

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.10.2015

CORAM:

THE HON'BLE MR. JUSTICE P.R.SHIVAKUMAR

Second Appeal No.1515 of 2000

Samsul Huda

... Appellant

Vs

1.Mahamada Beevi
2.Nazir Mohammad
3.Abdul Salem

... Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the Additional Subordinate Judge, Mayiladuthurai dated 27.07.1998 made in A.S.No.12 of 1998 confirming the Judgment and decree of the Additional District Munsif, Mayiladuthurai dated 8.11.1997 made in O.S.No.598 of 1995.

For Appellant : Mr.S.Sounthar

For Respondents : Mrs.P.Srividhya
for Mr.A.Muthukumar

JUDGMENT

For the sake of convenience, the parties are referred to in accordance with their ranks in the original suit and in appropriate places, their ranks in the second appeal shall also be referred to.

2. The plaintiff in the original suit is the appellant in the second appeal. The suit was filed for permanent injunction and mandatory injunction. Contending that the site belonged to Therezhundur Perumal Temple and the same was taken on lease by the plaintiff's father Abdul Salam some thirty years prior to the filing of the suit, whereupon he put up a hut and started residing therein; that on 18.08.1991 under a deed of settlement, the father of the plaintiff gifted the said property to the plaintiff and that thus the plaintiff became entitled to the superstructure and the leasehold right in respect of the land,

the suit came to be filed by the plaintiff (appellant herein). It was his further contention that the defendants, who are having their house on the west of the suit property, taking advantage of the natural obliteration of the fence, trespassed into a portion of the property and made an attempt to put up a toilet in the trespassed area; that the said attempt was prevented by the plaintiff and then a suit in O.S.No.46/1995 came to be filed by the plaintiff in the court of District Munsif, Mayiladuthurai in which an interim injunction was obtained; that disregarding and violating the order of interim injunction, the first defendant removed the parent wall of her property, a mud wall constructed abutting the parent wall of the property of the appellant/plaintiff and that hence the appellant/plaintiff was forced to approach the court for a permanent injunction against the respondents/defendants not to demolish the western wall of the plaintiff and for a mandatory injunction directing the defendants to remove the construction put up in the encroached portion and hand over possession of the encroached area to the plaintiff. The western wall of the plaintiff's house has been shown in Plaint 'A' schedule whereas the alleged encroached portion is shown in 'C' schedule and the construction put up in the alleged encroached portion has been shown in plaint 'B' schedule. From the description of the properties found in the plaint, it can be discerned that the leasehold land of the plaintiff lies on the east and the leasehold land of the defendants lies on the west and both are adjacent lands. The house of the plaintiff situates on the northern portion of her lease hold land, whereas the southern part has been used as garden in the backyard.

3. The suit was resisted by the respondents denying the plaintiff's case that she got the property under a Settlement Deed dated 08.08.1991 from her father. The other allegations regarding the alleged encroachment and construction of a toilet in the encroached portion have also been denied by the respondents/defendants. It was also contended that without causing any damage to the wall of the plaintiff, a compound wall was put up by the defendants at a distance of 2 to 4 feet from the western wall of the plaintiff's house and that therefore, the prayer for injunction in respect of plaint 'A' schedule property should not be granted. In respect of the other prayers, the defendants contended that the the suit should be dismissed holding the appellant/plaintiff not entitled to any of the relief sought for.

4. After framing necessary issues a trial was conducted. Three witnesses were examined as PWs.1 to 3 and two documents were marked as Exs.A1 and A2 on the side of the plaintiff. One witness was examined as DW1 and no document was produced on the side of the defendants.

5. The learned trial Judge, upon considering the evidence adduced on both sides, rendered a finding that the plaintiff failed to prove the extent of her property and also the extent of encroachment allegedly made by the respondents/defendants. The trial court also held that the plaintiff failed to prove the date of alleged encroachment also. Based on the said findings, the learned trial Judge answered all the issues against the plaintiff and dismissed the suit by a judgment and decree dated 08.11.1997.

6. The plaintiff filed an appeal in A.S.No.12/1998 on the file of the lower appellate court (Court of the Additional Subordinate Judge, Mayiladuthurai). The learned lower appellate Judge, after hearing, concurred with the findings of the trial court in all respects, dismissed the appeal and thereby confirmed the decree of the trial court by a judgment and decree dated 27.07.1998.

7. It is as against the said decree of the lower appellate court, the present second appeal came to be filed. Though the second appeal came to be filed in 1998 and it was numbered in 2000, it has not yet been admitted and only a notice of motion was ordered and on receipt of such notice of motion, the respondents have entered appearance.

