

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.06.2018
PRONOUNCED ON:13.07.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.406 of 2004

R.T.Veeraraghavan ...Appellant/2nd Plaintiff

Vs.

R.Sundaresan

2.R.Shankarlal ...Respondents/Defendants

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 21.04.2003 made in A.S.No.17 of 2002 on the file of the Subordinate Court at Chidambaram, reversing the judgment and decree dated 28.03.2002 made in O.S.No.57 of 1991 on the file of the District Munsif Court at Chidambaram.

For Appellant : Mr.Srinath Sridevan

For Respondents : Mr.R.Venkatesulu
for M/s.Usha Ramman

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 21.04.2003 passed in A.S.No.17 of 2003 on the file of the Subordinate Court, Chidambaram reversing the judgment and decree dated 28.03.2002 passed in O.S.No.57 of 1991 on the file of the District Munsif Court, Chidambaram.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for mandatory injunction.

4. The case of the plaintiff in brief is that the suit property belongs to the plaintiff and purchased by her under a registered sale deed on 09.12.1976 and since then it is only the plaintiff, who has been in the possession and enjoyment of the suit property in her own right and on the south of the

suit property, her son Veera Raghavan and one Thirunavukarasu owned their properties and Thirunavakarasu's property is situated to the east of Veera Raghavan's property and measures 20 ft in east-west direction and 65 ft in north-south direction and on the western side of the suit property, her son Veera Raghavan owns property measuring 45 feet in east-west and the defendants are brothers and they have claimed that they had purchased the property situated next east of the suit property and Thirunavakarasu's property from one Andul Sukkhur and others and claimed to have purchased an extent of $41 \frac{1}{4}$ ft in east-west direction inclusive of the alleged land on the west of it of an extent of $1 \frac{3}{4}$ ft and by claiming so, the defendants are attempting to trespass into the plaintiff's property to an extent of 20 ft on the western side and accordingly the plaintiff has also preferred a Caveat Petition in the Court and inasmuch as the defendants or their vendors never own any property to an extent of $41 \frac{1}{4}$ ft and on the other hand, with a view to grab the property belonging to the plaintiff, they claim to have purchased the larger area and when the property next east of the suit property measures 38 ft east-west with the Narasam and when the western wall of Abdul Sukkhur's property stands exactly on the western limit including the Narasasm, Abdul Sukkhur admitted the construction of his building in the property belonging to the plaintiff on the western side and compensated the plaintiff in money value at that time and he was allowed to have his building only to 40 ft east-west in the southern side while in the garden on the northern side he enjoyed only 38 ft east-west and the building of Sukur Sahib measured only 36 ft in north-south direction and in the garden portion, he enjoyed only 38 ft east -west, the defendants are attempting to put up the construction by encroaching into the plaintiff's property without any authority and also put up the construction in a high handed manner and hence according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. The plaint plan is incorrect and the description of the suit property is wrong and sale deed dated 09.12.1976 is not admitted by the defendants and the plaintiff has to prove the same. Even prior to 09.12.1976, Thirunavukarasu purchased an extent of 20 ft east-west and 60 ft north-south and the said property is situated to the south of the site referred to in the sale deed dated 09.12.1976 and Veera Raghavan did not own any extent there and to the west of Thirunavukarasu's property, Veera Raghavan purchased only $39 \frac{1}{2}$ ft, by way of two sale deeds dated 19.07.1976 and 23.06.1975, however he had claimed 45 ft i.e., $5 \frac{1}{2}$ feet extra and the same is the root cause for the dispute, further on the western side, the plaintiff's son owns

Rice Mill and the plaintiff and her son had not measured the boundary line for the Rice Mill property and 39 ½ ft vacant site and another 20 ft vacant site and in fact between the Rice Mill and the defendants property, the plaintiff and her son are entitled to only 59 ½ ft east-west actually whereas they are in possession of more than 65 ft east-west and the defendants 1 and 2 had purchased under two sale deeds 43 ft comprising the land of 1 ¾ ft by way of registered documents and subsequently the property belonging to Thirunavukarasu was also purchased by the defendants' brother Sathish Kumar. The defendants never attempted to trespass into the plaintiff's property as claimed and it is a false allegation and it is false to state that Abdul Shukkhur attempted to encroach into the plaintiff's property and it is seen that the plaintiff as put forth in the plaint herself is not sure as to the actual alleged encroachment made into her property by the defendants, whether it is 20 ft or 6 ¼ ft east-west and the plaintiff has not come forward with clean hands and the suit laid by the plaintiff, without seeking the relief of declaration is not maintainable. Hence the suit is liable to be dismissed.

