

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 02.08.2017

Judgment Pronounced on : 24.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.1316 of 2007
and M.P.No.1 of 2007

D.Gopalan ...Appellant/Plaintiff

Vs.

Mrs.D.Maria Sukumari ...Respondent/Defendant

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 24.04.2007 made in A.S.No.446 of 2005 passed by the learned IV Additional Judge, City Civil Court, Chennai reversing the Judgment and decree dated 15.06.2004 passed by the learned XII Assistant Judge, City Civil Court, Chennai in O.S.No.4386 of 1999.

For Appellant : Mr.M.Kamalanathan

For Respondent : Mr.G.Jayachandran

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 24.04.2007 made in A.S.No.446 of 2005 passed by the learned IV Additional Judge, City Civil Court, Chennai reversing the Judgment and decree dated 15.06.2004 passed by the learned XII Assistant Judge, City Civil Court, Chennai in O.S.No.4386 of 1999.

2.Brief facts of the case is as follows:-

The plaintiff is the owner of the suit "A" schedule property measuring 2520 sq.frt. The plaintiff has purchased portion of the suit property measuring to an extent of 1320 sq.ft., through a sale deed dated 05.07.1985 from one Kanagasundari and Perumal. Subsequently, he has purchased the remaining portion of the

property measuring to an extent of 1200 sq.ft., from the said Perumal by sale deed dated 06.01.1995. The above said property is comprised in Survey No.334/2, Egmore, Chennai. To enter into the above said property, there was a pathways from the road measuring 5 feet width and 82 feet in length. This passage is also part and parcel of the suit "A" schedule property. On the North of the suit property is the portion in Door No.26 which belongs to the plaintiff. The same was by sale deed dated 04.12.1958 which is the suit "B" schedule property. The defendant is residing at Door No.27/3, on the North of 'A' Schedule and South of 'B' Schedule property. In the year, 1998, the defendant encroached upon the plaintiff's property. Hence, the plaintiff came forward with the suit for declaration and mandatory injunction or alternatively for a direction to the defendant to pay compensation for the encroached portion of the suit schedule properties at the market value together with interest at the rate of 24% p.a.

3.On the other hand, opposing the claim of the plaintiff, the first defendant denied any knowledge of purchase of land under sale deed dated 05.07.1985 and 06.01.1995. The first defendant also states that he has is not aware any entrance of a passage leading to the plaintiff's property. The first defendant after purchase of her property on 27.06.1996, obtained patta for 713 sq.ft., in December, 1996 itself. The defendant purchased 700 sq.ft. and put up building in the same. The first defendant is not in possession and enjoyment of the property. Ever since the measurement of the property given by the plaintiff is not correct. The first defendant also denied the allegations in the plaint that During the second week of December,1988, when the plaintiff was in down, the defendants encroached in plaint "A" schedule property to the extent of 2 feet x 41 feet on the north and 17.5 feet x 15-1/2 feet in the plaint "B" schedule property and put up construction. The first defendant never encroached upon the plaintiff's property. The averments in the plaint are unfounded. Thus, the defendants sought for dismissal of the suit.

4.After contest, the trial Court decreed the suit as prayed for and granted mandatory injunction and also granted the alternative prayer, subject to the willingness of the plaintiff. Aggrieved upon the same, the defendant preferred an appeal before the first appellate Court and after contest, the first appellate Court reversed the findings of the trial Court by allowing the appeal and trial Court judgment was set aside. The judgment and decree of the first appellate Court is put to challenge in the present second appeal by the plaintiff.

5.At the time of admission, the following substantial question of law was framed by this Court.

"Whether the first appellate Court is right in holding that the Ex.A11 sketch drawn by the Taluk Surveyor in O.S.No.3546 of 1986 in respect of the respondent building and appellant's neighbouring building cannot be considered for deciding the question of encroachment as the same was not prepared for the present case?"

6.The learned counsel appearing for the appellant/plaintiff would submit that when the plaintiff filed a petition in I.A.No.1597 of 2004, seeking for appointment of Advocate Commissioner, the respondent/defendant contested the same on the ground that no Advocate Commissioner need be appointed and the Advocate Commissioner, who was previously appointed by the Court, has already filed his report under Ex.A11. After contest, the trial Court dismissed the said Interlocutory Application, but, the first appellate Court, without considering these aspects and simply ignoring the above said order, came to the conclusion that Ex.A11 is not applicable, since no Advocate Commissioner was appointed to measure the property in this case. Hence, the allegation of encroachment was not proved by the plaintiff. The above said finding is against law. Ex.A11 is produced to prove the encroachment in this case and it was prepared by the Advocate Commissioner, with the help of Surveyor in the previous case between the same parties with regard to same properties. But, the first appellate Court without adducing valid reasons, simply ignored Ex.A11 and came to a wrong conclusion. Hence, the appellant contended that interference of this Court is warranted and seeks to allow the appeal.

