

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.06.2015

CORAM

THE HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 237 of 2013

and

M.P. No. 1 of 2013

Dhandapani

... Appellant/Defendant

Vs.

Elumalai

... Respondent/Plaintiff

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 07.02.2011 in A.S. No. 23 of 2010 on the file of the Subordinate Judge, Gingee, confirming the judgment and decree dated 03.07.2008 made in O.S. No. 242 of 2000 on the file of the Additional District Munsif, Gingee.

For Appellant : Mr. Silambannan, SC
for M/s Profex Associates

For Respondent : Mr. R. Rajarajan

JUDGMENT

The challenge by the defendant, by means of this Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (CPC), is to the impugned judgment and decree dated 07.02.2011 passed by the Lower Appellate Court viz., Subordinate Judge, Gingee, in A.S. No. 23 of 2010 confirming the judgment and decree of the trial Court, viz., Additional District Munsif, Gingee, dated 03.07.2008 in O.S. No. 242 of 2000 wherein and by which the suit filed by the plaintiff was decreed as prayed for.

2. The plaintiff claims to have been in possession and enjoyment of the suit property from 27.3.1995, ie., date of purchase, from the original owner one Panchatchara Achari and his minor son

Sivakumar. According to the plaintiff, since the defendant, who purchased East West 14 feet vacant site which is situate in the eastern side of the suit property from the said vendor Panchatchara Achari, attempted to trespass into the suit property to build his house along with the wall in the suit property, he filed I.A. No. 692 of 2000 for grant of interim injunction. But the said petition was dismissed subsequent to which the defendant constructed a cement wall in the lower portion of the suit property. Hence, the plaintiff filed the suit for permanent injunction restraining the defendant and his men from interfering with his peaceful possession and enjoyment and also for mandatory injunction directing the defendant to remove the cement wall in the suit property.

3. The suit was resisted by the defendant stating that while he purchased the eastern portion from the original owner Panchatchara Achari on 10.4.1991, the plaintiff purchased the house site and house on 27.3.1995 and they were in enjoyment of the same separately. According to the defendant, the disputed wall belongs to him and the suit as filed by the plaintiff is not maintainable and hence, sought for dismissal of the suit.

4. The learned Additional District Munsif, Gingee, on the basis of the above pleadings, proceeded with the trial of the suit. In order to strengthen the case, the plaintiff besides examining himself as P.W.1, examined two more witnesses as P.W.2 and P.W.3 and marked Exs. A.1 to A.5. To nullify the evidence adduced on behalf of the plaintiff, the defendant examined himself as D.W.1 and examined one Narayanan as D.W.2 and marked Exs. B.1 to B.3. Exs. C.1 and C.2, viz., Commissioner's report and sketch respectively, were marked as Court documents.

5. The learned trial Judge, on consideration of the materials available thereon, finding that the defendant has raised wall in the suit property while the plaintiff was in possession and enjoyment of the same, decreed the suit as prayed for granting three months time to the defendant to remove the wall erected thereon. Challenging the same, the defendant preferred appeal and the Lower Appellate Court, after appreciating the facts, upheld the finding of the trial Court. Feeling aggrieved, the defendant has projected the instant Second Appeal.

6. The point for determination in this Second Appeal is whether the concurrent finding of the Courts below suffer from any material irregularity?

7. Heard Mr. Silambannan, learned Senior Counsel appearing for the appellant / defendant and Mr. R. Rajarajan, learned counsel for the respondent / plaintiff and perused the records.

8. The fact remains that the respondent / plaintiff had purchased the suit property under Ex. A.1 on 27.3.1995 with a tiled house whereas the defendant had purchased the vacant site lying east of the plaintiff's property under Ex. B.1 dated 10.4.1991. The plaintiff's case is that the defendant who had purchased the property on the eastern side of his property from the same vendor, is putting up a house and in the process, the defendant is trying to attach his eastern side wall and the same was objected to by him which resulted in the suit for injunction. However, it is alleged that after dismissal of the I.A. No. 692 of 2000 for injunction, the defendant had put up a cement wall on top of the old wall and hence, the plaintiff had amended the plaint for mandatory injunction. As such, it is clear that the dispute between the parties is over the wall in between the properties purchased by them from a common vendor.

