Soundararaj

Vs

Devasahayam and Others

Civil Appeal No. 10083 of 1983

(Varadarajan, J.)

24.10.1983

JUDGMENT

VARADARAJAN, J. –

1. This appeal by special leave is directed against an order of the learned Single Judge of the Madras High Court, made in C.M.P. No. 1368 of 1983, reviewing his judgment in Second Appeal No. 86 of 1978 which he dismissed on July 24, 1981, confirming the judgment in Appeal Suit No. 135 of 1974 of the learned Subordinate Judge, Padmanabhapuram who in turn confirmed the judgment of the learned Principal District Munsif, Padmanabhapuram in Original Suit No. 365 of 1973. The appellant Soundararaj filed the suit for demarcating the boundaries of his A schedule property bearing Survey No. 3199 on which his building stands from the respondents' B schedule property bearing Survey No. 3153 on which their buildings stand and for a mandatory injunction directing the respondents to remove the eaves protruding on the northern side by reason of which the eaves water was falling into his property.

2. The respondents denied that they encroached upon any portion of the appellant's property and contended that he had with ulterior motives removed the survey stones on the north-western and north-western sides of Survey No. 3153 belonging to them and that after encroaching upon some portion of road Poromboke he is claiming that the actual area of Survey No. 3199 belonging to him is more than the area as per the settlement. They contended that the eaves water falls only on their own land and that the appellant's claim for mandatory injunction is not sustainable in law. They further contended that even if it is found that the eaves water from their buildings falls on the appellant's property he has no right to object to it because they have acquired the right by prescription to allow the eaves water from their roof to fall into the property on which it is now falling.

3. The parties did not produce their respective title deeds. The appellant produced the Government survey plan Exhibit A-3. The Advocate-Commissioner who was directed to make a local inspection and file a report, filed his report Exhibit C-1 and plans Exs. C-2 and C-3 which were drawn to scale of 1 inch to 40 links. The respondents did not file any objection to the Commissioner's report and plans, while the appellant filed his objections to them. The appellant contended before the trial court that the plan Ex. C-2 should be accepted for deciding the question of the boundary of his property whereas the respondents contended that the plan Ex. C-3 should be accepted as the basis for determination of the boundary. The trial court accepted the appellant's contention that the correct measurement of the diagonal line JC in the Government plan Ex. A-3 is 119 links and that the measurement given in it as 113 links is wrong. The learned District Munsif took his own measurements by using a scale and was convinced on an inspection of the plans that the plan Ex. C-

2 is the correct basis for determining the boundary line and that the demarcating line for Survey No. 3153 belonging to the respondents is JR and not JD on the north and ZI and IJ on the other side, in Ex. C-2. As regards the eaves the learned District Munsif found that the northern and western eaves of the respondents' building protruding into the appellant's property as indicated in the plan Ex. C-2 should be shortened as indicated in Ex. C-2 and that the respondents have not perfected and right of easement by prescription. In this view the learned District Munsif passed a decree for demarcation of the appellant's property by putting up a boundary wall to a height of 7 feet immediately west of ZI and on IJ and JR within the appellant's property and for a mandatory injunction directing the removal of portions of the eaves of the respondents' buildings west of ZI and IJ and north of JR.

4. The first appellate court's judgment has not made available in the records before us. But it is seen from the judgment of the learned Single Judge of the High Court in the second appeal that the learned Subordinate Judge had confirmed the trial court's judgment and decree in toto. In the second appeal the boundary fixed by the trial court on the western side was acceptable to both the parties and the dispute was only with regard to the demarcation of the boundary line on the other side of the respondents' property. The respondents' contention in the second appeal was that the measurement given in Ex. C-3 should be accepted and not those given in court Ex. C-2, a contention which did not find favour with either the trial court or the first appellate court. The learned Single Judge negatived the respondent's contention in that regard observing thus :

> In the first place the finding that is impugned is purely factual in character and it does not involve any question of law. On this simple ground, the contention of the appellants deserves to fall and the appeal could well be dismissed. Even otherwise I find on merits, the appellants do not have a case at all. The trial court as well as the lower appellate court have chosen to place reliance on Exhibit C-2 rather on Exhibit C-3 because the measurements given in Exhibit C-2 tally with the measurements given in Exhibit A-3, the survey plan. It is common ground the measurements given in Exhibit C-3 do not tally. The appellants who now assail the correctness of the measurements given in Exhibit C-2 have not filed any objection to the Commissioners' report and the markings contained in Exhibit C-2 before the trial court. Having regard to these factors, it is not open to the appellants now to contend that the Commissioner's report and the markings contained in Exhibit C-2 are not correct.... Consequently it follows that there is no justification whatever to interfere with the findings recorded concurrently by the Courts below.

5. Regarding the eaves the learned Single Judge rejected the respondents' contention observing thus :

> The counsel for the appellants then stated that it will cause hardship to the appellants if they were to remove a portion of their eaves projecting into the land of the respondents and also to close the doorways opened by them. This is not a relevant factor for consideration in the appeal. Once it is found that the appellants are not entitled to any space of land beyond the line JR, they are not entitled to have their eaves projecting into the respondents' land or to open any doorways leading into his land.

6. With these observations the learned Single Judge dismissed the second appeals with no order as to costs.

7. But when the review petition filed by the respondents came up before the learned Single Judge he noticed the error in the measurement of the diagonal line JC in the Government survey plan Ex. A-3 pointed out by the trial court and opined that in view of that mistake there should be a fresh consideration of the question whether Ex. C-3 or Ex. C-2 merits acceptance because Ex. C-2 has been found by the first two courts to be more acceptable on the ground that the measurements given therein tally with those given in Ex. A-3. The learned Judge further opined that the parties who had not chosen to produce their title deeds for some reason or other should be called upon to produce them, and that there was substance in the respondents' contention that the survey stone at the northern limit of their property bearing Survey No. 3154 has been removed and that its position should be fixed and measurements taken from that point for determining the boundary of the appellant's property on the north-east at the point X or point E. The learned Judge further opined that as regards the projecting eaves the question is of adverse possession for a period of 12 years which is for acquisition of right to movable property and not the larger period relating to acquisition of a right of easement, overlooking the fact that the parties and all the courts until the review petition was filed understood the case to be only one of statement.

8. After hearing the learned counsel of the parties we are satisfied that the learned Single Judge was not fully justified in allowing the review petition and setting aside not only his own judgment which had confirmed the concurring judgments of the first two courts but also of the opinion that the learned Judge erred in setting aside the judgments of the first two courts and remanding the suit to the court of first instance without adopting the more equitable and just method of framing some additional issues, if any, strictly arising on the plattings and calling for findings on those issues from the trial court with liberty to both the parties for adducing evidence. Under the circumstances of the case we allowed the appeal in part and confirm the learned single Judge's order only insofar as it relates to setting aside his own judgment in the second appeal but set aside that order in other respects keeping intact the judgments an decrees of the first two courts. The High Court will frame such additional issues as may legally arise on the pleadings of the parties and call for findings thereon from the trial court as mentioned above and dispose of the second appeal after receipt of the findings in the light of those findings and judgments of the first two courts already rendered and the objections, if any, which may be filed by the parties to the findings. It is desirable that a fresh mind is brought to bear on the questions involved in the second appeal after receipt of the findings. The matter will go back to the High Court for fresh disposal in accordance with the law as indicated above. The costs shall abide the result. The parties are directed to appear before the High Court on November 17, 1983.

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