Case Note: Case concerning the existence of easementary rights of having water flowing from the property of one property owner to that of his neighbor. The court held that no such easementary right existed.

AIR2001SC1844, 2001(3)SCALE243, (2001)4SCC694

IN THE SUPREME COURT OF INDIA

Decided On: 04.04.2001

Saraswathi and Anr.
v.
S. Ganapathy and Anr.

Hon'ble Judges:
Mr. V.N. Khare andMr. S.N. Variava, JJ.

JUDGMENT

S.N. Variava, J.

1. This Appeal is against a Judgment dated 30th April, 1998.

2. Briefly stated the facts are as follows:

3. The 2nd Respondent was the owner of properties bearing Survey No.7/232 (New) as well as Survey No. 7/229 (New). On 27th February, 1973 the 2nd Respondent sold Survey No. 7/232 (New) to the Appellants. The Sale Deed mentioned the area to be 3341 sq. ft. and also gave certain descriptions of the said property.

4. On 30th April, 1973 the 2nd Respondent sold Survey No. 7/229 (New) to the 1st Respondent. This Sale Deed mentioned that the said property was of an area of 512 Sq. ft. and also gave measurement of the property.

5. The sale deeds of both the parties mentioned that they had right of ingress and aggress an open passage which was to the West of the property sold to the 1st Respondent. On 30th October, 1974 the 1st Respondent executed a Release Deed relinquishing all his rights except a right of passage in the open space.

6. The 1st Respondent after purchasing the property put up some additional construction on the property. The Appellants set a notice dated 22nd November, 1974 calling upon the

1st Respondent to remove the construction put up by him. On receipt of this notice the 1st Respondent unilaterally cancelled the Release Deed dated 30th October, 1974.

7. The 1st Respondent then filed Suit No. 183/75 for a permanent injunction against the Appellants for preventing him from using the open space. An interim injunction was granted in that suit.'

8. On 29th March, 1975 the Appellants filed Suit No. 512 of 1975 for declaration that the 1st Respondent had encroached upon the land belonging to the Appellants and praying for possession of the same. The Appellants also claimed easementary rights of light and air and an easementary right to have water from the roof of his house flow into 1st Respondent's property. The Appellants thus prayed for a permanent injunction restraining the 1st Respondent from closing the drainage outlet and obstructing the passage of light and air of the Appellants. The Appellants also claimed compensation from 2nd Respondent for shortfall in delivery of land, if it was found that there was a shortfall. This claim has admittedly been given up and had not been pressed.

9. Both the suits were tried jointly. A common Judgment dated 30th April, 1979 was delivered. In the Suit filed by the 1st Respondent it was held that the 1st Respondent could only claim such rights as were reserved under the Release Deed dated 30th October, 1974. In the Suit filed by the Appellants it was held that the Appellants were entitled to recover 258 sq. ft. encroached by the 1st Respondent. The Appellants were also granted the permanent injunction restraining the 1st Respondent from blocking the drainage and against stoppage of light and air.

10. The 1st Respondent preferred two Appeals bearing Nos. 190 of 79 and 191 of 79 against the common Judgment. By a Judgment dated 20th December, 1980 the District Judge remanded the matter back to the Trial Court to determine the question of encroachment by appointment a Commissioner and to consider whether there was any easementary right. The 1st Respondent filed an Appeal against the order of remand. The Appeal was dismissed by the Madras High Court on 6th April, 1983.

11. Pursuant to the directions given in the Order dated 20th December, 1980 the Trial Court appointed a Commissioner to find out encroachments. The Commissioner visited the suit property several times and conducted an elaborate enquiry. The Commissioner submitted a Report to which reference will be made subsequently.

12. The trial Court again decreed the Suit on 30th July, 1993 and held that there was an encroachment to the extent of 338 Sq. ft. The Trial Court held that there was blockage of rain water outlet and obstruction of light. The Trial Court directed delivery of possession of 338 Sq.ft. and directed removal of obstruction of drainage of water and of light.

13. The 1st Respondent filed an Appeal. The Appellate Court, inter alia, held as follows:

"Despite the complex question of law and facts involved in the suit in the judgment of the Trial Court, there is over simplification of the whole issues and the points in dispute. The

Trial Court seems to have based its conclusion virtually on the basis of the Commissioner's report and directed the removal of the illegal encroachment."

14. The Appellate Court the proceeds to make a large number of assumptions and on the basis of those assumptions holds as follows:

"26. Even though there is no strong reasons of logic stated by the Trial Court, the final conclusion of the Trial Court is unassailable. For the reasons stated in this judgment. There is no reason warranting interference in the judgment of the I Additional District Munsif, Coimbatore.

