

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.12.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.417 of 2015

and

M.P.No.1 of 2015

1.D.Jaganathan ... Appellant/Defendant

Vs.

D.Damodharan ... Respondent/Plaintiff

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 16.09.2014 passed in A.S.No.236 of 2010 on the file of the I Additional District Judge, City Civil Court, Chennai, whereby confirming the Judgment and Decree dated 30.06.2009 passed in O.S.No.5114 of 2002 on the file of the III Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.R.Subramanian
for Mr. C.Prakasam.

For Respondent : Mr.S.Suresh Kumar

JUDGEMENT

The defendant in O.S.No.5114 of 2002 on the file of the learned III Assistant Judge, City Civil Court, Chennai is the appellant and the respondent herein is the sole plaintiff in the suit. The said suit was filed for declaration that the defendant is a trespasser into the suit property, for a direction to the defendant to quit and deliver vacant possession of the suit property to the plaintiff and for a direction to the defendant to pay a sum of Rs.28,000/- towards damages for unlawful use and occupation of the suit property from 08.05.2000 and also for permanent injunction to restrain the defendant from alienating or letting out the suit property or from causing encumbrance whatsoever over the suit property. The trial court by decree and judgment dated 30.06.2009, decreed the suit as prayed for. As against the same, the appellant herein filed an appeal in A.S.No.236 of 2010 before the learned I Additional Judge, City Civil Court, Chennai. By decree and judgment dated 16.09.2014, the First Appellate Court dismissed the appeal, thereby confirming the decree and judgment of the trial Court.

Challenging the same, the defendant in the suit is before this Court with this second appeal.

2. The case of the plaintiff/respondent herein is as follows: -

The suit property is a portion of the superstructure at Door No.13, Thiruvalluvar Salai, Second Floor, Teynampet, Chennai, measuring 300 sq.ft. The suit property is part and parcel of a 3 storeyed building, constructed on the land comprised in Survey No.3774/3. Originally, the land in Survey No.3774/3 was a vacant site, measuring 545 sq.ft. The land was allotted to the father of the plaintiff, by name Devaraj in the family partition. Mr. Devaraj had three sons and two daughters, who are the plaintiff, the defendant and one Kumar and one Shanthi and Rani. According to the plaintiff, Mr. Devaraj, during his life time had given a letter of authorization under Ex.A5 to the plaintiff to spend his own money to construct the superstructure on the said property. Thus, according to the plaintiff, by spending his own money and out of his own efforts, he constructed the three storeyed building on the said vacant site. In one of the floors, he is residing and the others have been rented out to the tenants. According to the plaintiff, he has been collecting rent from the tenants. While so, on 04.01.2000, Mr. Devaraj issued a notice to the plaintiff, wherein, he contended that the property was not that of the exclusive property of the plaintiff. This gave rise to the cause of action for the plaintiff to file a suit. Therefore, the plaintiff filed an earlier suit in O.S.No.2481 of 2000 against his father Mr. Devaraj and his brothers Mr. Jeganathan (the appellant herein) and one Kumar. That suit was for permanent injunction to restrain the defendants therein from disturbing his right to possess the superstructure. That suit was decreed by the trial court. As against the same, the appellant herein filed an appeal in A.S.No.339 of 2008 and that was dismissed by the lower appellate court. As against the same, Mr. Jeganathan filed a second appeal before this court. But, at that time, it came to light that Mrs. Rani, who was added as a party died, but her legal representatives were not added. Therefore, this Court in the second appeal, which is yet to be admitted, observed that the remedy for the appellant herein is to make an application before the Lower Appellate Court in A.S.No.339 of 2008 to implead the legal representatives of Rani. Thus, the suit in O.S.No.2481 of 2000 has not yet reached finality and the same is pending by way of a second appeal before this Court and also by way of an interlocutory application before the lower appellate court.

3. Be that as it may, now coming to the present suit, during the pendency of O.S.No.2481 of 2000, which was filed on 02.01.2000, it is alleged that on 05.05.2000, the appellant herein who was one of the defendants in O.S.No.2481 of 2000 trespassed into the second floor of the superstructure, which is the suit property in the present suit. According to the

plaintiff, he has got no right to disturb the possession of the plaintiff and to trespass. Since the appellant, according to the plaintiff, had trespassed into the suit property on 05.05.2000, it has become necessary for him to file the present suit for the reliefs mentioned herein above. In this suit, the appellant contended that his father never gave any such authorization to the plaintiff to make construction of his own by spending his money. It is his further contention that the superstructure was constructed by Mr. Devaraj. It is the further case of the appellant that he did not trespass into the second floor of the superstructure and he was all along in possession.

4. Based on the above pleadings, the trial Court framed appropriate issues. To prove the case, on the side of the plaintiff, he was examined as PW1 and as many as 16 documents were exhibited. On the side of the defendant, he was examined as DW1 and as many as 2 documents were exhibited. Ex.B1 is the settlement deed said to have been executed by the father Mr.Devaraj in favour of the appellant. Ex.B2 is the patta for the land. Ex.A12 and Ex.A13 are the judgment and decree in O.S.No.2481 of 2000 respectively. Ex.A5 is the copy of the letter said to have been given by Devaraj in favour of the plaintiff authorising him to construct the superstructure.

5. Having considered all the above, the trial Court decreed the suit and the same was confirmed by the lower appellate court. That is how the appellant is before this Court with this second appeal.

