

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2016

CORAM:

THE HONOURABLE MR. JUSTICE T. RAJA

C.M.A.No.3437 OF 2014

A.Velanganni (since deceased)

1. V.Regina Mary
2. V.Lizi Haritha
3. V.Leema Florance
4. V.Leoni Belinda Appellants/Plaintiff

vs.

1. Queen Mary Vasanthi
2. Dorthi Monika
3. Daras Enretta
4. Sagaya Alwin Raj
5. Sheela Gracy
6. The Commissioner,
Corporation of Chennai,
Chennai 600 003. Respondents/Defendant

Civil Miscellaneous Appeal filed under Order XLIII Rule 1(u) of the Code of Civil Procedure, against the order of Remand made in the judgment and decree dated 16.09.2014 in A.S.No.473 of 2010 on the file of the II Additional City Civil Judge, Chennai, reversing the judgment and decree, dated 03.08.2010 in O.S.No.6407 of 2004, on the file of the V Assistant City Civil Judge, Chennai and remanding the same back to the V Assistant City Civil Judge, Chennai.

For Appellants : Mr.R.Selvakumar
For R5 : Mr.J.R.K.Bhavanantham
for Mr.P.B.Ramanujam
For R6 : Mr.R.Arunmozhi
R1 to R4 : Exparte before the Tribunal

J U D G M E N T

Aggrieved by the impugned order of remand passed by the learned II Additional City Civil Judge, Chennai, the legal heirs of the deceased plaintiff Velanganni have approached this Court.

2. The appellants herein are the legal heirs of the deceased plaintiff Velanganni. The respondents 1 to 4/defendants 1 to 4 are the legal heirs of plaintiff's deceased brother Arulappan; the 5th respondent/5th defendant is the sister of the plaintiff and the 6th respondent is the Corporation of Chennai.

3. Heard the parties on both sides. According to the plaintiff Velanganni, he is the absolute owner of the superstructure (hut) with land bearing Old No.4, New No.14, Gulam Abbas Alikhan 2nd Street, Thousand Lights, Chennai 600 006, comprised in R.S.No.56/58F, (New No.R.S.No.56/230) O.S.No.96 measuring 322 sq. ft. The said property was settled to him by his father D.Antony under a registered Settlement Deed dated 30.01.1986. Another settlement has been made by his father for his brothers, i.e. "B" schedule property was settled in favour of the plaintiff; "C" Schedule property was settled in favour of Arulappan and "D" Schedule property was settled in favour of Thomas.

4. Ever since the date of settlement, the plaintiff is in absolute possession and enjoyment of the schedule property. To the north of the plaintiff's property, the 'C' schedule property settled in favour of Arulappan is situated and the 5th defendant started constructing a building in that property and while doing so, erected a wall encroaching upon the plaintiff's property on the northern side of the schedule property without any sanctioned plan. Though the plaintiff objected to the same, finding no effect, he sent a legal notice to the 6th defendant/Commissioner of Corporation of Chennai, which too, did not evoke any response. Since the 5th respondent failed to come forward to reply the plaintiff, the latter filed a suit for permanent injunction restraining the defendants 1 to 5 from proceeding with the unauthorised and illegal construction and interfering with his peaceful possession and enjoyment of the suit property and also sought mandatory injunction to the 6th defendant, directing him to perform his statutory duty.

5. Learned counsel for the appellants submitted that when an Advocate Commissioner was appointed, he rightly identified the unauthorised construction raised within the northern side of the plaintiff's property measuring an extent of 2.6 x 27.6 feet. Further, referring to Ex.C2 - Plan attached with the Commissioner's Report, learned counsel submitted that the plaintiff is entitled to an area of 322 total sq. ft. However, when the Surveyor noticed the actual available area on the western side, the plaintiff has got 9.6 feet width only on the western side, whereas, as per Ex.A2 - Plan, he is entitled to 11.6 feet of width. But, the 5th defendant is having an area of 12.6 feet of width on the western side instead of 12 feet. However, the Trial Court, without considering the vital points,

wrongly dismissed the suit. As against which, when the plaintiff filed an appeal, the First Appellate Court has rightly accepted the Report submitted by the Advocate Commissioner.

6. After appreciating the case of both sides, the First Appellate Court held that according to the Plan, the total area of the share is 322 sq. ft and as per the Sub-Registrar's approved plan, his total area is 321 sq. ft. The original property belonged to the father of the plaintiff and the defendants 1 and 5, three shares were allotted to three parties, viz. the 'B' Schedule property was settled in favour of the plaintiff; 'C' Schedule property was settled in favour of Arulappan and the other portion, i.e. 'D' Schedule property was settled in favour of Thomas. It is seen that the plaintiff's father viz. D.Antony died on 02.09.1991, the plaintiff's brother Arulappan died on 22.07.2000. Since Arulappan executed a Sale Deed in favour of the 5th defendant in respect of his property on 20.04.1995, the 5th defendant became the owner of the said portion of the property.

