

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 05.12.2018

JUDGMENT PRONOUNCED ON : 12.02.2019

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.982 of 2007

1. Perumal Chettiar

2. Chandran

3. Ravi Appellants/Defendants

Vs

1. Devikarani

2. Palaniappan Respondents/Plaintiffs

Prayer:- This Memorandum of Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and decree passed in A.S.No.2 of 2004 dated 30.01.2004, on the file of Fast Track Court No.IV, Erode at Bhavani reversing the Judgment and decree dated 28.07.2003 made in OS No.469 of 1998 on the file of II Additional District Munsif, Bhavani.

For Appellants : Mr.V. Ayyadurai, Senior Counsel
for Mr.P. Muthukumarasamy

For Respondents : Mr.A.K. Kumarasamy, Senior Counsel
for Mr. S.Kaithaimalaikumaran

J U D G M E N T

The appellants/defendants have preferred this second appeal against the Judgment and decree dated 30.01.2004 passed in A.S.No.2 of 2004, on the file of Fast Track Court No.IV, Erode at Bhavani reversing the Judgment and decree dated 28.07.2003 passed in OS No.469 of 1998 on the file of II Additional District Munsif, Bhavani.

2. The Suit for the relief of permanent injunction.

3. For the sake of convenience, the parties are

referred to as, as described before the trial Court.

4. The averments made in the plaint, in brief, are as follows:

The second plaintiff in the Suit was the husband of the 1st plaintiff. The second and the third defendants are the sons of the 1st defendant. The Suit property covered by ABCD portion solely belongs to the plaintiff by virtue of a sale deed dated 11.03.1993 and the specific portion marked as AMND in the suit Plan was solely belonging to the second defendant by virtue of a sale deed dated 21.04.1993. Before 2 ½ years from the date of Suit, the plaintiffs had constructed a terraced house in ABCD portion adjoining to the terraced house on the eastern side of the 1st item of the Suit property, which had been coloured in red in the suit Plan of B and C portion and the 2nd item of the Suit property which was coloured in green being a lane left out. The suit properties are coloured with red and green distinctly, the plaintiffs have affixed doors, windows in the terraced house within the portion of the entire suit property which was absolutely belonging to the plaintiffs. The house situated on the eastern side of the Suit property was belonging to the 1st defendant. As per the unregistered Agreement Deed dated 12.05.1997, the first defendant was entitled to fix ventilator at the B & C portion of the suit Plan. The 1st defendant has a right to patch up the north south wall situated in B, C portion of the Suit Plan. Further, he was having the right to collect the rain water etc. But, he does not have any right to fix the windows and doors etc. Besides that, the 1st defendant does not have any right of passage through the Suit property. Later on, on account of minor altercations, all the defendants joined together and attempted to fix the doors in a Wall, which belonging to them. Therefore, it is essential that they have to be restrained by means of an order of

injunction restraining them from fixing the doors, windows etc., in the B,C portion of the suit Plan facing the suit property.

5. The case of the defendants in brief, is as follows:

It is true that the houses of the defendants were situated adjoining to the suit lane. But it is incorrect to state that they were facing north alone. It is absolutely false to say that there was an unregistered Agreement Deed dated 12.05.1997, based on which, the 1st defendant was entitled to fix the ventilator towards the suit lane. There was no such agreement that the plaintiffs have got any such right. It is false to say that the 1st defendant or the 2nd defendant have got right to maintain the wall by white washing and collecting rain water. It is absolutely false to say that they have no right

of fixation of windows, doors etc. In fact, the 1st defendant purchased the property east of rice mill measuring about 5 $\frac{3}{4}$ feet east west and 106 feet north south. The northern border of the same had been mentioned as MN in suit plan and Mill in the second Commissioner's Report. The plaintiffs have got no right in exceeding this measurement. The alleged sale deed in favour of the 2nd plaintiff alleging that the 2nd plaintiff purchased the suit property on the western side of the Suit lane, measuring about 4 feet east west on the northern side and measuring about 7 feet east west on the southern side was a fabricated document. The Second plaintiff does not acquire any right by means of this document. It is true that the 1st plaintiff had constructed a house in the property purchased by him. But, at the same time, he had encroached upon the vacant land of this defendant of one feet and 4 feet breadth on the northern side and 3X10 feet breadth on the southern side. He has constructed his house not before 2 $\frac{1}{2}$ years from the date of the Suit. Only 3 months prior to the filing of Suit, he has constructed a house. During the time of construction, even after made an objection by this defendant, he fixed the door on the southern side facing east. The plaintiffs have got no right whatsoever of ingress and egress in the suit lane. These defendants were enjoying the suit land by already fixing the doors and windows etc., and by white washing, collecting rain water and using light and air. The highhandedness of the plaintiffs was shown by the fact that they being the encroachers having fixed the doors and windows and afterwards, restraining the defendants in fixing the doors and windows etc. The predecessors of the plaintiffs were not having any right over the suit property. According to the defendants, the decree granted in favour of the plaintiffs by the I Appellate Court is liable to be set aside.

