plaintiffs have not come forward with the suit for mandatory injunction to remove the construction put up by the appellant / defendant within time. As against the judgment of the trial Court, the respondents / plaintiffs have not preferred any appeal. However, the appellant / defendant filed an appeal in A.S.No.92 of 2003 on the file of the District Court, Dindigul, and the said appeal was transferred to the Additional Sub Court, Dindigul, and numbered as A.S.No.235 of 2004. The appellate Court dismissed the appeal filed by the appellant / defendant after confirming the findings of the trial Court that the suit 'AB' wall is the exclusive wall of the respondents / plaintiffs. Aggrieved by the same, the appellant / defendant has preferred the above second appeal.

3. Though the decree of the trial Court alone was confirmed in the appeal, the decree of the appeal shows that the respondents / plaintiffs were also granted a decree for permanent injunction restraining the appellant / defendant from putting up any construction in the common lane that was pointed out by the respondents / plaintiffs in the plaint plan as 'CDEF', namely, suit second item. Hence, the learned counsel for the appellant / defendant Mr.S.Kadarkarai, pointed out this error and submitted that the decree of the appellate Court is therefore not supported by any finding. It was the further submission of the learned counsel for the appellant / defendant that the respondents / plaintiffs have not preferred any appeal as against the judgment and decree of the trial Court dismissing the suit in respect of the second item with a prayer for permanent injunction and hence, the decree of the appellate Court cannot be sustained.

4. Though the learned counsel for the respondents / plaintiffs wanted to show from the records that the lower appellate Court has given reasons for granting a decree in respect of the common lane, I find that there is no legal force in the said submission for two reasons:

(a) The operative portion of the judgment of the appellate Court clearly indicates that the dispute regarding the common lane is not a subject matter in the appeal. It appears that clause (iv) in the decree in A.S.No.235 of 2004 is only an error and it

does not reflect the judgment of the lower appellate Court.

(b) The suit was decreed partly accepting the case of the respondents / plaintiffs insofar as their relief with regard to the common 'AB' wall. The relief of permanent injunction restraining the appellant / defendant from putting up any construction in 2 feet lane on the south of the respondents / plaintiffs house property was negated by the trial Court after deciding the issue No.2 against the respondents / plaintiffs. Since the respondents / plaintiffs have not filed any appeal as against the disallowed portion and the judgment of the trial Court has become final, the decree of the appellate Court in clause (iv) is unsustainable and hence, the decree of the appellate Court is liable to be interfered with insofar as clause (iv) of the decree granting permanent injunction in favour of the respondents / plaintiffs restraining the appellant / defendant from putting up any construction in the 2 feet lane on the further south of respondents / plaintiffs' house property.

5. Hence, clause (iv) of the decree in A.S.No.235 of 2004 is liable to be set aside.

6. Regarding the prayer for the injunction and consequential injunction in respect of the suit wall, this Court finds that the trial Court as well as appellate Court have considered the entire evidence on record and rendered a finding that the suit 'AB' wall is the exclusive wall of the respondents / plaintiffs.

7. The learned counsel for the appellant / defendant Mr.S.Kadarkarai drew the attention of this Court to the recitals of documents Ex.B2 apart from some facts which are not seriously disputed. The learned counsel pointed out that the staircase of the appellant / defendant touches the southern face of 'AB' wall and that the respondents / plaintiffs are estopped from giving evidence against the recitals in Ex.B2 wherein the appellant / defendant was given half right over the 'AB' wall which lies on the northern side of the appellant / defendant's house.

8. At the time of admitting the appeal the following substantial questions of law have been framed by this Court:

1. Whether the 1st Appellate Court is correct in decreeing the suit in entirety while the trial court has only partly decreed the suit, dismissed the relief of 2 item of suit

property?

2. Whether the 1st Appellate Court is correct in decreeing the suit in entirety in the absence of cross Appeal?

3. Whether the oral evidence of P.W.2 against the registered sale deed Ex.B2 is valid and admissible in evidences?

4. Whether Ex.A.11 that document which is against the registered document Ex.B.2 can be relied on?

5. Whether the walls of defendants house and stair case touching the AB wall will not prove it is a common wall?

9. The document Ex.B2 is a sale deed dated 27.01.1982 executed by one Mariappan Chettiyar in favour of the appellant / defendant. It is pertinent to note that the predecessor-in-interest of the respondents / plaintiffs is not a party to this document. The vendor of the appellant / defendant cannot have right what he is not entitled to. In the absence of any evidence to show that the vendor of the appellant / defendant was enjoying the suit 'AB' wall as a common wall, the concurrent findings of the Courts below cannot be assailed only on the ground that the document under which the appellant / defendant purchased her property refers to the suit wall as a common wall. As pointed out by the Courts below, the entire length of 'AB' wall is 54 feet and 5 inches. However, the construction of the appellant / defendant is to an extent only upto 33 feet of the eastern side of the wall. Considering the physical features and the documentary evidence adduced by both parties, the trial Court as well as the appellate Court have negatived the case of the appellant / defendant that the suit 'AB' wall is a common wall. The contention of the appellant / defendant that the staircase of the appellant / defendant building has been constructed touching the 'AB' wall does not support her case that the suit 'AB' wall is a common wall. Since there is no valid reason to interfere with the findings of the Courts below in respect of the suit 'AB' wall, this Court confirm the findings of courts below having regard to the scope of Section 100 C.P.C.

10. As discussed earlier, the questions of law framed by this Court are answered in the following manner:

10.1. Question Nos.1 and 2 are answered in favour of the appellant / defendant and therefore, the clause (iv) of the decree of the appellate Court in A.S.No.235 of 2004 is set aside. Since the vendors of the respondents / plaintiffs are not bound by the recitals in the document Ex.B2, this Court finds that the evidence of P.W.2 even against the recitals in Ex.B2 is admissible in evidence. This Court does not find any justification for interfering with the findings of the Courts below on the basis of the fourth question of law as the documents Ex.A11 and Ex.B2 are not the only documents that were relied upon by the Courts below. Though Ex.A11 is only a letter and it is proved to be the one which was written by the vendor of the appellant / defendant it is admissible in evidence. Further, this letter was given on 13.03.1970 and the document Ex.B2 came into existence only on 27.01.1982. The predecessor-in-interest has categorically admitted in this letter about the exclusive right of the predecessor-in-interest of the respondents / plaintiffs. Further, this is not the only document that has weighed the Court below to arrive at the decision on all issues against the appellant / defendant.

10.2. The fifth question of law is purely factual and hence, the questions of law 3, 4 and 5 as framed by this Court are answered against the appellant / defendant and the judgment and decree in A.S.No.235 of 2004 on the file of the Additional Sub Court, Dindigul, confirming the judgment and decree in O.S.No. 244 of 1994 on the file of the District Munsif Court, Nilakottai is confirmed. However, clause (iv) in the decree in A.S.No.235 of 2004 is set aside and this Second Appeal is allowed to this extent. There is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

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