



S.A.No.177 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.01.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.177 of 2021
and
C.M.P.No.3694 of 2021

1. M.Mohana Krishnan
2. M.Jayanthi ... Appellants

Vs.

E.Pakkirisamy ... Respondent

PRAYER : Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 22.12.2020 in A.S.No.292 of 2019, passed by the learned VI Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 31.01.2019 in O.S.No.1462 of 2015 passed by the learned XIII Assistant Judge, City Civil Court, Chennai.

For appellants : Mr.N.A.Nissar Ahmed, Senior Counsel
for Mr.I.Kowser Nissar

For respondent : Mr.A.T.Jayaraman



S.A.No.177 of 2021

JUDGMENT

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The defendants in the suit in O.S.No.1462 of 2015 on the file of the XIII Assistant City Civil Court, Chennai, are the appellants before this Court.

2. The facts which have given rise to this second appeal are set out briefly hereinbelow and the parties are referred to in the same ranking as before the Trial Court.

FACTS OF THE CASE:

2.1. The plaintiff has filed a suit for mandatory injunction directing the defendant to remove the wall which was illegally constructed by them in the front side of the suit schedule property and permanent injunction restraining the defendants their men, agents or anyone acting on their behalf from further constructing the wall or putting up any construction in the common way, the suit schedule property.



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2.2. The plaintiff would submit that his mother late Krishnammal had purchased the land measuring an extent of 2,400 sq.ft. under a registered sale deed dated 14.07.1949 and his father Ettiappan had purchased the adjacent land measuring an extent of 1,283.5 sq.ft. under a registered sale deed dated 24.01.1956. The plaintiff's father died on 03.02.1970. Thereafter, the properties were in possession of the plaintiff and his mother.

2.3. The plaintiff had entered into a sale agreement with the defendants in respect of a small portion of the properties measuring an extent of 592 sq.ft. for a total sale consideration of Rs.2,20,000/- (Rupees Two Lakhs and Twenty thousand only). Along with the aforesaid land, they were also given rights to use the common passage measuring an extent of 502.5 sq.ft. Thereafter, a registered sale deed dated 17.11.2005 was executed by the plaintiff and his mother in favour of the second defendant. The plaintiff would submit that after he and his mother had signed on each sheet, they were asked to wait, and the defendants had gone inside the Sub-Registrar Office. Thereafter,



they have returned and requested the plaintiff and his mother to sign on the margins of the 10th and 11th pages. The plaintiff and his mother had signed as requested by the defendants. However, they were not aware of the criminal intention of the defendants.

2.4. Three years after the said registration, the plaintiff had obtained a copy of the sale deed and it was only then, he and his mother had come to know that the defendants had fraudulently altered and erased certain contents of the sale deed and cheated them. The following are the fraudulent entries made by the defendants.

(a) The last 3 lines which contain the recitals that the vendor (the 2nd defendant) should not independently sell the common way has been obliterated. The obliterated lines read as follows:

“தனிப்பட்ட முறையில் நீங்கள் பாராதீனம் செய்யக்கூடாது. இந்த வழியின் முன்புறம் உள்ள மாநகராட்சி கழிப்பிடத்தை எடுத்தவுடன் நீங்கள் அதன்வழியே செல்லவேண்டும் எங்கள் சொத்தின் மேல்புறம் திரும்ப வரக்கூடாது.”

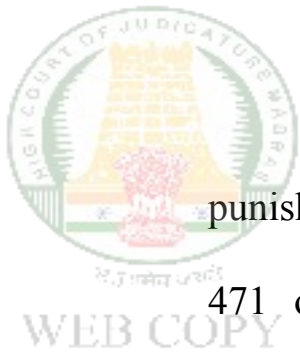


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(b) The plaintiff's signature has been fraudulently and falsely signed in the margins of the 7th page of the sale deed. The signature of the plaintiff had been obtained on the margins with the intent of making correction and erasing certain contents. The signature of the other vendors are not available in the same and in the 10th page also two lines have been erased and an additional line has been hand-written. None of these has been endorsed/counter signed by the plaintiff.

(c) That apart, in the 11th page of the sale deed, the vendors has whitened out certain portions and added by hand a recital that the purchaser will exclusively enjoy the property.

2.5. Though the second defendant has only purchased an extent of 592 sq.ft. of vacant land, they created document as if they have purchased an extent of 1,094.5 sq.ft. by fraudulently including the extent of 502.5 sq.ft. "L" shaped common way with the extent of 592 sq.ft. that has been sold. The plaintiff had filed the complaint on 20.12.2010 before the V Metropolitan Magistrate at Egmore for



punishing accused (the defendants herein) under Sections 420, 468 and 471 of IPC which was numbered as CC.No.1683 of 2011. The plaintiff's family member had also provided power of attorney for developing the property on 22.08.2012 to a builder and he sold the property measuring an extent of 377 sq.ft. to one Kalaivani.

