Madras High Court
Abdul Jabbar vs Ayisammal on 18 January, 2005
Author: A Ramalingam
Bench: A Ramalingam
JUDGMENT A.R. Ramalingam, J.

1. Aggrieved against the concurrent judgments of the District Munsif, Thiruvarur in O.S. No. 330 of 1988 and the Subordinate Judge, Nagapattinam in A.S. No. 73 of 1990 and particularly against the judgment of the Subordinate Judge, Nagapattinam in the above said appeal, the defendant viz., one Abdul Jabbar has preferred this second appeal.

2. The plaintiff viz., Ayisammal filed O.S. No. 330 of 1988 against the defendant Abdul Jabbar on the file of the District Munsif, Thiruvarur for the relief of permanent injunction in respect of the plaintiff's lane measuring 2x70 feet lying on the southern side of the plaintiff's house bearing door No. 1-10A within the total extent of 12 cents at Athikadai Village, Kudavasal Taluk covered by R.S. No. 45-2A. The brief allegations in the plaint are to the effect that the above said plaintiff's house was previously a thatched one and later it was constructed as a tiled one and its door number is 1-10A and that the said house is at Rahmania Street and it is facing west and that the defendant's house is lying on the south of the plaintiff's house and it is also facing west and that in between the said houses, there is a disputed lane measuring 2x70 feet for which the plaintiff has chosen to file the suit by saying that the defendant has attempted to trespass and interfere with the enjoyment and possession of the plaintiff upon the lane and that the lane is forming part of the plaintiff's house and it exclusively belongs to the plaintiff and that the plaintiff's father put up the tiled house after demolishing the thatched house after leaving 2 feet space in breadth and 70 feet space in length for the purpose of convenient enjoyment on the southern portion of the plaintiff's house and that the defendant has no manner of right or interest upon the said lane.

3. The written statement filed by the defendant in brief is as follows:-

The plaintiff should prove that she is the owner of 12 cents and that the fact that 2x70 feet space was left out while putting up the tiled house. In fact, the said lane does not belong to the plaintiff absolutely and the defendant as well as the plaintiff left out one feet each between the houses for the common use of both. It is being used as common lane by both the parties. So, half of the lane belongs to the defendant and it is in common enjoyment. The plaintiff has filed the suit vexatiously without adopting the decision of the Jamath in the village panchayat. Therefore, the suit is liable to be dismissed.

4. The District Munsif, Thiruvarur, being the Trial Court, after considering the oral evidence of the plaintiff as PW1 and her documents marked as Exs.A1 to A5, the oral evidence of the defendant as DW1 and two other witnesses as D. Ws.2 and 3 besides the commissioner's report and plan marked as Exs.C1 and C2 as well as the undertaking letter executed by the defendant and husband of the plaintiff to the Jamath President marked as Ex.X1, has found and come to the conclusion that the defendant has no right, title and interest upon the suit lane and instead the plaintiff alone has got right, title, interest and possession upon the suit lane and consequently, decreed the suit by granting

permanent injunction as prayed for.

5. On appeal preferred by the defendant before the Sub Court, Nagapattinam in A.S. No. 73 of 1990, the Sub Judge, Nagapattinam also, after considering and taking note of the oral and documentary evidence available on either side and the trial court's judgment, has come to the conclusion that the plaintiff alone has got title, possession and interest upon the suit lane and consequently, confirmed the judgment and decree of the Trial Court and dismissed the appeal.

6. Aggrieved against the concurrent findings and judgments of the courts below, this second appeal has been filed by the defendant by raising grounds as if the non production of title deed of the defendant cannot be found fault by the courts below and the document of title relied on by the plaintiff does not cover the suit lane also and thereby the second appeal has to be allowed.

7. Apart from the oral evidence of the plaintiff, on keen perusal of Ex.A3, I am able to see that it is a sale deed dated 25.4.1949 executed by one Mohamed Gani Rowther and others in favour of Mohamed Abdullah Rowther (father of the plaintiff) and as per this document, a thatched house within the total extent of 12 cents under R.S. No. 45-2A has been sold with the specific boundary north of Mohamed Ismail Rowther's house and south of Mohamed Ibrahim Rowther's house along with usual rights accrued to the vendors for Rs. 1500/=. Therefore, the plaintiff has been able to show that the house property purchased by her father in the year 1949 was a thatched house within the total extent of 12 cents lying on the north of the defendant's thatched house. There is also no mention about any existence of lane in between both the houses probably because there is no chance for such lane inasmuch as both the houses are thatched ones. It is simply mentioned as "on the north of Mohamed Ismail Rowther's house". Consequently, it means that there cannot be any space on the north of Mohamed Ismail Rowther's northern limit. On perusal of Ex.A4 dated 30.8.1967, I am able to see that it is a settlement deed executed by Fathima Beevi (plaintiff's father's first wife) in favour of the plaintiff (second wife's daughter) and as per this document, the tiled house bearing door No. 1-10A within the total extent of 12 cents in R.S. No. 45-2A with measurement of 30x50 $hjp mo has been settled in favour of the plaintiff besides some other properties. So, in between 1949 under Ex.A3 and this document on 30.8.1967, it seems that the thatched house has been demolished and tiled house has been constructed by the plaintiff's father. Even in this document, the southern boundary is shown as the thatched house of Mohamed Ismail Rowther and that significantly there is no mention about the lane and particularly the existence of right of the defendant or his ancestors beyond their northern limit and about any space available beyond the northern limit of the thatched house of Mohamed Ismail Rowther.