9. From the materials available on record, it is seen that in order to come to a concrete conclusion, a Commissioner was appointed before the trial Court who had filed his sketch and report as Exs. C.2 and C.1 respectively. For better appreciation of the case, it would be relevant to refer to the report of the Commissioner who has stated with respect to the construction by the defendant on the old wall and the relevant passage is usefully re-produced hereunder:-

".....The defendant raised his terraced building upon the old wall which measures East West 1 ½ ft. i.e.(B to C). This old wall abruptly stops at point B1. The North South of the old wall is 25 Ft. and the new wall of the terraced building of the defendant house that is between B1 and H is 24 Ft. At this measurement, the house is found slantingly. The measurement between A and B is 21' 2 inches. The distance between D and E is 16 ft. But the defendant terraced building is constructed beyond the 16 ft. it extends up to point B. In between B and B1 (old wall) defendant constructed his new building upon the B and B1 old wall...."

10. From the above extracted portion of the report of the Commissioner, the existence of the old wall is established and it is also made clear that the defendant had rested his new wall on top of the old wall, which is the wall of the tiled house belonging to the respondent/plaintiff. The appellant / defendant has raised the wall for the entire north south boundary whereas the old wall is only for

a length of 25 feet as evident from the Commissioner's report and plan. Admittedly, the appellant / defendant was the purchaser prior in point of time, however, of a vacant site. Therefore, even if the measurement is less than what he had purchased, it will not give him the right to disturb the wall of the respondent / plaintiff who had also purchased from the same vendor. As such, it is clear that there is no dispute regarding the identity of the property.

11. The evidence of D.W.1 and D.W.2 also firmly establishes that the defendant purchased only a vacant site and, therefore, he cannot claim any right over the wall included in the plaintiff's document Ex. A.1. A perusal of the records would show that to defeat the rights of the respondent / plaintiff, the appellant / defendant produced Ex. B.2 dated 26.6.2000 which is a separate sale deed, only with respect to the wall, executed a few days prior to the filing of the suit. There is no convincing reason coming forth from the appellant / defendant as to why the second sale deed was obtained after 9 years for the wall alone. It is clear that the very transaction itself is not transparent and it was executed with an intention to defraud the respondent / plaintiff. It is also pertinent to point out at this juncture that both the respondent / plaintiff and the appellant / defendant having purchased their properties from the common vendor, did not choose to examine him, who, in the considered opinion of this Court, would have been the best person to speak about the physical features of the property. Nevertheless, the vendor having joined hands with the appellant / defendant by executing the subsequent sale deed only in respect of the wall, could not have been trustworthy.

12. Learned Senior Counsel appearing for the appellant / defendant contended that the suit for injunction is not maintainable without a relief of declaration.

13. The said contention is only to be rejected for the simple reason that the title of the respondent / plaintiff is not disputed. Admittedly, the appellant / defendant has purchased only a vacant site. Therefore, he cannot claim any right over the wall. As there is no dispute regarding the title of the respondent / plaintiff, the suit as laid for, is maintainable. The Lower Appellate Court also had given a finding regarding title of the respondent / plaintiff as there was pleading to the effect in the plaint and the respondent / plaintiff also had produced his title deeds.

14. At this juncture, it would not be out of place for this Court to make a reference to the judgment of the Hon'ble Supreme

Court in Anathula Sudhakar v. P.Buchi Reddy (Dead) by LRs. and Others [(2008) 4 SCC 594] wherein Their Lordships have laid down certain guidelines to be followed in a suit for injunction. The relevant point found in paragraph 17 (d) of the judgment is usefully extracted below:-

"Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

15. The other contention raised by the learned Senior Counsel appearing for the appellant / defendant is that the appellant has got a right of easement over the suit wall. In support of such contention, he seeks in aid of the decision of this Court in C. Kesavan vs. S.Sivagurunathan [S.A. No. 220 of 1996, disposed on 07.01.2011].