27. Therefore the judgment and decree of the Ist Additional District Munsif, Coimbatore is O. S. No. 512/75 is confirmed and this appeal is dismissed with costs of R1 and R2/plaintiffs. There is no order regarding the cost of D-1."

15. At this stage it must be noted that the Appellate Court proceeded, amongst others, on the assumption that the area mentioned in Appellant's Sale Deed was to be taken as correct and if the Appellants were found to be in actual occupation of a lessor area then the same was to be treated as having been encroached upon by 1st Respondent.

16. The 1st Respondent then filed a Second Appeal. In the Second Appeal the following substantial question of law was raised:

"Whether the view taken by the Courts below that because there is deficiency in the extent of the property in the enjoyment of the plaintiffs, it should be taken as having been encroached by the second defendant is correct in law?"

17. The High Court then considered the Commissioner's Report, the Sale Deeds of both the parties, the evidence on record and concluded that the Judgments of the Trial Court and the 1st Appellant Court could not be maintained. The High Court held that both the Courts below had ignored documents/evidence and had proceeded on entirely wrong basis. The High Court held that the encroachment, if any, could only be said to be to the extent of 21 Sq. ft. and such encroachment paled into insignificance. The High Court recorded the statement of the counsel of the 1st Respondent that the 1st Respondent was willing to ensure that there was proper drainage of rain water from the premises of the Appellants. The High Court noted that the light and air were being blocked but that it was only to a small lumber room. The High Court thus allowed the Second Appeal. Hence this Appeal.

18. We have heard the parties at great length. Mr. Sivasubramaniam submitted that the High Court has overruled the concurrent findings of fact by both the Courts below and has re-appreciated evidence. Mr. Sivasubramaniam submitted that the High Court allowed the Second Appeal without there being any question of law, much less a substantial question of law.

19. On the other hand, Mr. Muralidhar submitted that the question of law framed by the High Court is a substantial question of law. He submitted that in deciding this substantial question of law it was necessary for the High Court to look at the documents and evidence on record.

20. We have seen the Judgments of the Trial Court and the 1st Appellate Court. The 1st Appellate Court has correctly noted that the trial Court had proceeded in a most summary fashion and had over-simplified complex of questions of law and fact. We also find that the 1st Appellate Court had adopted an entire erroneous approach in law. The Appellants had, admittedly, only purchased Survey No. 7/232 (New). They were thus entitled only to lands which formed part of this Survey No. The 1st Appellate Court noticed that even though the Sale Deed of the Appellants showed the extent of the land to be 3341 Sq. ft. in actual fact Survey No. 7/232 was only of an area of 2481 Sq. ft. The 1st Appellate Court also notices that the description of the property given in the Sale Deed was not accurate. After noticing these vital aspects the 1st Appellate Court proceeds to make a number of assumptions which have no basis. The 1st Appellate Court then concludes that if there is any shortfall in the land occupied by the Appellants then that shortfall must necessarily be encroachments by the 1st Respondent. In counting shortfall the 1st Appellate Court takes it for granted that the Appellants were entitled to 3341 sq. ft. as mentioned in the Sale Deed.

21. In our view, the High Court was right in coming to the conclusion that such an approach is unsustainable in law. The question before the Courts was whether or not there had been an encroachment by the 1st Respondent into land purchased by the Appellants. The other question was whether there was any easementary right in the Appellants. It is on these questions that there had been a remand to the Trial Court. The Trial Court, pursuant to the remand, had appointed a Commissioner. The Commissioner has given a detailed Report. It is now necessary to see this Report.

22. The Commissioner, in his Report, notes that the description of the property given in the Sale Deed of the Appellants is not accurate. The Commissioner, on actual measurements, gives a positive finding to the following effect:

"9. As the memo of instructions given by the respondent warranted me to note the actual extent of enjoyment by the petitioners and respondents with respect of T.S. Numbers, this respondent is in possession and enjoyment of an extent of 533 Sq. feet as follows i.e. 98 Sq. feet in T.S. No. 7/228-PART; 423 Sq. feet in 7/219 PART; and 12 Sq. feet in 7/232 PART. The Petitioners are in possession and enjoyment of 2506 Sq. feet in T.S. 7/232 PART and an extent of 235 Sq. feet in T.S. 7/231 and an extent of 350 Sq. feet in T.S. No. 229 PART used as lane thus totally measuring an extent of 3091 Square feet.

