

(2008) 12 MAD CK 0086
In the Madras High Court
Case No : S.A. (MD) No. 546 of 2000

Subbiah

APPELLANT

Vs

R. Vellaichamy Naicker (Died.) (Muthulakshimi, Nagarajan
and Rameswari)

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Evidence Act, 1872 — Section 11, 13(2), 32(3), 32(7)

Citation : (2008) 12 MAD CK 0086

Hon'ble Judges : A.C. Rumugaperumal Adityan, J

Bench : Single Bench

Advocate : K. Periyasamy, for the Appellant; K. Rajkumar, for the Respondent

Final Decision : Allowed

Judgement

A.C. Arumugaperumal Adityan, J.—This Second Appeal has been directed against the decree and judgment in A.S. No. 105 of 1996, on

the file of Court of the Subordinate Judge, Tenkasi, which had arisen out of a decree and judgment in O.S. No. 47/1994 on the file of the Court of

District Munsif, Shencotta. The suit was filed by the plaintiff for declaration of his title in respect of the plaint schedule No. 2, which is comprised in

S. No. 1 and also for mandatory injunction to remove the cement pipe laid by the defendant near his eastern wall and also to remove the door and

windows placed on his eastern wall. Both the Courts below have concurrently held that the plaintiff is not entitled to the relief of mandatory

injunction. The trial Court has dismissed the suit in entirety. But on appeal, the first appellate Court, had granted the declaratory relief, as prayed

for by the plaintiff in the plaint, which necessitated the defendant to approach this Court by way of this Second Appeal.

2. The plaint averments in brief sans irrelevant particulars are as follows:

Plaint schedule No. 1 property was allotted to the plaintiff's father in the family partition. The defendant had constructed his house on the property

situate on the west of the plaint schedule No. 1 property. The defendant had also constructed his eastern wall of his house. Beyond his eastern

wall, the defendant is not having any land. When the defendant attempted to drain his rain water on the lane east of his eastern wall of his house,

there arose a dispute between the plaintiff's father and the defendant. There was a "panchayat" took place between them. Even in the Panchayat it

was decided that beyond the eastern wall of the defendant's house, he is not entitled to any land. The defendant has dug a pit about 1 foot depth

and has laid the drainage pipe alone in the eastern wall of his house, after getting permission from the plaintiff and it was also agreed in the

"panchayat" by the defendant that they will reduce the cement slab window on the eastern side to a required extent. The "panchayat" between the

plaintiff's father and defendant was entered into an agreement on 30.09.1983 and it was reduced into writing and both the parties have signed in

the said "panchayat nama". The plaintiff has constructed his house in his land. The plaintiff claimed that he is entitled to about 1 foot beyond his

eastern wall of his house and has objected the defendant from constructing his western wall in the suit property. The defendant, as per his gift deed,

dated 11.9.1979, is entitled to only 15 feet on the east-west direction. The eastern wall of the defendant is situated within 15 feet on the east-west

measurement on the south. The plaintiff is entitled to east-west 27-1/2 feet. But the defendant is not entitled to claim any right in respect of the

property, in which he has laid the pipe line, on the east of his western wall of his house. Since, the defendant has let in waste water in the property

east of his house, the plaintiff has cancelled the license granted in favour of the defendant. Hence, the plaintiff has filed the suit for mandatory

injunction and also for declaration of his title in respect of the plaint schedule No. 2 property. The plaintiff has issued a suit notice dated

28.04.1988 through his lawyer. After receipt of the said notice, the defendant has sent a false reply, dated 04.05.1998. The defendant cannot

claim more than 15 feet east-west allotted to his father under the gift deed, dated 11.09.1979. The plaintiff's uncle was one of the panchayators,

who signed in the "panchayat nama" mentioned above. The plaintiff's father had executed a mortgage deed in respect of his property on

13.12.1965, in favour of one Mohammed Mythin Sahib. Even in that mortgage deed, the east-west measurement for the plaintiff's property was

shown as 10 carpenter cubic feet. In the plaint plan, the plaintiff has earmarked the portion allotted to the defendant in their family partition dated

30.06.1965. So, beyond his east-west wall, the defendant is not entitled to 2-5/8 feet, which is scheduled to the plaint, as plaint item No. 2, which

forms part of the plaint schedule item No. 1. Hence, the suit for declaration of title and for mandatory injunction.