7.Per contra, the learned counsel appearing for the respondent would submit that the plaintiff came forward with the suit for declaration and mandatory injunction on the ground that the defendant has encroached upon the plaintiff's property. In such a case, it is the bounden duty of the plaintiff to prove that the defendant has encroached upon his property. To prove the same, in the presence of defendant, both the properties have to be measured and report has to be filed. Then only the report and plan can be accepted, but, the plaintiff miserably failed to prove his case. Hence, the first appellate Court reversed the findings of the trial Court. So, the judgement and decree passed by the first appellate Court is appropriate and does not warrant any warrants no interference. Therefore, the respondent contended that the second appeal has to be dismissed.

8. I have heard the rival submissions and also perused the materials available on record.

9.On perusal of the records, it is clear that the plaintiff has purchased the suit properties through Ex.A3 and Ex.A4. To

substantiate the same, he has produced the patta marked as Ex.A7. In Ex.A7, the sketch of the property is described on the back side of the patta. To prove the title of the plaintiff, he has produced Ex.A3 and Ex.A5 and the layout of the plaintiff's property is marked as Ex.A9. On the north of the suit 'A' Schedule property, Door No.26 is situated and the same belongs to the plaintiff. The suit property was purchased in the year,1999. In that property, it is alleged that the defendant encroached upon the Western portion measuring 1 feet. Hence, the plaintiff filed the suit for declaration of his title and mandatory injunction to deliver the vacant possession. In the said suit, Advocate Commissioner was appointed and he has measured the suit property with the help of Surveyor and filed his report. The said Commissioner's report and rough sketch is marked as Ex.A10 and Ex.A11. In addition to that patta was also issued in favour of the plaintiff and the same is produced. The above said measurement was taken in respect of both the properties. However, in order to avoid the technical flaw, the plaintiff has filed another application seeking appointment of another Advocate Commissioner to measure the suit property. That petition was objected to by the defendant on the basis of Ex.A1, the sketch. Hence, the second Advocate commissioner petition was rejected by the Court. So, the trial Court relied upon the title deeds and the earlier Commissioner's report and decreed the suit, granting mandatory injunction to remove the encroachment. However, the first appellate Court has not accepted the findings of the trial Court on the ground that to prove the encroachment, no Advocate Commissioner was appointed and that the plaintiff has not proved the case by producing relevant document. It is also held that the evidence of plaintiff also goes against his case. Thus, for reversing the finding of the trial Court, the first appellate Court has adduced reason and found that Ex-A1 is the self serving document of the plaintiff and the same cannot be relied upon and no Advocate Commissioner was appointed to prove the encroachment. The Trial Court itself has given finding that Ex.A1 is not an acceptable document and it cannot be relied upon. As the trial Court has not relied upon Ex.A1 Rough Sketch, the finding with regard to Ex.A1 by the first appellate Court is unwarranted.

10.As far as the appointment of Advocate Commissioner is concerned, the respondent/defendant filed a petition in I.A.No.1597 of 2004, and the same was dismissed on 08.03.2004. In which the respondent contended that appointment of new Advocate Commissioner is not necessary, since through Ex.A11, already the property has been measured. On the basis of Ex.A11, the trial Court negatived the claim of the plaintiff for appointment of new Commissioner. There was no fault on the part of the plaintiff. Hence, the finding in this regard and the reason adduced by the first appellate Court are not sustainable.

11.The only point that arises for consideration in this case is as to whether the only document, viz., Ex.A11, which was filed in the previous case, could be relied upon or not?

12.Admittedly, both the plaintiff and defendant are adjacent land owners and having properties and admittedly there was a litigation between them with regard to the same property. The dispute in that suit was also regarding encroachment, for which the Commissioner was appointed to find out the encroachment. The commissioner along with the surveyor measured the properties of both plaintiff and defendant, including the suit property in the suit and filed his report. Already there was a finding by the competent authority by measuring the property in addition to the title deeds. In such a situation, why Ex.A11 could not be relied in this case is the crucial point for consideration.