16. In this regard, first of all, it is to be pointed out that necessary pleadings have not been made in the written statement regarding easements based on which appropriate issue relating to the same on which the parties could have lead evidence. As a normal rule, no amount of evidence could be looked in to in the absence of sufficient pleadings. Hence, the theory of common party wall and that it belonged to the respondent / plaintiff subject to an easementary right of the appellant / defendant are not sustainable. Hence, the said decision is not applicable to the facts of the present case.

17. Further more, it is to be noted that a Court of Law will not embark upon a roving enquiry into the truthfulness or falsity of

allegation. In the instant case, the mere purchase of the wall by the appellant / defendant by a separate sale deed after 9 years from the date of original purchase, would not enable the Courts below, much less, this Court to hold a roving enquiry about the validity of the same.

18. The totality of the facts and circumstances of the case as spelt out by various documents and the oral evidence adduced by the parties lead to the irresistible conclusion that the respondent / plaintiff had established his case that the appellant / defendant made a claim over his property. In such circumstances, I am of the opinion that the concurrent finding of the Courts below warrants no interference by this Court.

19. As a rule, the High Court has no jurisdiction to entertain the Second Appeal on the ground of an erroneous finding on fact, however, gross or inexcusable the error may appear to be or as a rule, in Second Appeal, finding of fact should not be disturbed. However, if they are based on no evidence or in disregard of evidence or on inadmissible evidence or against the basic principles of law or on the face of it, there appears an error of law or procedure or when there is a vast divergence between the pleadings and proof, such findings can be interfered with, as opined by this Court.

20. In view of the aforesaid reasons and taking an over all assessment of the facts and circumstances of the present case, this Court holds that the Courts below have rightly rendered a pure finding of fact and consequently, decreed the suit in a proper way and looking at from any point of view, since the concurrent finding of the Courts below are based on pure finding of fact, they do not require any interference in the hands of this Court because of the fact they do not suffer from any material irregularity or patent illegality. The point is answered accordingly.

In the result, the Second Appeal fails and the same is dismissed confirming the concurrent finding of the Courts below. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

gri

04.06.2015

This matter having been cited today under the Caption for Being Mentioned on Friday, the 19th day of June 2015 pursuant to the Order of this Court dated 04.06.2015 and made herein in the presence of the above said advocates on the either the Court made the following Order.

This Second appeal was posed today under the caption "For Being Mentioned" at the instance of the appellant / defendant.

2. Heard the learned Senior Counsel appearing for the appellant / defendant and the plaintiff / respondent.

3. The suit filed for mandatory injunction directing the defendant to remove the wall in the suit property, was decreed by the trial Court granting three months time to the defendant to remove the wall erected thereon and the same was confirmed by both the Lower Appellate Court as well as this Court in the the above Second Appeal.

4. Today, on mentioning, learned Senior Counsel for the appellant / defendant submitted that the appellant's house rests on the wall in dispute and sought for four months time to demolish the wall by himself after erecting a supporting wall to rest his roof.

Accordingly, with the consent of the learned counsel appearing for the plaintiff / respondent, this Court is inclined to grant four months time, from the date of receipt of a copy of the judgment, to the appellant / defendant to demolish the suit wall.

gri

19.06.2015

Sd/-

Assistant Registrar(CS IV)

//True Copy//

To

Sub Assistant Registrar

1. The Subordinate Judge, Gingee

2. Additional District Munsif, Gingee

Copy To

The Section Officer

V.R. Section, High Court, Madras.

+1cc to Mr.G.Rajan, Advocate, S.R.No.27167

S.A. No. 237 of 2013

RJ(CO)

CA(08/10/2015)