3. The defendant in his written statement would contend that the plaint schedule item No. 2 does not belong to the plaintiff. The plaint schedule

item No. 2 will not form part of the plaint schedule item No. 1, beyond the eastern wall of the defendant's house. The defendant's uncle

Marimuthu Naicker was entitled to 2-5/8 feet lane. In the said lane, the plaintiff is not entitled to any right or title. But, the plaintiff in his plaint has

also included this 2-5/8 feet on the west of his house clandestinely. About 2-5/8 feet lane on the west of plaint schedule No. 2 was originally

belonged to one Arunachala Naicker, who had executed a sale deed in favour of Sankaralinga Naicker on 03.01.1940, for the above said

property for whom Arunachala Naicker had purchased the property again on 08.01.1945, under a sale deed. Thereafter, the sons of Arunachala

Naicker viz., Subbiah Naicker, Laxmana Naicker and Marimuthu Naicker along with their father Arunachala Naicker, had partitioned the said

property. In the said partition about 2-5/8 feet was left to be enjoyed as a lane by Marimuthu Naicker and Laxmana Naicker. The plaintiff is

entitled to east of the above said 2-5/8 feet lane. The defendant had constructed his house in the year 1980 in the plot got under the gift deed,

dated 11.05.1979, from Lexmana Nadar. At the time of constructing his house, the defendant had placed his windows on his eastern wall and also

his sunshade, which is projected about 1-1/2 feet east of his eastern wall. In the plaint second schedule property, the defendant's door is situated

protruding about 1 foot in the lane. The defendants are letting out the waste water in the plaint schedule property and also drainage water,

whereas, the plaintiff is letting out his drainage water through a pipe laid in the plaint schedule property. There was no "panchayat" took place, as

alleged in the plaint on 30.09.1993, between the plaintiff's father and the defendant and there was no "panchayat nama" entered into between the plaintiff's father and the defendant, as alleged in the plaint. The alleged document dated 30.09.1993 is a concocted one. Neither the defendant's father nor his uncle or the plaintiff has signed in the said document. The plaintiff is not entitled to 27-1/2 feet east-west on the south of his property. The drainage pipe on the east of the defendant's eastern wall was not laid with the permission of the plaintiff, as alleged in the plaint. There is a mistake crept in the measurement for the eastern boundaries of the plaintiff's property, in the gift deed as well as in the partition deed, dated 30.06.1965. The second schedule property was not enjoyed in common by the plaintiff and the defendant. The plaintiff is not entitled to any declaration in respect of his plaint schedule item No. 2 and he has also not entitled to get an order of mandatory injunction. Hence, the suit is liable to be dismissed.

4. On the above pleadings, the learned trial Judge has framed five issues for trial. The plaintiff has examined himself as P.W.1 besides examining another witness as P.W.2 and also exhibited Exs.A1 to A6. On the side of the defendant, the defendant was examined as D.W.1 and Exs.B1 to B4 were marked. A Commissioner was appointed by the learned trial Judge to note down the physical features of the plaint schedule property and he has filed Exs.C1 & C3, reports, and Ex.C2 & C4, plans.

5. On the basis of the available evidence both oral and documentary, the learned trial Judge finding no reasons to grant a decree in favour of the plaintiff, has dismissed the suit. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred an appeal in A.S. No. 105/1996, before the learned Subordinate Judge, Tenkasi, who had confirmed the decree in respect of dismissal of the relief regarding mandatory injunction but allowed the appeal in part granting the relief of declaration asked for in the plaint, which necessitated the defendant to approach this Court by way of this Second Appeal.

6. The following substantial questions of law are involved for determination in this Second Appeal:

1. Whether the Courts below are correct in law in accepting the boundary recitals in documents Ex.A1 and A2, when those documents are not

inter parties and inadmissible in evidence under Sections 11, 13(2), 32(3) and 32(7) of the Evidence Act, especially when the executant of the document is not examined? and

2. Whether the lower Court is right in granting the discretionary power of permanent injunction when the plaintiff did not approach the Court with clear hands?

7. Substantial Question of Law Nos. 1 & 2:

(a) Heard the learned Counsel appearing for the appellant as well as the learned Counsel appearing for the respondents and considered their respective submissions.

(b) The learned Counsel appearing for the appellant would contend that as per Ex.A3, a mortgage deed, executed by the plaintiff's father on

13.12.1965 the east-west measurement for the plaintiff schedule item No. 1 was given as 10 carpenter cubic feet, which comes to 27-1/2 feet. But,

in the subsequent partition entered into between the family of the plaintiff under Ex.A6, dated 05.09.1996, the east-west measurement for the

plaintiff schedule property on the south wrongly been mentioned as "11" carpenter cubic feet instead of "10" carpenter cubic feet. Hence, the learned

Counsel appearing for the appellant would contend that even though the plaintiff has scheduled item No. 1 with an east-west measurement of 10

carpenter cubic feet, he is not entitled to the declaration and injunction as prayed for, because, within his property i.e., plaintiff schedule item No. 1

he has already constructed his house and the western wall of the plaintiff's house comes within the measurement given in plaintiff item No. 1 schedule

property and that the plaintiff schedule 2 property, even though under the plaintiff is said to be within the plaintiff schedule 1 property, it does not come

within the plaintiff schedule one property. Even though a commissioner was appointed by the trial Court, the learned Advocate Commissioner has

not identified the plaintiff schedule properties with the help of a taluk Surveyor. When the appeal was taken up by this Court, this Court felt that

unless the plaintiff schedule properties are identified with a help of a taluk surveyor, a decision cannot be rendered. As per the orders of this Court

dated 22.10.2008, the trial Court was directed to reissue the warrant to the same Advocate Commissioner or to appoint another Advocate