8. The arguments advanced by Mr.S.Sounthar, learned counsel for the appellant and by Mrs.P.Srividhya, learned counsel representing Mr.A.Muthukumar, learned counsel on record for the respondents are heard. The judgments of the courts below and other documents produced in the form of typed set of papers are perused.

9. Admittedly, the site regarding which the appellant/plaintiff claims to be having leasehold right belongs to the temple. Similarly, the adjacent site over which the house of the respondents/defendants has been constructed also belongs to the very same temple. Though the appellant's claim, that she derived title from a Settlement deed executed by her father, has been denied in the first part of the written statement, the latter parts of the written statement goes to show that the defendants do not dispute the possession of the house property by the appellant/plaintiff, which lies on the east of the house property belonging to the respondents/defendants. The contention of the appellant/plaintiff is that there was a fence in between the two sites held by the parties as tenants under the temple and the fence got destroyed due to natural causes, and that taking advantage of the same, the respondents/defendants obliterated the fence altogether, encroached into a portion described in plaint 'C' schedule out of the leasehold property held by the appellant/plaintiff and put up a wall shown as 'B'

schedule property. It is the further case of the appellant/plaintiff that enclosing the encroached portion in the backyard of the plaintiff's house, the defendants put up the wall to a distance of 50 feet with a thickness of one foot. Based on such pleadings, the appellant/plaintiff prayed for a mandatory injunction for the removal of the toilet put up in the alleged encroached portion.

10. The appellant/plaintiff also contended that after enclosing the encroached portion with the wall, the defendants dismantled their wall and were threatening to demolish the western wall of the house of the appellant/plaintiff and make further encroachments and that hence she was forced to file the suit for a permanent injunction not to demolish the western wall of the house of the plaintiff and for recovery of the alleged encroached portion, namely the portion described in plaint 'C' schedule, besides the prayer for mandatory injunction for the removal of the construction made on the alleged encroached portion, namely the toilet put up by the defendants.

11. The case of the plaintiff is three folds:

The defendants encroached upon a portion measuring east-west 4-1/2 feet and north-south 50 feet in the garden on the south (backside) of the house of the plaintiff. The alleged encroached portion has been shown as the 'C' schedule property and a prayer for recovery of possession of the same has been made. Besides encroaching upon the said portion, according to the plaintiff and annexing the said portion with the property of the defendants, the defendants put up a compound wall to a length of 50 feet north-south with a thickness of 1 feet. The said compound wall has been shown as 'B' schedule property and the plaintiff has prayed for a mandatory injunction for the removal of the said compound wall. In addition, though it is admitted by the plaintiff that the parent walls of the plaintiff's house and the defendants' house are buttressing each other, the plaintiff has sought for a permanent injunction not to demolish her western wall made of stones (nky;g[w fy; jha; Rth;). The said prayer was made on the basis of the contention that the defendants were proclaiming to remove their eastern parent wall made of mud and also demolish the stone wall of the plaintiff, namely the western parent wall of the house of the plaintiff. The said western parent wall of the house of the plaintiff has been shown as plaint 'A' schedule property and the relief of permanent injunction has been sought for.

12. So far as the relief of or permanent injunction in respect of plaint 'A' schedule wall is concerned, it is the contention of the respondents/defendants that they have not made any attempt to demolish, nor did they proclaim to demolish the western parent wall of the plaintiff's house as pleaded by the plaintiff in the plaint. When such a plea is made, unless the

appellant/plaintiff is in a position to show that there was such an attempt or declaration, she cannot succeed in getting the relief of injunction in respect of plaint 'A' schedule wall.

13. So far as the compound wall and the alleged encroached portion shown respectively as plaint 'B' schedule and plaint 'C' schedule properties, it is the case of the respondents/defendants that the compound wall shown as plaint 'B' schedule property is not even in alignment with the eastern parent all of the house of the respondents/defendants and that leaving 2 to 4 feet from the line of alignment of the eastern wall of the house of the defendants, the compound wall came to be put up by them. When such a plea was made, the appellant/plaintiff could have very well sought for appointment of an Advocate-Commissioner to find out whether it was in alignment with the eastern wall of the defendant's house or whether the compound wall is erected in such a way that it has been further shifted on the east from the line of alignment of the eastern wall of the defendant's house to prove her case of encroachment over the 'C' schedule property.

