

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :11.07.2018

PRONOUNCED ON:06.08.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.952 of 2004
and
C.M.P.No.6991 of 2004

- 1.M/s. Benziger Foundation Pvt. Ltd,
rep. By its
Managing Director,
S.Amala Benziger
- 2.Mrs.S.Amala Benziger
- 3.T.Joseph Benziger ... Appellants/Defendants 4 to 6
- Vs.
1. V.Ganesan
- 2.V.Lakshmi
- 3.S.Soundari
- 4.V.Lalitha Respondents/Plaintiffs
- 5.M/s.Kwality Incorporation
rep. By its Managing Partner,
Mr.D.Pitchai,
No.21, Second Street,
Tailors Estate,
Kodambakkam,
Chennai 600 024.
- 6.D.Pitchai Respondents/Defendants 1 to 3
7. R.Sivaramakrishnan ... Respondents/Defendants 1 to 3

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Additional District Judge (Fast Track Court III), Chennai in A.S.No.29 of 2001 dated 04.02.2003 against the judgment and decree of the II Assistant Judge, City Civil Court, Chennai dated 05.11.1998 in O.S.No.5194 of 1995.

For Appellants : Mr.P.Sunil

For RR1 : Mr.S.Udaya Kumar

RR1 and R3 to R7 : Dismissed vide order of court dated 17.12.2009.

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 4.2.2003 passed in AS.No.29/2001 on the file of the Additional District Judge, Fast Track Court III, Chennai confirming the judgment and decree dated 5.11.1998 passed in OS.No.5194/1995 on the file of the II Assistant Judge, City Civil Court, Chennai.

2. The second appeal has been admitted on the following substantial questions of law.

(i) Whether the Courts below erred in granting a decree for possession, when the measurements with regard to the purchase differ?

(ii) Whether the Courts below justified in passing a decree for possession when the agreement dated 17.02.1994 marked as Ex.A7 contemplates execution of sale deed later?

3. The defendants 4 to 6 in OS.No.5194/1995 are the appellants in this second appeal. The respondents 1 to 4 in the second appeal had laid the abovesaid suit against the defendants for the reliefs of declaration and possession, contending that they are the owners of the suit property and had entered into an agreement with the first defendant to construct a building consisting of basement, ground floor and first floor and accordingly the first defendant had constructed the superstructure and it is the case of the plaintiffs that the fourth defendant had purchased the front portion in the first floor from the plaintiffs for which, a registered sale deed dated 23.06.1994 has been executed in favour of the fourth defendant in respect of the undivided share of the land and the first defendant had accordingly handed over the possession to the fourth defendant of the area concerned and according to the plaintiffs, the defendants 4 to 6 i.e., the appellants had unauthorizedly and illegally occupied the rear portion of the first floor premises of the suit building without any authority or entitlement and accordingly as they had refused to hand over the possession of the same, despite the exchange of notices

between the parties, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

4. The defendants 4 to 6 had resisted the plaintiffs' suit on the footing that the sale deed dated 23.6.1994 relates to the share of the land for the rear portion of the building in the first floor and further according to them, the first defendant had entered into an agreement for sale with the sixth defendant on 17.2.1994 to sell the front portion of the first floor premises and accordingly it is contended that the fourth defendant is in the possession of rear portion of the first floor and the sixth defendant is in the possession of front portion of the first floor and accordingly the defendants 4 to 6 are in the lawful possession of both the rear portion of the first floor premises and hence according to them, the plaintiffs are not entitled to obtain the reliefs sought for.

5. On the basis of the materials placed on record, the Courts below had accepted the plaintiff's case and accordingly challenging the same, the present Second Appeal has been preferred.

6. It is found that the plaintiffs had also laid a suit against the appellants in O.S.No.5714 of 1995 claiming that they are the owners of the suit property and alleging that the appellants are in the unlawful possession and enjoyment of the suit property without any authority and accordingly contending that the appellants are liable to pay damages for their illegal use and occupation of the suit property sought a sum of Rs.42,000/- from the appellants for their illegal use and occupation of the suit property from January 1995 to July 1995 at the rate of Rs.6,000/- per month. The abovesaid suit was also resisted by the appellants on the same pleas as put forth by them in O.S.No.5194 of 1995.

7. It is found that both O.S.No.5714 of 1995 and O.S.No.5194 of 1995 were jointly tried by the trial court and common evidence had been recorded in both the suits and accordingly based on the oral and documentary evidence adduced by the respective parties, the trial court was pleased to decree both the suits as prayed for by the plaintiffs. As against the judgment and decree passed in O.S.No.5714 of 1995, it is found that the appellants have not filed any appeal. The appellants have preferred the first appeal only as against the judgment and decree passed in O.S.No.5194 of 1995.