8. On perusal of Ex.A5 dated 9.8.1970, I am able to see that it is a release deed executed by Havva Beevi and others being sisters of the plaintiff's father in favour of the plaintiff. As per this document also the southern boundary of the plaintiff's house has been shown as house of Mohamed Ismail Rowther and including the titled house and thy;tPr;Rf;bfhy;iy with the total extent of 12 cents bearing door No. 1-10A. Therefore, the plaintiff's documents viz., Exs.A3 to A5 go to show that the plaintiff is the owner of the titled house bearing door No. 1-10A within the total extent of 12 cents and that they also indicate that there was no space by way of lane or otherwise left out by the plaintiff or her father on the southern side.

9. Further, according to the defendant's evidence, his tiled house has been put up only in the year 1975 and the same has been put up by him and it is also admitted by him that breadth of his house is 32 feet in north-south. So, it goes without saying that the defendant has put up tiled house after removing the thatched house only in the year 1975 i.e., long after Exs.A3 to A5. Whileso, it is normally expected that the defendant has no occasion or necessity to leave any space much less one feet beyond the northern limit of his house. It is more so when the plaintiff's father has also constructed a tiled house even before 1967 as disclosed by Exs.A4 and A5. That is why the defendant is expected to produce document of title relating to his property even while it was thatched house and later converted into tiled house and if such document of title is produced before the court, then it would be easy to find out as to whether any space much less two feet was left out by the defendant at the time of constructing his house and at the time of construction of the plaintiff's house. But, even though the defendant, in his cross examination, admits that if his document of title is produced into court, it would be possible to know the space left out by him as well as the plaintiff, he has not chosen to produce any of the document of title relating to his house available with him. In such circumstances only, both the courts below have commented and pointed out that the defendant has wilfully failed to produce his document of title and such conduct itself goes to show that there is no possibility of leaving any space beyond the northern limit of his house in the year 1975 or even earlier. 10. No doubt, it was found by the advocate commissioner on his inspection that some sunshades of both the houses and drainage pipe of the defendant's house are protruding or facing in the disputed lane. But, at the same time, the defendant, in his cross examination, has categorically admitted that the sunshade of his house, to the extent of 6 inches, is protruding towards north facing the disputed lane and there is also a pipe on the north leading the drainage water to the backyard. This protrusion of sunshade into 6 inches and installation of drainage pipe upon the northern wall of the defendant's house leading drainage water to the backyard cannot be taken advantage to say as if the lane is a common one and the defendant left out two feet space for the purpose of common lane. It has to be significantly pointed out in this context that there is no entrance upon the northern wall of the defendant's house facing the lane or in a way accessing into the lane from the defendant's house. If really it is a common lane as claimed by the defendant, normally, it is expected that there would be an entrance towards the lane for the purpose of convenient enjoyment. On the other hand, it is an admitted fact that if the defendant were to come to the lane, he should come out of the house and enter only through the entrance in between both the houses facing west and likewise, it is also an admitted fact that the defendant cannot go to his backyard through this alleged common lane. In such circumstances, it is highly artificial and improper to claim by the defendant as if the lane is in common use and the defendant is having common enjoyment and right upon the suit lane. It is further probabilised by the fact that the defendant is having a lane on the south of his house leading to the backyard. Therefore, all the above observed factors clearly go to indicate that the defendant cannot have any right much less common right and enjoyment upon the disputed lane and in all reasonableness and probabilities, the disputed lane should form part of only the plaintiff's house which was constructed even before 1967 by the father of the plaintiff. No doubt, the plaintiff or her predecessor in title kept quiet without protesting the protrusion of the sunshade to 6 inches and providing of drainage pipe on the northern wall of the defendant's house and it should be probably for the reason that the plaintiff's house was belonging to other sharers also who might not have been interested at that time and only when the plaintiff has become the absolute owner of that house after execution of Exs.A4 and A5,

interference has been made by the defendant as if he has common right and enjoyment upon the disputed lane and then only the dispute arose between the parties.

11. No doubt, Ex.X1 has been marked to show that there is undertaking letter signed by the defendant and the plaintiff's husband to the effect that they would not quarrel with each other and they would keep the walls in tact for the separate enjoyment of the respective portions of both the parties. But, the plaintiff is not a signatory to that undertaking letter and it is the evidence of the plaintiff that even if her husband is a signatory to the undertaking letter, it cannot be binding upon her right upon the suit lane. Probably, only such undertaking letter without the knowledge of the plaintiff has made the plaintiff to file the suit. Therefore, inasmuch as both the courts below have concurrently appreciated and come to the conclusion that the disputed lane absolutely belongs to the plaintiff and defendant has no manner of right upon the same, I am of the view that the second appeal has no acceptable and reasonable grounds and merits and consequently, there is no necessity for this court to interfere with the concurrent findings and judgments of the courts below. Accordingly, the second appeal has no merits and deserves to be dismissed.

12. In the result, the second appeal is dismissed with costs.