

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :24.01.2019

Pronounced on :01.02.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN
S.A.No.402 of 1995

1.A.Radhakrishnan (deceased)
2.R.Vijayalakshmi
3.R.Chezhiyan
4.D.Poongodi
5.S.Malarkodi

Rep.by power agent Mr.R.Vijayalakshmi
(Appellants 2 to 5 residing at
NO.17 and 18 Raja Street,
T.Nagar, chennai ... Appellants/ Respondents
Defendants

Appellants 2 to 5 and R2 brought on record as LRS of the
deceased sole Appellant vide order of Court dated 23.11.2018
made in CMP.No.10620 & 10621 of 2006 in Second
Appeal.NO.402/1996.

Vs

1.C.Alagappan
2.A.Krishnaveni ... Respondents

Appellants 2 to 5 & R2
brought on record as legal
representatives of the
deceased sold appellant vide
order of court dated
23.11.2018 made in
CMP.No.10620 & 10621 of 2006
in S.A.No.402 of 1995 (CVKJ)

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PRAYER: The Second Appeal filed under Section 100 of CPC,
against the judgment and decree of the learned III
Additional Judge, City Civil Court, Chennai in A.S.No.91 of
1994 dated 24.01.1995 by reversing the judgment and decree
of the XIII Assistant Judge, City Civil Court, Chennai, in
O.S.No.4155 of 1983 dated 30.12.1991.

For Appellants 2,4 & 5 : Mr.R.Ganeshkumar

For A3 : No appearance

For R1 & R2 : No appearance

JUDGEMENT

The defendant in O.S.No.4155 of 1983 on the file of the XIII Assistant City Civil Court, Chennai, is the appellant herein.

2.O.S.No.4155 of 1983 had been filed by the plaintiff N.Chokkalingam against the defendant A.Radhakrishnan seeking a judgment and decree for a mandatory injunction directing the defendant to remove the building constructed at premises No.17, Raja Street, T.Nagar, Chennai - 600 017, which is unauthorized, illegal and not according to the plan sanctioned by the Corporation of Chennai and in violation of rules of Chennai Metropolitan Development Authority and also for costs. By judgment dated 30.12.1991, the suit was dismissed. Since the plaintiff died pending the suit, his legal representative C.Alagappan had been brought on record. He filed A.S.No.91 of 1994. This appeal came up for consideration before the III Additional City Civil Court, Chennai. By judgment dated 24.01.1995, the appeal was allowed. Challenging that judgment the defendant had filed the present Second Appeal.

3.Pending the Second Appeal the appellant A.Radhakrishnan died and his legal representatives, R.Vijayalakshmi, R.Chezhiyan, D.Poongodi and S.Malarkodi were brought on record as appellants 2-5 and A.Krishnaveni was brought on record as second respondent.

4.The Second Appeal had been admitted on the following substantial question of law:-

"Whether the suit for mandatory injunction directing the defendant to remove construction is maintainable without impleading the CMDA, particularly when the relief is also sought that the construction is in violation of the plan accorded by the CMDA?"

O.S.No.4155 of 1983 (XIII Assistant City Civil Court, Chennai):-

5.The plaintiff claimed to be the owner of the premises bearing Door No.16, Raja Street, T.Nagar, Chennai-600 017. The defendant was carrying on business as Poonga Agencies at Door No.17, Raja Street, T.Nagar, Chennai-600 017. The plaintiff claimed that the defendant had put up construction by laying pillars on the compound wall on the eastern side of the house of the plaintiff. He had not left any space as per the building rules of the Corporation of Chennai and Chennai Metropolitan Development Authority. He had also put up five floors. The plaintiff claimed only three floors can be put up in the said area. The plaintiff had issued a notice on 13.06.1983 calling upon the defendant to remove the construction. Thereafter, the suit had been filed seeking mandatory injunction as stated above.

6. The defendant filed written statement claiming that the construction had been put up within his own property by leaving vacant space as required. It was specifically stated that the plaintiff had not mentioned the specific rules which had been violated. It was also denied that the rights of the plaintiff had been affected. It had been also stated that the defendant had already completed the construction and tenants have also occupied the building. He had also constructed a Kalayana Mandapam. He claimed that there was no nuisance for the plaintiff. It was stated that sufficient parking space was also given in the ground floor. It was claimed that he had not violated any of the rules of the Chennai Metropolitan Development Authority or Corporation of Chennai. It had been stated that the Court has no jurisdiction to grant the relief claimed by the plaintiff. It was also claimed that the plaintiff had specifically permitted the defendant to put up scaffolding material to enable the defendant to construct the building. It was stated that the suit should be dismissed.

7.During trial, the plaintiff examined himself as PW1 and the defendant examined himself as DW1. An Advocate Commissioner was examined as CW1. The plaintiff did not file any documents. The defendant filed Ex.B1 dated 01.10.1982, the letter of consent given by the plaintiff. The report and sketch of the Advocate Commissioner were marked as Exs.C1 to C6. The plan of the Corporation was marked as Ex.X1.