Commissioner to identify the plaintiff schedule Item No. 1 property as well as the

plaint schedule Item No. 2 property in accordance with the measurements given for the property for the first schedule property to Ex.A6 and to submit a report. Accordingly, the Commissioner has filed Ex.C 5 report and Ex.C6 plan. It is pertinent to note at this juncture that in Ex.A6, east-west measurement for the plaint schedule item No. 1 property has wrongly been stated as 11 carpenter cubic feet instead of 10 carpenter cubic feet, because, even in Ex.A3 mortgage deed, executed by the plaintiff's father in the year 1965, the east-west measurement for the plaint schedule item No. 1 property was mentioned as only 10 carpenter cubic feet. Under such circumstances, on the basis of Ex.A6, the plaintiff cannot claim 11 carpenter cubic feet as east-west measurement on the south of his property. In Ex.C6, Plan, the Commissioner has given east-west measurement on the south of the plaintiff's property as 27 feet between the points "D E" and the learned Advocate Commissioner has also noted the eastern boundary for the plaintiff's property as C-1, but he would state in his report Ex.C5 that the portion "C1 D" measuring 1 foot 9 inches has been given by the plaintiff for the formation of the road, which is situated on the east of his property. Under such circumstances, the plaintiff cannot claim that he is entitled to 27-1/2 feet towards west from the point "D" i.e., 6 inches beyond the point "A E" in the land, which is situated west of his western wall "A E" of his building. Even though 1 foot 9 inches was given by the plaintiff for the formation of the road, he cannot claim 27-1/2 feet on the south from the point "D" towards west. It is not the case of the plaintiff that the portion marked as "C-1 D" with an extent of 1 foot 9 inches belongs to the Government or 3rd parties. This 1 foot 9 inches portion was given by the plaintiff for the formation of the road, which is situated on the east of the plaintiff's house. Now, the learned Counsel for the respondent would state that there is no admission by the plaintiff as to the effect that this 1 foot 9 inches between the point "D C1" in Ex.C6 plan was given for laying the road on the east of his house. But Ex.C6, plan, was prepared by the learned Advocate Commissioner, with a help of a Surveyor, who had fixed the eastern boundary for the plaintiff's property as "E C1" measuring 28 feet 9 inches. The learned Counsel for the respondent at this juncture would point out that even as per Ex.A6 measurement, the learned Advocate Commissioner has fixed the eastern

boundary for the plaintiff's house property as "C1" on the east. Even then as per Ex.A6, the plaintiff's east-west measurement for the property is

given as 11 carpenter cubic feet to which he is not entitled to as per Ex.A3. The measurement given in Ex.A6 will not bind the appellant herein

because Ex.A6 is the partition deed inter se between the members of the plaintiff's family. As per Ex.A3, the earliest document of the year 1965,

the plaintiff is entitled to only 10 carpenter cubic feet east-west on the southern side. So, as per Ex.A3, on the southern side east-west, the plaintiff

is entitled to only 27-1/2 feet (10 carpenter cubic feet). But, the plaintiff, as per Ex.C6 plan, was in possession of 28 feet 9 inches out of which he

had given 1 foot 9 inches for the formation of the road. At any event, the plaintiff cannot claim any space beyond his western wall of his house,

which is marked as "A E" to Ex.C6 plan, by the learned Advocate Commissioner. So, the plaintiff, on the basis of the measurement given in the

documents of the defendant, cannot claim declaration for the plaint schedule item No. 2, which is admittedly more than the extent mentioned under

Ex.A3 document. As rightly held by the trial court, the plaintiff is not entitled either for declaration of title or for permanent injunction or for

mandatory injunction. Substantial Question of Law Nos. 1 & 2 are answered accordingly.

8. In fine, the appeal is allowed and the decree and judgment of the learned first appellate Judge in A.S. No. 105/1996, on the file of the Court of

Subordinate Judge, Tenkasi, is set aside and the suit in O.S. No. 47 of 1994 is dismissed.

9. At this juncture, it is represented that the land which is situated on the west of the plaintiff's western wall of his house marked as "A E" by the

learned Advocate Commissioner in Ex.C6, Plan, is being enjoyed in common, by both the plaintiff and respondent. The measurement for the said

common lane, which is earmarked as "A1 A E E1" by the learned Advocate Commissioner is one foot and that the said lane is being enjoyed in

common. If it is so, the parties are directed to enjoy the said lane in common in future too. Ex.C6, Plan, shall form part of the decree. No costs.