10. The 4th para of the memo of instruction by the respondent specifically directed me to note down whether the respondent is within the limits as per Ex.A-1 I found that the area of enjoyment and possession of the respondents/defendants exceeds only to the tune of 21 Sq. ft. and that is too on the northern side. The specific measurements and area of

enjoyment by the Respondent is shown in a separate diagram in the Diagrams 1 to 4 may be read as part and parcel of this report;"

23. Thus, it is to be seen that it is the Appellants who are encroaching upon 350 Sq. ft. in Survey No. 7/229. The 1st Respondent has excess area to the extent of 12 Sq. ft. in Survey No. 7/232. The Commissioner has also found that the 1st Respondent has land to the extent of 21 sq. ft. over and above what he had purchased under his Sale Deed. Both the trial Court and the 1st Appellate Court had this factual position before them. One fails to understand the logic by which both these Court concluded that the encroachment was to the extent of 338 Sq. ft. Both these Courts ignored the fact that the encroachment, to the extent of 338 Sq. ft. could only be there provided the measurements and description given in the Sale Deed of the Appellants were correct. As set out above, those measurements and the description are entirely incorrect. The factual position was that the Appellants, who had only purchased Survey No. 7/232 was in possession not only of entire Survey No. 7/232 (less 12 Sq. ft.) but was in possession (without any right) of 350 Sq. ft in Survey No. 7/229 which was purchased by 1st Respondent. The Appellants having only purchased Survey No. 7/232 is not entitled to more than 2481 Sq. ft. The Appellants are now in possession of more than what was purchased by them. The Appellants were seeking to claim possession of property which they had never purchased under their Sale Deed. The High Court has rightly not allowed this.

24. Next comes the question of easementary right of drainage of water and easementary right of the light and air. On the Appellants' property abetting the 1st Respondent's property, there is a small triangular room. Water from the roof of that room used to flow into the open ground in Survey No. 7/229. Earlier, the 2nd Respondent was the owner of both Survey No. 7/232 as well as Survey No. 7/229. Therefore, water from the roof of a room in his possession and ownership used to flow into open space belonging to him. In such a case there was no question of any easementary rights. The 1st Respondent then sold Survey No. 7/232 to the Appellants on 27th February, 1973 and Survey No. 7/229 to the 1st Respondent on 30th April, 1973. The sale to both the parties is within a period of 2 months. No easementary rights could have been acquired by the Appellants within this period of two months. As the 1st Respondent had purchased the property he was entitled to construct on his own property. Mr. Sivasubramaniam seriously submitted that the 1st Respondent was bound to allow water from the roof of the triangular room to flow on to the land of the 1st Respondent as it had always done in the past. Mr. Sivasubramaniam seriously contended that the 1st Respondent could not construct on his own land in a manner which would prevent the flow of such water into 1st Respondent's land. In our view, this argument merely needs to be stated to be rejected. No person can have a right to have water from his property flow onto to land of his neighbour. No such right was granted under the Sale Deed. No such easementary right can be claimed in law. All that the Appellants can claim is to see that water from the roof of his house is allowed to flow, on to his own land. The 1st Respondent's counsel has made a statement which has been recorded by the High Court. That statement reads as follows:

"On 23-11-1994, my client has filed I.A. No. 206/94 against you and obtained a temporary injunction. In which, my client was directed to make an arrangement to drain

the rain water collected on the terrace of your small room situated on the Eastern side of my client's kitchen. My client aggreable to bear the cost for making hole in your terrace and put up a concealed drainage pipeline form inner room to the outlet of your house itself. Through this letter, I seek you willingness for my client's above proposal."

25. On the basis of this statement an Order to the following effect has already been passed:

"With reference to the clearing of rain water on the roof of the plaintiffs' property, the appellant through his counsel undertook to reimburse the cost to be incurred for making an arrangement as described in the letter dated 30-11-1994 of the appellant through his counsel. The respondents/plaintiffs shall be at liberty to avail of the same and call upon the appellant to pay the expenses incurred by disclosing the details and within four weeks from the date of receipt of such a demand from the plaintiffs, the appellant shall pay the amounts to the plaintiffs by a demand draft."

26. In our view, this is sufficient protection for the Appellants.

27. So far as the question of light and air is concerned, it cannot be denied that the concerned triangular room is only a small lumber room. If that be so, then there is no question of blockage of light and air.

28. In our view there is no infirmity in the Judgment of the High Court. It calls for no interference. Accordingly, the Appeal stands dismissed. There will be no Order as to costs.