6. In support of the plaintiff's, P.W.1 was examined. Exs.A1 to A5 were marked. On the side of the defendants' D.W.1 was examined. Exs.B1 to B7 were marked.

7. The Trial Court on a consideration of the materials placed on record, both oral and documentary and the submissions made, was pleased to grant the relief of mandatory injunction in favour of the plaintiff only to an extent of 65 ft north-south and 1 ¾ ft east-west and accordingly disposed the plaintiff's suit. On Appeal, the first appellate court, set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the defendants, thereby dismissed the plaintiff's suit. Impugning the same, the present Second Appeal has been laid.

8. The following substantial questions of law were formulated for consideration at the time of admission of the Second Appeal.

i. Whether a suit for mandatory injunction is not maintainable without a prayer for declaration?

ii. Whether a defence of estoppel by acquiesce in a suit for mandatory injunction does not shift the burden of proof on the defendants to prove such plea?

9. The suit has been laid simpliciter for the relief of mandatory injunction, mainly contending that the defendants had encroached into the plaintiff's property as claimed in the plaint. The defendants have in toto disputed the

entitlement of the plaintiff to the property as put forth by the plaintiff and contended that the plaintiff and her son are entitled to only a lesser extent namely 59 ¼ ft and on the other, hand they had been erroneously claiming 65 ft without any basis and accordingly disputed the claim of the plaintiff that they had encroached into her property and put up construction and hence prayed for the dismissal of the plaintiff's suit. The defendants have also raised the plea that the suit laid by the plaintiff without seeking the relief of declaration is not maintainable.

10. On a reading of the plaint averments, it is found that the plaintiff seeks claim of title to the suit property on a particular set of facts. However, the same had been stoutly challenged by the defendants in the written statement particularly disputing the plaintiff's entitlement of the property as detailed in the plaint. Accordingly, it is found that when the defendants have thrown a challenge to the claim of the plaintiff's alleged title to the suit property as such, as rightly determined by the first appellate court, the plaintiff should have sought the relief of declaration by amending the plaint properly. Albeit the case of the defendants throwing a strong challenge to the claim of the plaintiff's title to the suit property, still the plaintiff had not endeavored to seek the relief of declaration, such being the position, as rightly put forth, it is found that in the light of the decision of the apex court reported in AIR 2008 SCC 2033 (Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by L.Rs and Others] the suit laid by the plaintiff without seeking the relief of declaration is found to be not sustainable as per law. Though the plaintiff would claim title to the suit property of an extent of 65 ½ ft east-west based on Ex.A3 alone and would contend that the defendants are entitled only to 38 ft east-west on the basis of Ex.A2 document, however on the basis of the materials placed on record, it is found that as spoken to by the parties, it is found that the plaintiff and her son had traced the title to the suit property as belonging to them only pursuant to the decree passed in O.S.No.96 of 1957 and the decree passed in the said suit has come to be marked as Ex.B7. It is thus found that the plaintiff and her son claim title to the property as belonging to them on the strength of Ex.A1 and Exs.B1 to B3. As rightly found by the first appellate court, on a perusal of Exs.B1 to B3, Ex.A1 and Ex.B3 being the same, it is found that in toto, the plaintiff and her son would be entitled to only 59½ ft east-west by way of abovesaid documents and on the other hand, the plaintiff having suppressed the abovesaid documents and projected her case only focusing Ex.A3 alone, and when it is found that the parties are at serious dispute, as regards the entitlement of the suit property as such and in such view of the matter, it is found that the first appellate court has rightly determined that the

suit laid by the plaintiff without clearly establishing her right in respect of the suit property by seeking the relief of declaration and laying the suit only for the mandatory injunction is not maintainable and accordingly no valid ground is made out to interfere with the abovesaid determination of the first appellate court in rejecting the plaintiff's case.

