

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.04.2018

CORAM :

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

Second Appeal No.267 of 2018

and C.M.P.No.6733 of 2018

D.Sivakalai

... Appellant/Plaintiff

Vs.

Dhayan Basha (Deceased)

1.D.Sajida Begum

2.D.Mumtaz Begum

3.D.Fathima Begum

4.D.Ayesha Begum

... Respondents/Defendants

PRAYER:- Second Appeal has been filed under Section 100 of C.P.C to set aside the judgment and decree dated 29.04.2014 made in A.S.No.225 of 2012 on the file of the III Additional City Civil Court, Chennai, confirming the judgment and decree dated 21.07.2011 made in O.S.No.8514 of 2008 on the file of the XV Assistant City Civil Court, Chennai.

For Appellant : Mr.S.Partheeban

For Respondents : Mr.K.P.Gopalakrishnan

J U D G M E N T

This Second Appeal has been filed to set aside the judgment and decree dated 29.04.2014 made in A.S.No.225 of 2012 on the file of the III Additional City Civil Court, Chennai, confirming the judgment and decree dated 21.07.2011 made in O.S.No.8514 of 2008 on the file of the XV Assistant City Civil Court, Chennai.

2.The appellant is plaintiff and first respondent is the second defendant in O.S.No.8514 of 2008 on the file of the XV Assistant City Civil Court, Chennai. The appellant filed the said suit for declaration that she is entitled to occupy the land on the eastern side of her property without any interruption or inconvenience caused by one deceased Dhayan Basha and first respondent or anybody on her behalf. According to the appellant, she purchased the suit property on 20.04.1994 from Mithrammal. The said Mithrammal purchased the suit property

from Dr.Dilara Begum, wife of Haji Mohamed Siddique Sait Shahib on 14.10.1968. From the date of purchase, she is in possession and enjoyment of the suit property. She purchased the property measuring 342 Sq.ft. with boundaries. The dimension has been mentioned in the sale deed. The extent of the property is wrongly mentioned as 272 Sq.ft. She came to know about the said mistake only when she approached the Primary Co-operative Land Development Bank Ltd., Saidapet to avail loan. The first defendant agreed to demolish the portion of the property of the appellant and hand over to her. Subsequently, he did not hand over the suit property. Hence, the present suit.

3.The deceased first defendant, Dhayan Basha filed written statement and denied all the averments and contended that he is not owner of the suit property. The first respondent is owner of the property. The suit is not maintainable for non joinder of proper party and for filing suit against the wrong person. The first defendant contended that he did not agree to hand over the portion as claimed by the appellant. The appellant purchased only 272 Sq.ft and there is no passage between the property of the appellant and first respondent. The appellant has not taken any steps from the year 1994 for rectifying the defects in the sale deed or for taking possession from the first defendant and first respondent and also contended that suit is barred by limitation.

4.Pending suit, the first respondent was impleaded as second defendant and she has adopted the written statement filed by the deceased first defendant.

5.Based on the pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the appellant examined herself as P.W.1 and marked ten documents as Exs.A1 to A10 and the deceased first defendant examined himself as D.W.1 and one S.Rajakumari, Clerk of Sub-Registrar Office was examined as C.W.1 and marked three documents as Exs.C1 to C3.

6.The learned Trial Judge considering the pleadings, oral and documentary evidence, especially the admission of the appellant in the cross examination, dismissed the suit, holding that appellant has failed to substantiate her claim for declaration and injunction and appellant did not seek relief of possession as admittedly the possession of the disputed property is with the first respondent.

7.Against the said judgment and decree, the appellant filed A.S.No.225 of 2012 before III Additional City Civil Court, Chennai. The learned First Appellate Judge framed necessary points for consideration and considering all the materials available on record and judgments of the Trial Court, dismissed

the appeal, holding that the learned Trial Judge has considered all the facts and law in proper perspective and there is no error warranting interference to set aside or modify the said judgment.

8. Against the said judgment and decree dated 29.04.2014 made in A.S.No.225 of 2012, the appellant has filed the present Second Appeal.

9. The learned counsel for the appellant contended that the dimension of the property and boundaries are correctly given and stamp duty is paid for 342 Sq.ft. The appellant has proved by summoning the Clerk from Sub-Registrar Office and proved that Stamp Duty is paid only for 342 Sq.ft in the sale deed and relied on the judgment reported in (2006) 5 SCC 466 (Subhaga and others Vs. Shobha and others) and submitted that once the property has been identified by the boundaries, even if there is any discrepancy, normally, the boundaries should prevail.

10. The learned counsel for the respondents contended that appellant purchased only 272 Sq.ft as mentioned in the sale deed and she is in possession only to that extent. From the date of purchase, the appellant did not claim any extent more than the extent mentioned in the sale deed. The suit is barred by limitation.

11. Heard the learned counsel for the appellant as well as the respondents and perused the materials available on record.

12. The disputed property is 70 Sq.ft. According to the appellant, she purchased 342 Sq.ft., while by mistake, it was mentioned in the sale deed as 272 Sq.ft. The appellant has purchased the property in the year 1994. At that time itself, the building of the first respondent was in existence and there is no open space between the properties of the appellant and first respondent. According to the appellant, she measured the property and then only purchased the property. It is the further case of the appellant that she demolished the existing super structure and put up four storied building after obtaining necessary approval from Corporation of Chennai. This shows that at the time of purchase as well as after demolition of superstructure, the appellant knew the extent of land in her possession. The appellant did not take any steps from the year 1994 for possession of the disputed extent belonging to her. She has contended that building of the first respondent is in the disputed portion and first defendant agreed to hand over the same to her. The deceased first defendant denied the said contention. The appellant has not produced any acceptable evidence to substantiate her case. She has also not stated when the bank officials informed her about the discrepancy in the

extent of the land sold to her. Exs.A1 to A3, the sale deeds of the predecessor of the appellant also mentions the extent of the property is only 272 Sq.ft. Admittedly, the disputed land is in possession of first respondent and the building in the disputed portion was in existence even before purchase by the appellant. The appellant has not sought for possession of the disputed land from first defendant or first respondent.

13.The Courts below have considered all the above facts in proper perspective and dismissed the suit and appeal by giving cogent and valid reason. These findings are finding of facts by appreciating oral and documentary evidence produced by appellant. There is no error of law warranting interference by this Court on the concurrent findings. The learned counsel for the appellant has not made out any Substantial Question of Law to be decided in the Second Appeal.

14.In the result, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

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

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

+1cc to Mr.K.P.Gopalakrishnan, Advocate, S.R.No.29507

+1cc to Mr.S.Partheeban, Advocate, S.R.No.29372

Second Appeal No.267 of 2018
and C.M.P.No.6733 of 2018

CNR(CO)
GSP(11/06/2018)

WEB COPY