

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

Second Appeal No.728 of 2009

and

M.P.No.1 of 2012 and C.M.P.No.4358 of 2016

1. Mrs.Jayalakshmi Ananthakrishnan
2. Ms.Lakshmi Ananthakrishnan .. Appellants

Vs.

1. Navaneetha Krishnan
2. N.Umamaheswari Respondents

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 21.08.2007 passed in A.S.No.493 of 2006 on the file of the Additional District and Sessions Court (Fast Track Court No.4), Chennai, against the judgment and decree dated 18.07.2005 passed in O.S.No.10254 of 1996 on the file of the XII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.G.K.R.Pandian
For Respondents : Mr.A.N.Sivaprakasam

JUDGMENT

The unsuccessful plaintiff is before this Court challenging the judgment and decree dated 21.08.2007 passed in A.S.No.493 of 2006 on the file of the Additional District and Sessions Court (Fast Track Court No.4), Chennai, confirming the judgment and decree dated 18.07.2005 passed in O.S.No.10254 of 1996 on the file of the XII Assistant Judge, City Civil Court, Chennai.

2. According to the appellants, the first appellant's Late husband bought a plot bearing S.No.7/10, T.S.No.7, Block No.4 of Kasturi Bai Nagar, Adyar, Pallipattu Village of Saidapet Taluk, measuring an extent of 75' x 33', by way of Registered Sale Deed dated 07.04.1980. The first appellant's Late husband's cousin brother purchased the adjacent plot on the Northern side to the same measurement. The cousin brother sold out the plot to the second defendant without any passage for free ingress and egress to the said plot. The first appellant and her husband were employed at Bahrain and her husband died on 15.04.1991, after which, the first appellant returned to India and started construction of her house in the plot in question. But, to her

shock and surprise, the first appellant/plaintiff found that the respondents/defendants have encroached the property to an extent of 11' x 33' on the Northern side of her plot. The plaintiff was further shocked to find that the respondents have also encroached another extent of 2'.9'' x 64' on the Eastern side of the plaintiff's property and is using and enjoying it along with the respondents' piece of land purchased by them for the purpose of his passage for free ingress and egress to his house on the backside of the plaintiff's house. Hence, the plaintiff is left only with 64' x 30' instead of 75' x 33' as per the Sale Deed. Hence, the first appellant/plaintiff filed the suit against the respondents/defendants for declaration, recovery of possession, mandatory injunction and permanent injunction.

3. It is the case of the respondents/defendants before the trial Court that they have not trespassed into the plaintiff's property in question. According to the respondents/defendants, the first respondent's wife's Plot No.17-A was not provided with any passage from road for her ingress and egress to her Plot either in the Sale Deed dated 31.07.1985 or in the earlier Sale Deed dated 07.04.1980 and, thus, the first respondent's wife entered into an Agreement with neighbouring Plot owners (Plot No.17/1 to 4 and Plot No.17-B) for her free access to her property through a 10' passage running from 8th Main Road to Plot No.17-B. It is the further case of the first respondent's wife that she has got drainage connection, water connection, electricity supply, etc., through the said 10 feet passage exclusively owned by the said owner of Plot No.17/B from the year 1985.

4. The trial Court, on a consideration of the entire facts of the case, dismissed the suit filed by the first appellant/plaintiff holding that the plaintiff is not entitled for the relief of declaration declaring that the plaintiff is the absolute owner of the plaint A and B schedule property, that the plaintiff is not entitled for the relief of recovery of possession of plaint A and B schedule property, that the plaintiff is not entitled for the relief of mandatory injunction to remove the construction in plaint A and B schedule property and also permanent injunction restraining the defendants from interfering with the plaintiff's construction of compound wall in the plaint A and B schedule property and that suit is bad for non-joinder of necessary parties. Challenging the said judgment and decree of the trial Court, the first appellant/plaintiff went on appeal before the first appellate Court, which upheld the judgment and decree of the trial Court. Aggrieved by the same, the appellants are before this Court by way of the present Second Appeal.

5. It is the contention of the learned counsel for the appellants that the orders passed by the Courts below are in violation of principles of natural justice, as no suitable reason for rejection of claims is given. He further contended

that the first appellant's daughter was a minor at the time of filing of the suit and thus, the first appellant, being a co-owner, filed the said suit and hence, the suit is not bad for non-joinder of necessary parties. It is also his contention that the Courts below have miserably failed to appreciate the Advocate Commissioner's Report and have rejected the same on untenable grounds and have come to an erroneous conclusion that encroachment of the suit property lies on the road, in spite of the fact that the same was categorically specified in the Advocate Commissioner's Report that the encroachment was made only by the respondents. According to the learned counsel for the appellants, the first appellant came to India after her husband's death and started construction in 1992 and during that point of time, she came to know about the alleged encroachment by the respondents and thus, she filed the said suit in 1996 and hence, it is not barred by limitation.