8. When it is found that O.S.No.5714 of 1995 and O.S.No.5194 of 1995 were jointly tried and the parties had adduced common evidence in both the suits and the plaintiffs had alleged in the abovesaid suits that they are the owners of the

suit property or the property in dispute and accordingly sought for the appropriate reliefs against the appellants in the abovesaid suits and when it is further seen that the trial court holding that only the plaintiffs are the owners of the suit property or the property in dispute and accordingly held that the plaintiffs are entitled to damages from the appellants for their use and occupation of the suit property illegally during the relevant period, it is found that the appellants having failed to prefer any challenge to the judgment and decree passed in O.S.No.5714 of 1995, the present Second Appeal laid by the appellants only challenging the judgment and decree passed in O.S.No.5194 of 1995, in the light of the principles of law enunciated in the decisions reported in

(i) 2001 (2) MLJ 283 (V.Pandian and other Vs. K.P.Subramanian and another]

(ii) 2006 (4) MLJ 1016 [S.A.Viswanathan (died) and another Vs. R.Krishnan and another]

(iii) 2008 - 3- LW 747 [Brij Narain Singh Vs. Adya Prasad (dead) & others]

(iv) 2010 (3) CTC 799 [K.Viswanathan and Karuppanna Chettiar Vs. R.Appavoo chettiar and 6 others Vs. K.Viswanathan and Karuppanna Chettiar]

(v) 2016 - 2 -LW 581 [O.s.Suriyavelu Mudaliar Vs. J.Palanivelu Mudaliar]

(vi) 1992 AIR (Madras) 280 [Arumugha Nainar Vs. Lakshmana Perumar (died) and others]

(vii)1993 Supp (2) SCC 146 [Premier Tyres Limited Vs. Kerala State Road Transport Corporation]

(viii) 1997 (9) SCC 543 [Ram Prakash Vs. Charan Kaur (smt) and another]

it is found that the present Second Appeal preferred by the appellants as against the judgment and decree passed in O.S.No.5194 of 1995 as confirmed in A.S.No.29 of 2001 would be hit by the operation of resjudicata.

9. As rightly found by the Courts below, it is found that the 6th defendant had only purchased the front portion of the first floor as per Ex.A1 sale deed and it is also found that subsequent there to a rectification deed has also come into existence. No doubt the 6th defendant has no notice of the abovesaid deed and also not signed in the same. But, as it could be seen from the recitals contained in Ex.A1 sale deed, the same pertains only to the front portion of the first floor of the property concerned and further when it is seen from the

agreement dated 17.02.1994 marked as Ex.A7, the first defendant had agreed to construct and handover the front portion of the first floor only to the defendants vide the said agreement and accordingly evidence has also been adduced though P.W.2 on the said lines and when it is found that the 6th defendant had also admitted that as per Ex.A7 agreement, he got the possession of the front portion of the first floor and when there is no material produced by the appellants as regards any agreement entered into by them with reference to the rear portion of the property concerned and accordingly, it is seen that considering the materials placed on record, particularly from the documents marked as Exs.A1, A7 and A16 in toto, as rightly determined by the Courts below, the defendants had only purchased the front portion of the first floor of the suit building and in such view of the matter, the defendants cannot be allowed to claim that they had been lawfully occupying also the rear portion of the building. Accordingly, it is seen that the defendants having failed to establish that they had purchased the suit property i.e., the property in dispute and when the materials placed on record go to establish that only the front portion of the building had been purchased by the defendants and when the contract had been entered into between the plaintiffs and the first defendant for the construction of the rear portion and handing over the same only to the plaintiffs and the defendants in the guise of their occupation of the first floor had also unlawfully occupied the rear portion of the building, it is found that the Courts below are justified in upholding the reliefs sought for by the plaintiffs.

10. In this matter, considering the oral and documentary evidence adduced by the respective parties, it is found that the plaintiffs being the owners of the suit property and accordingly the plaintiffs' claim of title to the suit property having been upheld as above seen in the present suit as well as in O.S.No.5714 of 1995 and when it is further seen that, as could be found from the type set copy furnished, the plaintiffs had also obtained decree against the appellants/defendants for recovery of damages for their use and occupation of the suit property illegally for another set of period O.S.No.1652 of 2002, the contentions of the defendants' counsel that the plaintiff have not established their claim of title to the suit property as such cannot be accepted.

11. In the light of the above discussions, the courts below are found to have analysed the materials placed on record in the proper perspective and accordingly granted the reliefs sought for by the plaintiffs in respect of the suit property and no interference is called for with reference to the same. The substantial questions of law formulated in the second appeal are accordingly answered.

12. The counsel for the defendants/appellants in support of his contentions placed reliance upon the decision reported in 2014 (2) SCC 269 [Union of India and others Vs. Vasavi Cooperative Housing Society Limited and Others] The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

13. For the reasons aforesated, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge,
(Fast Track Court III),
Chennai.

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

Copy to

The Section Officer,
VR Section,
High Court.

+1cc to Mr.K.P.Santhosh, Advocate Sr.54237
+1cc to Mr.S.Udayakumar, Advocate Sr.53763

S.A.No.952 of 2004

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