7. But, the Advocate Commissioner has clearly stated that on the southern side of the 5th defendant's property, i.e. the northern side of the plaintiff's property, the 5th defendant is found in excess possession of 2.6 feet. Therefore, the learned First Appellate Court has rightly come to the conclusion that the 5th defendant has been in excess possession of an extent of 2.6 feet of land, which actually belongs to the plaintiff. But, it should not have remanded the matter to the trial Court.

8. Learned counsel appearing for the 5th respondent/5th defendant submitted that as the deceased plaintiff A.Velanganni is none other than the brother of the 5th respondent/5th defendant and that the said extent of 2.6 feet has mistakenly been encroached into the plaintiff's property, the 5th respondent is prepared to pay suitable compensation to the plaintiff.

9. But, the learned counsel appearing for the appellants, objecting to the suggestion made by the counsel for the respondents, submitted that if 2.6 feet of land is allowed to be retained with the 5th respondent/5th defendant, the appellants will not be in a position to effectively make use of the suit property.

10. Therefore, this Court, finding that there has been a clear and categorical view taken by the First Appellate Court that the 5th respondent/5th defendant has encroached into the northern side of the plaintiff's property, to an extent of 2.6 feet, the judgment and decree of the First Appellate Court below is set aside and the Suit is decreed as prayed for. It is also made clear that the Surveyor's Plan shall be made part and parcel of the decree. The respondents/defendants are given

three months' time to hand over possession of the extent of the encroached land to the appellants/plaintiffs.

In fine, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected M.P.No.1 of 2014 is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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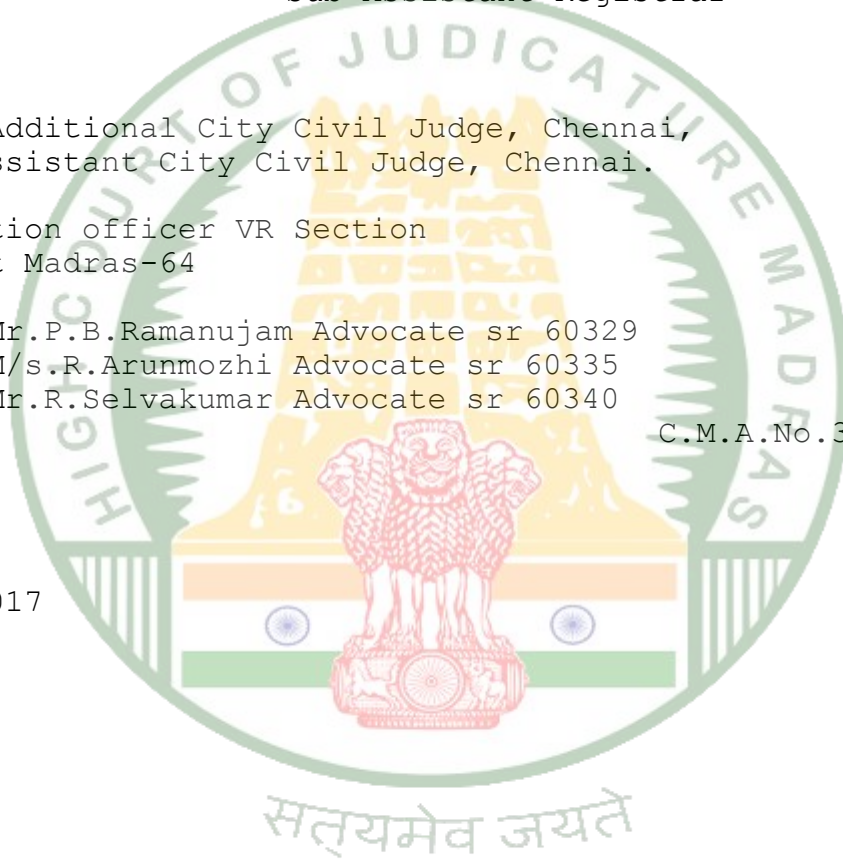
- 1.The II Additional City Civil Judge, Chennai,
- 2.The V Assistant City Civil Judge, Chennai.

3.The Section officer VR Section
High Court Madras-64

- +1 cc to Mr.P.B.Ramanujam Advocate sr 60329
+1 cc to M/s.R.Arunmozhi Advocate sr 60335
+1 cc to Mr.R.Selvakumar Advocate sr 60340

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