

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2017

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH

Second Appeal No.115 of 2017

and

C.M.P.No.2791 of 2017

Chellapandian .. Appellant/Appellant/Defendant

Vs

Babi ... Respondent/Respondent/Plaintiff

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 25.03.2010 passed in A.S.No.24 of 2009 on the file of the Additional Subordinate Judge, Mayiladuthurai, confirming the judgment and decree dated 06.12.2007 made in O.S.No.2 of 2007 on the file of the Principal District Munsif, Mayiladuthurai.

For Appellant .. Mr.A.Muthukumar

For Respondent .. Mr.S.Sounthar

JUDGMENT

The appellant is the defendant in the suit. The suit has been filed by the respondent/plaintiff for declaration, recovery of possession and permanent injunction. As the Courts below concurrently decreed the suit as prayed for, the present second appeal has been filed by raising the following substantial question of law:

(1)Whether the Courts below erred in law in granting the decree for declaration and mandatory injunction without locating the suit B Schedule property?

(2)Whether the Courts below erred in law in placing the burden on the defendant in a suit for declaration and mandatory injunction when the plaintiff has not even sought for appointment of a Commissioner for taking measurements of the properties of both the parties?

(3) Whether the lower appellate Court erred in law in dismissing the petition for appointment of Commissioner, I.A.No.49 of 2009 when the defendant had disputed the very existence of suit B Schedule property?

(4) Whether the suit is barred by limitation?

(5) Whether the Courts below have misconstrued and misappreciated the evidence on record?

2. Both the appellant and the respondent purchased their respective properties from the common vendor. 'A' Schedule property belongs to the respondent and 'B' Schedule property belongs to the appellant. The appellant/defendant purchased the property measuring 50 x 20 feet much earlier. The respondent/plaintiff purchased the property measuring 1800 sq.ft. prior to the filing of the suit. By consent, the measurement was made by the respondent/plaintiff and her counsel, as advised by the learned counsel for the appellant. As it was found that about 21 sq. ft. was encroached in the suit property, the suit has been laid.

3. The Courts below decreed the suit on the premise that even as per the evidence of D.W.1, there is no dispute about the fact that the property purchased by him has been fully utilised for construction and thus the remaining extent has to go to the respondent/plaintiff. Incidentally, the factors such as measurement having been made earlier and the admission of the appellant/defendant that Ex.A4 is a photograph showing the houses of the appellant and the respondent were taken into consideration by the trial Court.

4. Learned counsel appearing for the appellant submits that a specific plea has been taken before the lower appellate Court for not appointing the Advocate Commissioner. After the dismissal of the suit, the appellant filed an interlocutory application, which was wrongly dismissed by taking it along with the appeal. The reason given by the lower appellate Court that the appointment of Surveyor has not been sought for cannot be accepted.

5. Learned counsel appearing for the respondent submits that since concurrent finding has been rendered by the Courts below, no interference is required under Section 100 C.P.C., especially, when the decree has been passed, based upon the statement made by D.W.1.

6.The Courts below decreed the suit based upon the materials available both oral and documentary. The documents filed by both sides coupled with the evidence of the appellant being D.W.1 was taken into consideration. The appellant has not denied various suggestions putforth but on the contrary admitted them. Thus they have become relevant facts. Coming to the question of appointment of Advocate Commissioner, report of the Advocate Commissioner is a piece of evidence to enable the Court to come to a conclusion. Though the appellant/defendant has raised a plea in the written statement, he has not filed any application before the trial Court. The lower appellate Court dismissed the appeal on merits. In other words, the lower appellate Court has taken into consideration the relevant materials and satisfied that they will be sufficient to decide the appeal. The Advocate Commissioner's report is only to enable the Court to come to just conclusion. When the Court does not feel it appropriate to appoint an Advocate Commissioner, there cannot be any error in rejecting the plea of appointing the Advocate Commissioner.

7.In such view of the matter, there is no substantial question of law involved, warranting interference. Hence the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

mmi

To

1.The Additional Subordinate Judge,
Mayiladuthurai.

2.The Principal District Munsif,
Mayiladuthurai.

+1cc to M/s.S.Sounthar,Advocate sr.9928

+1cc to M/s.A.Muthukumar,Advocate sr.9812

S.A.No.115 of 2017

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ss(3/3/2017)