

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.170 OF 2008

Mariyagnanam

... Appellant/Appellant/Plaintiff

Vs

Arumugam

... Respondent/Respondent/ Defendant

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree passed in A.S.No.9 of 2005 dated 23.08.2005 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai, confirming the judgment and decree passed in O.S.No.188 of 1991, dated 18.03.2004 on the file of the Court of District Munsif, Mayiladuthurai.

For Appellant :Mr.A.Muthukumar

For Respondent :Mr.S.Soundar

J U D G M E N T

Challenging the decree and judgment passed in A.S.No.9 of 2005 dated 23.08.2005 on the file of Principal Subordinate Court, Mayiladuthurai, confirming the decree and judgment passed in O.S.No.188 of 1991, dated 18.03.2004 on the file of District Munsif Court, Mayiladuthurai, the unsuccessful plaintiff has preferred the above Second Appeal on the following substantial questions of law:

"1.When the plaintiff has purchased 2430 sq.ft under a registered sale deed, Ex.A1, long prior to the defendant's sale deed and the defendant's predecessors in interest had only 749 sq.ft whether the lower appellate court erred in law in holding that the plaintiff has no title to the suit property ?

2. Whether the lower appellate court erred in law in non suiting the plaintiff on the ground that he had filed the suit for possession 4 months after the encroachment ?

3. Whether the lower appellate court misconstrued misappreciated the evidence on record ? "

2. According to the plaintiff, she purchased an extent of 2430 sq.ft., under a registered sale deed. The defendant encroached upon a portion of her property and constructed a compound wall during her temporary absence on account of Christmas holidays. Hence, she filed a suit for declaration of title, recovery of possession and consequential injunction. The defendant controverting the statements would contend that the plaintiff was never in possession of the property beyond the southern wall of her house. Ever since the purchase of the property from his predecessor, he is in peaceful possession and enjoyment of the property. He put up a compound wall with the permission and knowledge of the plaintiff. Since he and his predecessors were in possession of the property for more than 30 years, he is entitled to title through adverse possession also.

3. After elaborate evidence, the Trial Court found that the plaintiff failed to assert the identity and extent of the property and dismissed the suit and declared that the defendant is the title holder. On appeal, the Lower Appellate Court had set aside the finding that the defendant is the title holder of the extent claimed by him, however, dismissed the suit on the ground that the plaintiff has failed to prove her title and cannot rest her case on the weakness of her opponent. Hence, the Second Appeal.

4. In so far as the first question of law raised by the appellant, it comprises of two factual issues of title with regard to the plaintiff and defendant. In so far as the defendant's title is concerned, the Lower Appellate Court has given an adverse finding against him and in the absence of appeal against the same, it need not be analysed here. But will it confirm the title on the plaintiff is to be seen. It is well settled in a suit for declaration of title, onus lies on the plaintiff to prove the right, title and interest. In so far as the present case is concerned, though the plaintiff claims that she purchased 2430 sq.ft under Ex.A1, she failed to establish by suitable evidence the existence of the extent of property overboard. The oral evidence and documentary evidence prove otherwise. The plaintiff has marked the sale deeds of the defendant and the predecessors in title to negative the title of the defendant vide Exs.A2 - A4, but failed to mark any document

of her vendor having right title and interest over the property she purchased. Without establishing the title on her own evidence, the plaintiff ventured to harp upon the weakness of the defendant. The plaintiff in her own evidence would admit that she filed a suit against her neighbour alleging encroachment on the northern side of her property, which ended in compromise. The facts regarding filing of the suit and the definite extent of land retained by the plaintiff were not produced before the Court. The Commissioner appointed by the Court, in his report Exs.C1 and C2 mention that the breadth of the property on the eastern side is only 22 1/2 feet as against 30 feet as found in the sale deed. The shortage of measurement is attributed to encroachment by neighbours. In the previous litigation, the appellant must have measured her property and must be aware of her southern boundary. But, in spite of the same, the appellant has not come out with clear and specific measurement and there is no explanation for the discrepancies in the same. The Trial Court have elaborately discussed the issue and recorded a categorical finding that the plaintiff failed to identify the property and not clear about the extent of the property she purchased. The plaintiff in her oral evidence would admit that she had not measured the property before she purchased the same. Even though, the plaintiff would insist on production of plan approval for defendant's building, she failed to establish the measurement by producing her own, even after categorical admission of obtaining approval for her building. The Lower Appellate Court has rightly found that the plaintiff rather than establishing the title, relied on the weakness of defendant and is not entitled to relief as prayed for. This Court do not find any contrary evidence establishing the factum of title in favour of the plaintiff. Title cannot be conferred only because the defendant does not have title or prove title over his property. It shall be proved and established independent of the title of others. In such circumstances, the first question of law raised by the appellant does not raise any legal issue and it is in the nature of question of fact and answered against the appellant.

5. In view of the finding that the appellant failed to prove and establish her title independently among other grounds and that the delay in filing the suit is not the only reason for denial of the relief claimed, the issue is answered against the appellant. Even though the suit is not barred by limitation, the antecedents of the plaintiff in conducting a suit for recovery of possession with her neighbour, would lead a prudent man to believe that she would have taken legal action immediately. When the plaintiff/appellant herself was not sure of the linear measurements, extent of property and area under encroachment and failed to prove her entitlement of possession, with sufficient evidence, and when she amended the plaint over the measurements

of the property and restricted her prayer, an adverse finding has been given by the Courts below. The appellant has not dislodged the logical conclusion arrived at by the Courts below, as wrong or erroneous. In such circumstances, the question of law raised in this aspect also is answered against the appellant.

6. In fine, there arise no legal issues, warranting interference of the concurrent findings of the Courts below and accordingly, the above Second Appeal stands dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

aav/tk

To

1.The Principal Subordinate Court
Mayiladuthurai.

2.The District Munsif Court
Mayiladuthurai.

Copy to
The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.S.Sounthar, Advocate, S.R.No.79063

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.79023

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SSD(CO)
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