13.The first appellate Court has not adduced any reason as to why Ex.A11 cannot be considered. The first appellate Court simply stated that Ex.A11 was prepared for another case and it cannot be considered in this case. The plaintiff already took steps for the appointment of new Advocate Commissioner in this case. His claim was objected by the defendant. Hence, the Court also negated the claim on the ground that to find out the encroachment, two measurement is not necessary. Hence, the plaintiff has not taken any further steps. So, the plaintiff cannot be found fault on the ground that he has not taken any steps to measure the property. After the remand of the previous suit, the second Advocate Commissioner was appointed and he has filed his reports, which were marked as Ex.C3 and Ex.C4 in the above said case. In the above said Commissioner's report, it was not stated by the Commissioner or Surveyor that there was no encroachment by the defendant. The plaintiff has taken steps to prove his case by ways and means known to law, but it was opposed to by the defendant and his contention was accepted by the trial Court also. In such circumstances, the plaintiff has not taken any further steps for appointment of second Commissioner. It is not the case of the defendant that Ex.A11 is completely wrong one. In such circumstances, there is no hurdle in accepting Ex.A11. The first appellate Court has also not adduced any reason for not accepting Ex.A11. The properties were measured on the basis of title deeds and revenue records. So, Ex.A11 is an acceptable document. Hence, the trial Court has rightly relied upon Ex.A11. Therefore, the findings of the first appellate Court with regard to Ex.A11 is not sustainable. The first appellate Court has also adduced reason that the plaintiff has failed to produce the engineer report. Qualified engineer has measured the property for the purpose of valuation and not to find out as to whether there was any encroachment.

Hence, the non production of engineer report is not fatal to the case of the plaintiff. So, viewing from any angle, the findings of the first appellate Court to reverse the findings of the trial Court is not sustainable and the reasons adduced by the first appellate Court for reversing the judgment of the trial Court cannot be accepted. Therefore, this Court comes to the conclusion that the findings of the first appellate Court is not tenable and not in accordance with law. Hence, this Court is of the view that the second appeal deserves to be allowed and the substantial question of law raised by the appellant/plaintiff is answered in his favour.

14. The trial Court decreed the suit for mandatory injunction and further decreed for alternative relief of payment of compensation instead of removing encroachment at the option of both parties. The said conclusion will only lead to further litigation. Hence this Court is of the view that by considering the period of litigation which is nearly about 20 years and further more the plaintiff claimed alternative relief only for purchasing peace and to avoid any further litigation, the ends of justice will be met if the trial court verdict is modified and the alternative relief of compensation on the market value alone is granted instead of mandatory injunction. The trial Court gave option for payment of compensation on 15.06.2004. Both parties were not inclined to invoke that option and 1st appeal was filed by the defendant and latter on the present 2nd appeal was filed by plaintiff. In the plaint, compensation with 24% interest from the date of plaint is claimed as alternative relief (c). The claim of interest @ 24% is excessive and allowing 12% interest will be just and reasonable. The trial Court gave finding with regard to encroachment in 'A' schedule property only, but the trial Court decreed wrongly drafted for 'B' schedule property also. As per para 8 of trial court judgment no encroachment is found in 'B' schedule property. Hence the plaintiff is entitled to compensation in respondent encroached portion 39.6 feet length and 3 feet breadth, in S.N.334/2 which is the suit "A" schedule property. Thus, the substantial question of law is answered accordingly.

15. In the result, the second appeal is allowed without costs. The judgment and decree dated 24.04.2007 made in A.S.No.446 of 2005 passed by the learned IV Additional Judge, City Civil Court, Chennai is hereby set aside and the decree and judgment of the trial court is restored with modification instead of mandatory injunction, the suit is decreed for alternative relief of compensation only for the encroached portion in the 'A' schedule of property measuring 39.6 feet length and 3 feet breadth in S.No.334/2. The plaintiff is entitled to compensation on the market value on the date of

plaint with interest @ 12% per annum instead of 24% till date of realisation. If the amount is not paid within three (3) months from the date of receipt of copy of this Judgment, the plaintiff will be entitled to get 24% interest.

rrg

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

- 1.The IV Additional Judge,
City Civil Court,
Chennai.
- 2.The XII Assistant Judge.
City Civil Court,
Chennai.
- 3.The Section Officer,
V.R.Section,
Chennai - 104.

+1cc to Mr.M.Kamalathan, Advocate, S.R.No.58271
+1cc to Mr.G.Jayachandran, Advocate, S.R.No.58086

Judgment in
S.A.No.1316 of 2007

VG-II(CO)
KAK(18/12/2018)

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