8.The learned XIII Assistant City Civil Court Judge, specifically found that it was only the Chennai Metropolitan Development Authority who had authority to examine whether a building constructed was in violation of any plan or rule and they alone had the authority to demolish such a building. It is to be noted that Chennai Metropolitan Development Authority was not a party to the suit. It was also specifically found that according to Ex.B1, the plaintiff himself had consented to the defendant to put up scaffolding material in his property in order to put up the

construction. Therefore, it was held that the plaintiff was estopped from questioning the construction put up by the defendant. Finally, By judgment dated 30.12.1991, the learned XIII Assistant City Civil Court Judge, dismissed the suit.

A.S.No.91 of 1994 (III Additional City Civil Court, Chennai):-

9.As stated above, the appeal was filed by the legal representative of the plaintiff. This came up for consideration before the III Additional City Civil Court Judge, Chennai. The learned III Additional City Civil Court Judge, examined the nature of building which had been constructed and observed that the suit had been filed stating that the building was constructed without leaving any space and it would infringe the privacy of the plaintiff. It was found that the rain water will drain in the portion of the plaintiff. The learned III Additional City Civil Court Judge, refused to accept Ex.B1. The learned III Additional City Civil Court Judge, finally found that building had been constructed in violation of the plans and consequently, directed the defendant to demolish the building and allowed the appeal.
S.A.No.402 of 1995:

10.Challenging the judgment in A.S.91 of 1994, the defendant had then filed the present Second Appeal. The Second Appeal had been admitted on the following substantial question of law:-

"Whether the suit for mandatory injunction directing the defendant to remove construction is maintainable without impleading the CMDA, particularly when the relief is also sought that the construction is in violation of the plan accorded by the CMDA?"

11.For the sake of convenience, the parties would be referred as plaintiff and defendant.

12.The plaintiff had filed O.S.No.4155 of 1983 in the XIII Assistant City Civil Court, Chennai, seeking mandatory injunction directing the defendant to remove the construction put up by him in his property. The plaintiff resided in Door No.16, Raja Street, T.Nagar, Chennai-600 017. The defendant was carrying on business as Poonga Agencies at Door No.17, Raja Street, T.Nagar, Chennai-600 017. In the plaint, it had been asserted that the building put up by the defendant was an unauthorized building. It was stated that it was not according to the plan sanctioned by the Corporation of Chennai and was in violation of the rules of Chennai Metropolitan Development Authority. However, the plaintiff did not file the sanctioned plan for the building.

He did not produce the rules which had been violated by putting up the construction.

13. The learned First Appellate Judge had proceeded on assumptions instead of proceeding on facts while deciding the appeal. He had stated that the building 'will' infringe the privacy of the plaintiff. He had further stated that rain water 'will' be drained in the premises of the plaintiff. He further stated 'if' the plaintiff wants to paint or white wash his western side wall he cannot do that. He also stated 'if' the plaintiff does not object at this stage, then the defendant 'may' claim easement of necessity. All the above findings are based on presumptions. Similarly, there are further presumptions about 'leakage', 'bad odour' and also 'if there is heavy rain, the water falling on the western side wall of the respondent will go into the land of the appellant only'. It is thus seen that the learned First Appellate Court Judge had proceeded purely on assumptions. Ex.B1 dated 01.10.1982, letter, had been relied on by the learned Trial Court Judge but, it was rejected by the learned First Appellate Court Judge. This letter had been issued by the plaintiff to the defendant. It is as follows:

"I N.CHOCKALINGAM son of Narayanan Chettiyar residing at 16, Raja Street, T.Nagar, Madras 17 hereby PERMIT Mr.A.Radhakrishnan residing at 17, Raja Street, Madras 17 to use my vacant land of the EASTERN side for five feet adjacent his compound wall to fix scaffolding materials(Saram) for the construction purposes and these materials should be removed by him after completing his building work."

It is seen that the plaintiff himself had granted consent to the defendant to put up scaffolding for the purpose of construction.

14. The substantial question of law relates to whether Chennai Metropolitan Development Authority should have been a necessary party to the proceeding. The entire plaint proceeds on the ground that the building was in violation of the rules of Chennai Metropolitan Development Authority. Moreover Chennai Metropolitan Development Authority is the competent authority to demolish any building which had been constructed in violation of rules. The Chennai Metropolitan Development Authority is a necessary party.

15. Order 1 Rule IX CPC is as follows:

"Mis-joinder and non-joinder:- No suit shall be defeated by reason of the mis-

joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party."

It is clear from the provision that non joinder of a necessary party is fatal to a suit. In the present case, the Chennai Metropolitan Development Authority is a necessary party. They have not been impleaded as a party to the suit. The suit has to necessarily fail.

16. The Second Appeal is allowed, with costs. The judgment and decree of the III Additional City Civil Court Judge, Chennai, in A.S.No.91 of 1994 dated 24.01.1995 is set aside. The judgment and decree of the XIII Assistant City Civil Court, Chennai, in O.S.No.4155 of 1983 dated 30.12.1991 is confirmed. The Second Appeal is allowed with costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

Smv

To

- 1.The III Additional City Civil Court, Chennai.
- 2.The XIII Assistant City Civil Court, Chennai.

Copy to

The Section Officer, VR Section,
Madras High Court.

+1cc to Mr.R.Ganeshkumar , Advocate SR.No. 8924

S.A.No.402 of 1995

A.SK(04/10/2019)

A.SK(14/11/2019)