14. In fact, the appellant/plaintiff has not chosen to furnish the east-west measurement of her property, out of which a portion is said to have been encroached upon. Without furnishing the east-west measurement either of the property of plaintiff or of the property of the defendants, the appellant/plaintiff cannot succeed in her attempt to substantiate her case that a portion of her property has been encroached upon and enclosing such encroached portion, the compound wall shown in the plaint 'B' schedule has been put up. When the defendants have taken a clear stand that the compound wall is not even in alignment with the eastern wall of their house and it was put up 2 or 4 feet away on the west from the line of alignment with their eastern parent wall, the plaintiff ought to have led evidence to show that the east-west breadth of her property has been diminished by encroachment. Besides making a clear plea as to what is the breadth of the leasehold property of the plaintiff, she should have made arrangements for the measurement of the property either by an Advocate-Commissioner or by a Surveyor to prove the alleged encroachment. The appellant/plaintiff has not chosen to do so. Hence the attempt made by the appellant/plaintiff can be viewed as an attempt to fish out of troubled waters, creating confusion by making an ambiguous plea.

15. Both the courts below, on proper appreciation of the pleadings and evidence, rendered a correct and concurrent finding that the plaintiff miserably failed to prove her case that any portion of her property had been encroached upon by the defendants and that she also failed to prove that the compound wall was put up in the leasehold property of the plaintiff. Hence the courts below cannot be found fault with for rejecting the plea for mandatory injunction in respect of 'B' schedule wall and recovery of possession in respect of 'C' schedule property.

16. So far as the injunction in respect of 'A' schedule is concerned, the said prayer was not pressed and the same was recorded by the trial court itself. Hence the trial court has not committed any error in dismissing the suit, non-suiting the plaintiff for the reliefs of mandatory injunction in respect of 'B' schedule and recovery of possession in respect of 'C' schedule property. The lower appellate court also has not committed any error in confirming the decree passed by the trial court.

17. An appeal from the decree of the Court subordinate to the High Court shall lie to the High Court under Section 100 of the Civil Procedure Code only on a substantial question of law. No substantial question of law is proved to have arisen for consideration in the second appeal. Hence this court comes to the conclusion that the second appeal fails and the same deserves dismissal.

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

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

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To

1. Additional Subordinate Judge, Mayiladuthurai

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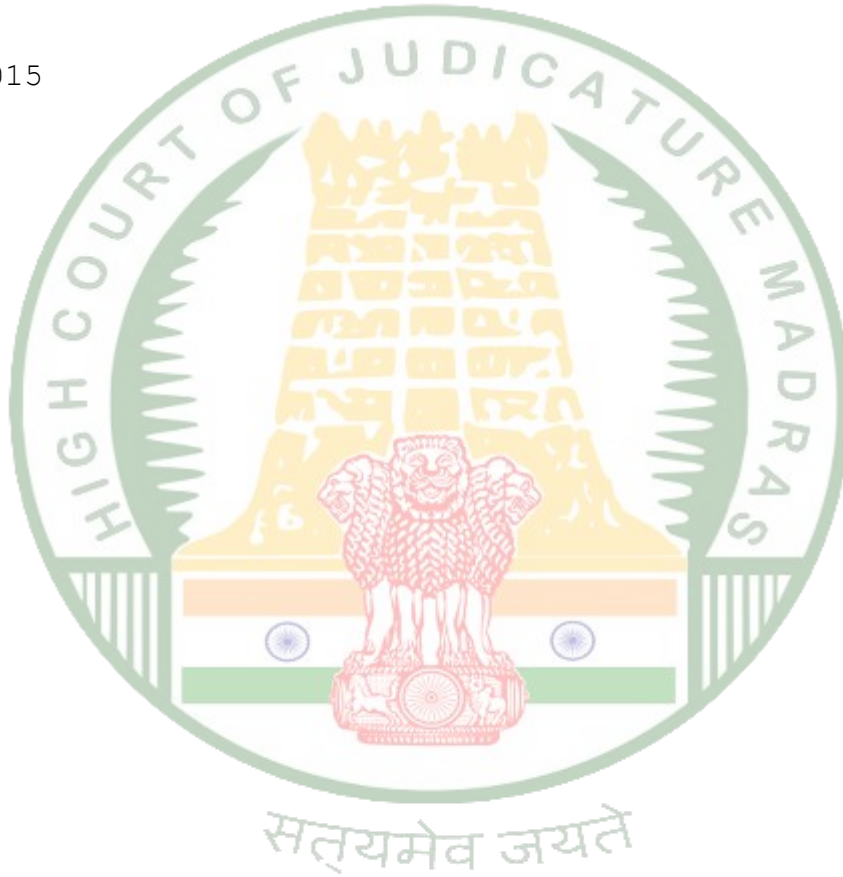
2. Additional District Munsif, Mayiladuthurai

+1 cc to Mr.S.Sounthar Advocate sr.57579

+1 cc to Mr.A.MuthuKumar Advocate sr.57198

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