6. In reply, learned counsel appearing for the respondents/defendants submitted that the trial Court was right in dismissing the suit on the ground of non-joinder of necessary parties and that the said suit is clearly barred by limitation, as the cause of action arose in 1986 on completion of the construction by the respondents, whereas, the first appellant/plaintiff filed the suit in 1996. He further submitted that the Advocate Commissioner did not carry out the directions given by the trial Court in execution of the warrant.

7. This Court, on 27.07.2009, admitted this Second Appeal on the following substantial questions of law:

(i) Whether the Courts below have committed an error of law in holding that the suit is bad for non-joinder of the legal heirs of Ananthakrishnan in the absence of a specific plea to that effect being raised in the Written Statement?

(ii) Whether the Courts below are right in rejecting the Advocate Commissioner's Report, when the same has specifically stated that the encroachment in the suit property was made by the respondents?

(iii) Whether the Courts below are right in relying upon the evidence of D.W.2 - the Surveyor, when admittedly he had not measured the property after fixing the undisputed boundary stone?"

8. From the narration of facts mentioned supra, it is seen that the first defendant is not the owner of the property, but his wife is the owner of the property, which was purchased by means of sale deed dated 31.07.1985. The private passage

situated on the Eastern side of the plaintiff and second defendant's property measuring 10'x 90' running from the street, absolutely belongs to one N.Sundar and others, namely the owners of Plot Nos.17/1-4 and 17-B. The second defendant's vendor put up construction upto foundation in the year 1983 itself and after purchase by the second defendant, the construction was put up in the ground and first floor in the year 1986. The second defendant has entered into Memorandum of Understanding/agreement with regard to the Eastern side owners of Plot Nos.17/1-4 and 17-B in respect of 10 feet private passage for free access to Plot No.17-A. The Advocate Commissioner has also been appointed and he has also submitted a report.

9. On the entire reading of the judgments of the Courts below, it makes it clear that as there are several owners, the plaintiff ought to have made all those persons as parties to the suit, and non-joinder of necessary and proper parties, is fatal to the case. Both the Courts below have come to the conclusion based on findings of fact that the defendants have not encroached any portion, much less the schedule mentioned property in the plaint and they are in occupation of the property to an extent of 1 ground and 27 Sq.Ft. alone as per the sale deed, dated 31.07.1985, which was marked as Ex.B-1.

10. Further, the learned Advocate Commissioner was examined as D.W.3, who deposed in his evidence as follows:

" பிரதிவாதியின் சுவாதினத்தில் உள்ள இடத்தையும் சர்வேயர் அளவு, எடுத்தார். அளவு, மீட்டர்களில் உள்ளது. அதை அடிகளாக மாற்றிக் கணக்கிடப்படவில்லை. சர்வேயர் தன்னுடைய வரைபடத்தில் பிரதிவாதி சுவாதினம் உள்ள விஸ்தீர்னம் 1 பசுடிரனே 27 ஞ்று, குவ, என குறிப்பிட்டுள்ளார். என்னுடைய அறிக்கையில் பிரதிவாதி தன்னுடைய சுவாதினத்தில் எவ்வளவு, விஸ்தீர்னம் உள்ளது என குறிப்பிடவில்லை. ..."

11. From the above evidence of the learned Advocate Commissioner, it is clear that there is no encroachment by the defendants. Moreover, when two views are possible with regard to a particular fact and one fact has been accepted by the Courts below, it is not for this Court in the Second Appeal to reverse the findings of facts on the ground that another view is possible. Hence, the Courts below are right in dismissing the suit, more particularly in the light of the evidence of the learned Advocate Commissioner extracted supra.

12. With regard to the evidence of D.W.2 who is the Surveyor, it is to be noted that when an independent evidence of the Advocate Commissioner has been taken note of and that even if there is a contradiction between the statement of D.W.3 Advocate Commissioner and D.W.2 Surveyor, by no stretch of imagination, it can be construed as question of law.

13. This Court finds that the contentions of the appellants are far-fetched and the appellants are trying to seek modification/interference in the findings of facts rendered by the trial Court, as confirmed by the first appellate Court.

14. In view of the above discussion, the three substantial questions of law framed by this Court, are answered against the appellants. Hence, the Second Appeal is dismissed. No costs. Consequently, the miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

aeb/cs

To

1. The Additional District and Sessions Judge
(Fast Track Court No.4), Chennai.
2. The XII Assistant Judge, City Civil Court, Chennai.
3. The Section Officer,
V.R. Section, High Court, Madras. (2 copies)

+1cc to Mr.GKR.PANDIAN Advocate, S.R.No.5019
+1cc to Mr.K.N.PANDIAN Advocate, S.R.No.5084

S.A.No.728 of 2009

KS (CO)
TR(16/02/2018)

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