2.6. While this being so, on 06.03.2015, the defendants had attempted to construct a wall in the northern side of the schedule property and the plaintiff had immediately lodged a complaint with K2 Police Station, Ayanavaram, and there was no action taken on the complaint. It is the case of the plaintiff that the defendants had constructed the wall in the front side and they had tried to construct wall in eastern side of suit property. He would further submit that he had provided the common passage in the front side measuring 5 feet width and 23.5 feet length, but the defendants had illegally taken away the passage by constructing a wall measuring 6 feet width and 29.5 feet length and remaining entrance place having 7.5 feet length only which cannot be tolerated by the plaintiff. Then, the plaintiff provided a



common way in the eastern side in 5 feet width and 77 feet length, but, the defendants were trying to construct wall for taking passage in 6 feet width and 77 feet length. It is the contention of the plaintiff that the common way is for both parties, but, the defendants had illegally tried to possess it only by themselves.

2.7. The plaintiff had planned to construct a house in the 2,400 sq.ft. retained by him. However, on account of this illegal wall constructed by the defendant, the Bank had refused to give loan to the plaintiff. The plaintiff would submit what was sold to the vendor /second defendant was only an extent of 592 sq.ft. out of 1,283.5sq.ft and the remaining land measuring an extent of 691.5 sq.ft. was settled by the plaintiff's mother in favour of her granddaughter under a settlement deed dated 15.02.2008. The plaintiff's mother had also settled her properties on her two grandsons. The common way measures 77.5 ft. in length and 5 ft. in width on the eastern side and 23.5 ft. in length and 5 ft. in width on the northern side. In the light of act of the defendants, the plaintiff has come forward with the suit in



question.

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2.8. The defendants would deny the allegations contained in the plaint and they would submit that it is an extent of 1,094.5 sq.ft. that has been sold by the plaintiff and his mother under the sale deed dated 17.11.2005. In fact, the plaintiff had filed a suit in O.S.No.6437 of 2008, for declaring the sale deed dated 17.11.2005 as null and void and for permanent injunction. The suit was dismissed for default on 29.09.2010 and the plaintiff's petition for restoring the same was dismissed on 29.6.2011. The revision filed against the defendants in CRP (NPD) No.4787 of 2013 before this Court was also dismissed on 03.01.2014 and thereafter, the plaintiff has not challenged the said order. As a result, the order in the above CRP had reached its finality. Therefore, the sale deed executed by the plaintiff is valid and binding on him.

2.9. The plaintiff had admitted the genuineness of the sale deed dated 17.11.2005 and now, he and his mother are denying the validity



of the same. Therefore, the present suit is only an attempt to harass the defendants and they sought for the dismissal of this suit.

TRIAL COURT:

3. The Trial Court, on perusing the record, had framed the following issues.

- “1. Whether the suit is barred by limitation?*
- 2. Whether the suit is hit by Res-Judicata?*
- 3. Whether the plaintiff is entitled for mandatory injunction as prayed for?*
- 4. Whether the plaintiff is entitled for permanent injunction as prayed for?*
- 5. To what relief if any the plaintiff is entitled for?”*

4. The plaintiff has examined himself as P.W.1 and marked Exs.A1 to A17. The first defendant had examined himself as D.W.1 and marked Exs.B1 to B10.

5. The Trial Court held in favour of the plaintiff with reference to the first two issues viz., with regard to limitation and



res judicata. However, the learned Judge has dismissed the suit only on the ground of non-joinder of necessary parties. The Trial Court took a view that since the remaining property had been settled on the grandchildren of the plaintiff's mother, their non-inclusion as parties in the proceedings was fatal to the case. On this ground, the suit was dismissed. In fact, non-joinder was not a ground raised by the defendants.

6. Challenging the said judgment and decree, the plaintiff has preferred an appeal in A.S.No.292 of 2019 on the file of the VI Additional City Civil Court, Chennai.

LOWER APPELLATE COURT:

7. The learned Judge, by his judgment and decree dated 20.12.2020, has reversed the judgment and decree of Trial Court, by allowing the appeal.

8. The learned Judge had taken note of the interpolations and



deletions that had been carried out in the sale deed, whereby, the defendants/vendors appear to have included the common passage as part of the property that was sold to them.

9. Challenging this judgment and decree, the defendants are before this Court.

10. When the matter was listed for admission on 05.03.2021, this second appeal was admitted on the following substantial questions of law.

“(a) Whether the lower appellate Court erred in not seeing that the respondent having lost the declaratory relief in suit O.S.No.6437 of 2008 cannot maintain a suit subsequently for mandatory and permanent injunction in O.S.No.1462 of 2015?

(b) Whether the lower appellate Court erred in shifting the burden of proof on the appellants when the respondent failed to discharge his burden and prove his case?

