

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2017

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THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

Second Appeal No.614 of 2016

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C.M.P.No.11494 of 2016

Mrs.S.Mohana

W/o.A.Kalynasundaram

.... Appellant/Plaintiff

vs.

L.Murugesan

S/o.Loganathan.

.... Respondent/Defendant

This appeal is preferred under Section 100 CPC against the judgment and decree made in A.S.No.28 of 2011 dated 08.01.2016 on the file of the II Additional Judge, City Civil Court, Chennai, reversing the judgment and decree made in O.S.No.4277 of 2008, dated 30.10.2010, on the file of the V Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.G.Dhanasekaran

For Respondent : Mr.A.S.Narasimhan

J U D G M E N T

Against the reversing the judgment and decree of the trial Court, this appeal has been filed at the instance of the plaintiff by framing the following Substantial Questions of Law :

1. Whether the court below is right in relying on the patta issued by the Revenue Department for arriving at the judgment?

2. Whether the lower Court is right to law when it over looked the fact that the appellant is estopped from encroaching the land after he receiving compensation in out of court compromise in Suit No.O.S.No.5754/1922.

3. Whether the decision of lower court is valid in law when the claim of the appellant is barred by Article 65 of the Limitation Act?

2. Both the plaintiff and defendant have purchased the specific extent of land along with the boundaries from the common vendor by name Chokalinga Gramani. The defendant has purchased an extent of 828 sq.ft. north south 36' east west 23'

sq.ft. under Ex.B1, dated 07.02.2000. The plaintiff has purchased an extent of North south and east west 32' under Ex.A1, dated 13.02.2004. With the grievance that the extent of four feet left for the purpose of enjoying light, air and rain water, has been encroached by the defendant and construction has been put up, the present suit has been laid for permanent and mandatory injunction against the defendant.

3.The trial Court decreed the suit as prayed for, subsequent to placing reliance upon the report of the learned Advocate Commissioner. Accordingly, having found that there is lesser extent available in the property purchased by the plaintiff under Ex.A1, the suit was decreed. The lower Appellate Court reversed the judgment and decree of the trial Court holding that the Commissioner's report has been wrongly taken into consideration by the trial Court, since as per Ex.B1, though the defendant is entitled for 36' x 23', for total extent of 828 sq.ft., the commissioner found only 19 sq.ft. east west side. The evidence of CW1 coupled with Ex.C1 which is the Permanent Land Register has been taken into consideration in favour of the defendant. CW1 is the Assistant Surveyor. The reasoning of the trial Court that the defendant has not obtained the approval from the Planning Authority was found to be relevant by the lower Appellate Court. Incidentally, it was held that the sale in favour of the defendant being earlier, the general principle governing boundaries will prevail over the extent has to be applied. Challenging the said decision, the present appeal has been filed.

4.Learned counsel for the appellant would submit that the defendant has not produced any approved plan. This would show unnecessary life requisition plan. The Commissioner has found lesser extent of the property purchased by the plaintiff under Ex.A1. Thus, the judgment and decree of the lower Appellate Court has to be set aside.

5.Learned counsel for the defendant would submit that the lower Appellate Court has considered the relevant materials and that no interference is required, admittedly, in the teeth of Ex.B1 coupled with the evidence of CW1, which is based upon Ex.C1.

6.The fact that both the parties have purchased the respective properties from the common vendor is not in dispute. Similarly, the fact that the sale deed of the defendant is being prior in time is not in dispute. The sale deed of the plaintiff makes a reference to the boundary of the defendant. Now in the sale deed in favour of the defendant, the measurement has been show as 36' x 23' sq.ft. The lower Appellate Court has taken into consideration the shortage of extent with respect to the

plaintiff alone but not the defendant, though the sale being earlier in point of time. It is rightly found by the lower Appellate Court by applying the principle of boundary prevailing over the extent. There is no material to show the alleged encroachment by the defendant, as rightly held by the lower Appellate Court. The report of the Commissioner, being a piece of evidence, has been correctly appreciated by the lower Appellate Court as against the trial Court. The permission from the Planning Authority is not relevant for the purpose of deciding the suit. On the contrary, reliance has been rightly made on the patta in favour of the defendant coupled with the other evidence available on record. The lower Appellate Court further taken into consideration the matter of clarity on the part of the plaintiff as he was not clear about the alleged encroachment and there is also change in the pleadings in the plaint that while constructing her house leaving 2 fts and subsequently amended as 4fts.

7. In such view of the matter, this Court does not find any need for interference in the judgment and decree of the II Additional City Civil Court, Chennai made in A.S.No.28 of 2011 dated 08.01.2016 since what is available is only the question of fact.

Accordingly, this Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The II Additional Judge,
City Civil Court,
Chennai.

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

3. The Section officer
VR Section High Court Madras

+1 cc to Mr.G.Dhanasekaran Advocate sr 995

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