11. That apart, as rightly found by the first appellate court, the suit property has not been properly described in the plaint and the same can be seen by the amendment effected in the plaint several times and despite the same, it is found that the suit property has not been properly described by giving out the boundary recitals, extent etc., As rightly found by the first appellate court, on factual aspects, the southern boundary has not been correctly given in the plaint and that apart, when it is found that the plaintiff has not come forward with the actual extent to which she is entitled to, it is seen that even the trial court has granted only the relief in favour of the plaintiff to a lesser extent than what she had claimed in the plaint and accordingly it is seen that the description of the suit property given in the plaint is incorrect. That apart, as found by the first appellate court, when the property involved in the suit as described in Ex.A7 has not been properly described and at one place mentioned as situated to the south of the street and in the schedule described as situated to the north of the street and further as determined by the first appellate court, when the extent and the boundaries as described in the documents placed on record would go to show the incorrect description of the suit property and as above noted, when the plaintiff has failed to establish that she and her son in toto are entitled to 65 ft and accordingly on the basis of the sale deed projected by the plaintiff, we cannot presume that the plaintiff is entitled to 65 ft east-west as described in the suit property. When as above seen, Exs.B1 to B3 put together would only go to show that the properties comprised there in measures only of 59½ ft, the determination of the first appellate court that there is no possibility of the plaintiff and her son owning 65 ½ ft east-west as claimed in the plaint is correct and accordingly, on that basis rightly held that the plaintiff has failed to establish the alleged encroachment into the property belonging to the plaintiff. At the most, the plaintiff is not sure about the actual extent to which she is entitled and failed to establish the actual extent of the property to which she is legally entitled to and when the documents projected show that the plaintiff is entitled to only a lesser extent than what she had claimed, accordingly, it is found that without seeking the relief of declaration as to the actual entitlement, the plaintiff cannot be allowed to maintain the relief of mandatory injunction simpliciter.

12. The plaintiff's counsel contended that the defendants by taking the plea of estoppel by acquiescence has admitted the title of the plaintiff to the property in dispute. However, on a reading of the averments contained in the written statement as well as the materials placed on record, it is found the defendants in toto have disputed the claim of the plaintiff in respect of the suit property and also taken the plea that the alleged encroachment projected by the plaintiff had been put up by the defendants only to the knowledge of the plaintiff and at no point of time, the plaintiff had raised any objection to the same and accordingly also contended that the plaintiff is estopped on the plea of acquiescence. By that it cannot be held that the defendants have admitted the entitlement of the plaintiff to the suit property and accepted that they had encroached into the plaintiff's property as argued by the plaintiff's counsel. When the defendants have disputed the entitlement of the plaintiff and her son to the property measuring east-west 65ft and contending that they are only entitled to the property measuring east-west 59 ½ ft, despite the same, when the plaintiff has miserably failed to establish that she and her son, in fact are entitled to 65 ft as claimed in the plaint, it is seen that the plaintiff cannot be allowed to contend that the defence of estoppel by acquiescence put forth by the defendants in the written statement plea would entitle the plaintiff to the reliefs sought for.

13. In the light of the above discussions, the plaintiff is found to have miserably failed to establish her title to the suit property as put forth in the plaint and the plaintiff's suit is found to be not maintainable without seeking the relief of declaration, particularly when the defendants have thrown a stiff challenge to the plaintiff's alleged claim of title to the suit property. The defence version of the plea of estoppel by acquiescence could not in any manner, be construed as if the defendants have accepted the plaintiff's claim of title to the suit property, particularly when it is noted that the defendants have right from the inception, been challenging the plaintiff's title to the suit property as claimed in the plaint and in such view of the matter, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

14. The defendants' counsel, in support of his contentions placed reliance upon the decisions reported in

(i) 2005 (3) MLJ 495 [Kandasamy and others Vs. Savithri (died) and another]

(ii) 2012 (1) CTC 708 [Arulmighu Kothandaramasamy Koil, Thirupuvanam Vs. Vairam and 5 others]

(iii)AIR 2008 SCC 2033 [Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by Lrs & Others]

(iv) MANU/TN/2330/2015 [R.Appadurai Vs. T.K.Samikkannu]

(v)MANU/TN4050/2016 [T.Murugamanickam Vs. S.Parthasarathy]

15.In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CO)

// True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge,
Subordinate Court at Chidambaram.
- 2.The District Munsif,
District Munsif Court at Chidambaram.

Copy to

The Section Officer,
VR Section,
High Court.

+1cc to Mr.USHA RAMMAN, Advocate SR.No.46494

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Pre-delivery judgment made in
S.A.No.406 of 2004

SR(CO)
SMI/23.08.2018

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