(c) Whether the lower appellate Court erred in not seeing that the respondent approached the Court with a huge



S.A.No.177 of 2021.

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delay and unclean hands and erred in granting mandatory and permanent injunction without any iota of right or title over the property merely on the basis of presumptions and assumptions?”

11. Heard the learned counsel on either side and perused the materials available on record.

DISCUSSION:

12. The issue revolves around the fact as to whether the sale deed dated 17.11.2005 registered as Document No.4154 of 2005 on the file of the Sub-Registrar Office, Anna Nagar, executed by the plaintiff and his mother in favour of the second defendant included the pathway as well.

12.1. In the 8th page of the above said sale deed, the following recitals are found.

“.....கீழண்டை பக்கத்தில் கி.மீ.அடி.4 தெ.வ.அடி.64 உள்ள



மனையை பொதுசந்துவழிக்காக விட்டு விட்டு மற்ற மனையையும் ஹை
சந்து வழியில் போக்குவரத்து செய்துக் கொள்ளும் பாத்தியதையும்
உள்படவும்....”

12.2. However, the schedule to this sale deed would read as follows.

“..... இதன் மத்தியில் கிழக்கு மேற்கு வடபுறம் 37 அடி, தென்புறம் 37
அடி, வடக்கு தெற்கு கீழ்புறம் 16 அடி மேல்புறம் 16 அடிக்கு மொத்தம்
592 சதுரஅடி கொண்ட மனையும் எட்டியப்பன் சொத்தின் (வீட்டு
மனையில்) இருந்து வீராசாமி மெயின் ரோடு தெருவிற்கு வரும் வழியின்
விபரம் பின்வருமாறு—

கிழமேல் 5 அடி அகலமும், தென்வடல் 77 கொண்ட நீளமும்
மற்றும் கிழமேல் 23 1/2 அடி நீளமும் வ.தெ.5 அடி அகலமும் கொண்ட
எல் வடிவம் கொண்ட வழி ஆக மொத்தம் 502.5 அடியும் சேர்த்து
1094.5 சதுரஅடி காலிமனை மட்டும் வாங்குபவர் நடைபாதையாக
பயன்படுத்திக் கொள்ள வீட்டு மனை விற்பவர்கள் ஆகிய நாங்கள் உறுதி
கூறுகிறோம்

12.3. The following words are hand written.

“... ஆக மொத்தம் 502.5 அடியும் சேர்த்து 1094.5 சதுரஅடி



காலிமனை மட்டும் ...”

12.4. The following words are also hand written.

“ ... கிரயம் பெறுபவர்க்கு மொத்தமாக நடைபாதையை
அனுபவிக்க உரிமை உண்டு என்று உறுதி கூறுகிறோம் ...”

12.5. However, at the end of the page, corrections are stated to be nil, which clearly shows that these erasures and interpolations had been made thereafter. A perusal of the contents of page 8 extracted *supra* would clearly show that there is a deletion, which has also not been certified. Therefore, it is crystal clear that the common pathway has not been alienated to the defendants and the same is a common way to both the defendants and the plaintiff and the persons claiming under the plaintiff.

13. The argument that the judgment and decree in the suit in O.S.No.6437 of 2008 would operate as *res judicata* has been rightly turned down by the Trial Court itself, which has been challenged by the appellants. The judgement and decree in the suit in O.S.No.6437 of



2008 is not one on merits and it is not the judgment and decree where the issues has been heard and finally decided. Therefore, in the light of the above, substantial question of law (a) is answered in favour of the plaintiff.

14. The plaintiff had, at the very first instance, attempted to challenge the sale deed by filing the suit in O.S.No.6437 of 2008 which was dismissed for default and the application to restore the same has also been dismissed. The revision filed against this order has also ended in dismissal and immediately, thereafter, the present suit has been filed. Therefore, there is no delay on the part of the plaintiff. These issues have also been answered against the defendant by the Trial Court and there is no challenge to the same. Therefore, substantial question of law (c) is answered in favour of the plaintiff.

15. In the light of recitals contained in the document filed on the part of the plaintiff, the contention that the plaintiff has failed to discharge the burden and prove his case is absolutely incorrect. The



S.A.No.177 of 2024.

plaintiff has been able to establish not only the recitals in the document viz., in the sale deed dated 17.11.2005, but, also about the interpolations made therein. Therefore, substantial question of law (b) is also answered in favour of the plaintiff.

Accordingly, this second appeal stands dismissed. Consequently, connected C.M.P. stands closed. No costs.

31.01.2024

Index : Yes/No
Speaking order/non-speaking order
ssa

To

- 1.The VI Additional Judge, City Civil Court, Chennai.
- 2.The XIII Assistant Judge, City Civil Court, Chennai.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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S.A.No.177 of 2021

P.T.ASHA, J.,

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S.A.No.177 of 2021

31.01.2024