6. Having heard the counsel on either side, I find the following substantial questions of law, which need to be answered in the second appeal:-

1. Whether the present suit in O.S.No.5114 of 2002 as filed is maintainable in law in view of the earlier suit in O.S.No.2481 of 2000?
2. Whether the courts below were right in granting the decree declaring the appellant as a trespasser by relying on Ex.A5?.
3. Whether Ex.A5 has been proved?

7. I have heard the learned Counsel on either side and I have also perused the records carefully.

8. The learned counsel for the appellant would submit that the present suit is barred by the earlier suit, which has not yet reached finality. It is further submitted that Ex.A5 has not been proved, which is evident from the fact that his father Mr.Devaraj made a complaint against the plaintiff and he himself issued a notice on 02.01.2000. This letter under Ex.A5 is not valid at any rate. According to the learned Counsel, as against the co-sharer, the decree granted by the courts below in

favour of the plaintiff is not sustainable.

9. The learned counsel appearing for the respondent vehemently opposed this appeal. According to him, Ex.A5 has been duly proved, which has given authorization to the plaintiff to make construction of the superstructure. He would further submit that since the trespass was made on 05.05.2000, during the pendency of the earlier suit, the said trespass has given a fresh cause of action for him to file the present suit. Thus, according to him, the present suit is maintainable. He would further submit that the reliefs sought for in the present suit are totally different and therefore, the earlier suit is not a bar for the present suit. He would further submit that Ex.A5 has been duly proved and further, this suit is only in respect of a portion of the superstructure and therefore, this present suit is maintainable. Thus, according to the learned counsel, the courts below have rightly granted decree as prayed for by the plaintiff.

10. I have considered the above submissions.

11. Admittedly, the earlier suit in O.S.No.2481 of 2000 was filed based on the legal notice issued by Mr.Devaraj, which was the cause of action for him to file the said suit. The cause of action in that suit was that Mr.Devaraj disputed the right of the plaintiff to claim possession and also to collect the rent. Rightly, he has filed suit for certain reliefs. But, unfortunately, in that suit, the plaintiff did not ask for any declaration in respect of either his title or possessory title. That was only a suit for bare injunction. I do not want to express any view in respect of the said issue because it is for this Court to go into that question in the second appeal pending as against the decree and judgment in O.S.No.2481 of 2000.

12. But, the fact remains that in the earlier suit, the right of the plaintiff herein to be in possession was precisely in issue. That was decided by the trial court and by the appellate court and the same is now pending before this Court. Thus, substantially what was the main issue in O.S.No.2481 of 2000 is an issue in the present suit also. Thus, the present suit, in my considered view, is not maintainable. But, the contention of the learned counsel for the appellant is that the cause of action for the present suit is totally different. If it is true that the alleged trespass was made during the pendency of O.S.No.2481 of 2000, the appropriate remedy available for the plaintiff is to amend the suit in O.S.No.2481 of 2000 based on the subsequent events and make the suit comprehensive. But, instead of doing this, the plaintiff has filed the present suit. In my considered view, this is not at all maintainable.

13. Now turning to Ex.A5, it is based on Ex.A5 that the plaintiff claims that he had right to be in possession of the superstructure and to collect rent. This was the claim made in O.S.No.2481 of 2000. Thus, the execution of Ex.A5 is directly in

issue in the earlier suit. The validity of Ex.A5 is also directly in issue in the earlier suit. When that be so, I am unable to understand as to how this Court can go into the very same question. It is for this reason, I have to say that the plaintiff has misdirected himself in filing the present suit instead of amending the earlier suit based on the subsequent events.

14. The learned counsel for the respondent submits that the reliefs sought for in the present suit are totally different. I am not persuaded by the said argument at all. If really the defendant had trespassed into the suit property during the pendency of O.S.No.2481 of 2000, he could have approached the trial court in O.S.No.2481 of 2000 for restoration of possession to him in that suit itself. Similarly, for any loss caused to the plaintiff on account of the alleged trespass, he has to work out his remedy in that suit itself. Thus, though the reliefs sought for are slightly different, they have got every connection with the cause of action in the earlier suit and also the cause of action which arose during the pendency of the earlier suit on account of certain subsequent developments. For these reasons, I hold that the present suit in its entirety as framed is not at all maintainable and both the courts below have failed to consider this question.

15. Accordingly, I answer the first substantial question of law in favour of the appellant. Since, I hold that the suit is not maintainable, I do not want to answer the other substantial questions of law because the other substantial questions of law may have some bearing in the second appeal, which is pending as against O.S.No.2481 of 2000. In such view of the matter, I hold that the decree and judgment passed by the trial court and confirmed by the lower appellate court is liable to be set aside. It is for the respondent to work out his remedies, which he has prayed for in the present suit, in the earlier suit in O.S.No.2481 of 2000 itself.

16. In the result, the second appeal is allowed and the decree and judgment of the trial court and confirmed by the Lower Appellate court is hereby set-aside and the suit in O.S.No.5114 of 2002 is dismissed. However, considering the facts and circumstances, there shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

sd/-

Assistant Registrar(Cs-III)

/TRUE COPY/

Sub-Assistant Registrar

To

1. The I Additional District Judge,
City Civil Court,
Chennai,

2. The III Assistant Judge,
City Civil Court,
Chennai,

+1 CC to MR.C.Prakasam Advocate. SR.NO.65421

+1 CC to MR.S.Suresh Kumar Advocate. SR.NO.65327

Second Appeal No.417 of 2015

CO-SV
JD 07/01/2016



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