6. Based on the above said pleadings, the Trial Court has framed the following issues:-

- i. Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for?
- ii. To what other reliefs the plaintiffs are entitled to?

7. During the time of trial, on the side of the plaintiffs, the 2nd plaintiff examined himself as PW1. He has examined one more witness as PW2, who was the attester in Ex.A.3. 25 documents were marked as Exs.A.1 to Ex.A.25, on their behalf. On the side of the defendants, the 1st defendant examined himself as DW1 and marked one document as Ex.B.1. Further, the Report and Plan submitted by the Advocate Commissioner were marked as Exs.C1 to Ex.C4.

8. On considering the oral and documentary evidence adduced by the respective parties and the submissions made on the either side, the learned II Additional District Munsif,

Bhavani has observed that Ex.A.3, which was a crucial document alleged to be executed between the plaintiffs and the defendants is legally sustainable and did not bind upon the 2nd and 3rd defendants and further, by observing the variation in respect to the measurement in the title document, produced on the side of the plaintiffs, in respect to the land belonging to them, finally dismissed the Suit.

9. Aggrieved over the Judgment and decree passed by the II Additional District Munsif, Bhavani dated 28.07.2003, the plaintiffs have filed the Memorandum of Appeal before the Additional District Judge, Fast Track Court No.IV, Erode at Bhavani. On 30.01.2004, Additional District Judge, Fast Track Court No.IV, holding that Ex.A.3 cannot be discarded and the admission made in the said document by the defendants in respect to the enjoyment of the Item Nos.1 and 2 of the Suit property establishes that Ex.A.3 appears to be a genuine document and believing the documents marked on the side of the plaintiffs, set aside the Judgment and decree dated 28.07.2003 passed by the II Additional District Munsif at Bhavani and consequently, allowed the Suit granting the injunction infavour of the plaintiffs.

10. At the time of admitting the Second Appeal, the following substantial question of law are formulated for consideration in this Second Appeal.

- i. Whether the Judgment and decree of the lower Appellate Court constitutes error of law for want of considering the relevant issues such as admissibility and reliability of unregistered document marked as Ex.A3, title and right of the parties with reference to the disputed area, non-consideration of Advocate Commissioner's report and the plan annexed therewith which warrants interference by this Court?

11. According to the plaintiffs, a portion which was marked as ABCD, purchased by the 1st plaintiff vide a sale deed dated 11.03.1993, was marked as Ex.A1. Similarly, a portion marked as AMND in Rough Sketch annexed with the plaint was purchased by the 2nd plaintiff, vide sale deed dated 21.04.1993, was marked as Ex.A2. Exs.A4 to A7 were the sale deeds dated 17.01.1933, 11.02.1935 & 04.07.1938, 22.08.1963 respectively executed in favour of the predecessors of the plaintiffs in respect to the suit property. The learned II Additional District Munsif, Bhavani clearly observed that the measurement mentioned in those documents as "fpoNky; Kok; 15 njd;tly; Kok; 47 ,jpYk; nghJtpy; 1 3 gg;F epyKk;" was not tallied with the measurement now mentioned by the plaintiffs in the plaint.

12. Further, it was observed that in Ex.A.2, which was the Sale Deed executed in favour of the 1st plaintiff, in which, it was mentioned about the 4 boundaries as ' சித்தீவரனுக்கு கிரயம் செய்து கொடுக்கும் இடத்துக்கும் (கழக்கு) (வடக்கு) காவேரி ஆற்றுக்கு செல்லும் ரோட்டுக்கு (தெற்கு) தேவி காரணிக்கு பாத்தியப்பட்ட இடத்துக்கு (மேற்கு) இதன் மத்தியில் தென்வடல் அடி இருப,றமும் 106 கிழமேல் அடி வடப,றம் 4 கிழமேல் அடி தென்ப,றம் 7 இந்த அளவ,ள்ள 583 சதுரடி நிலம் வீட்டிடம் மூராகும் இடத்துக்குண்டான மாமூல் வழிநடை தடம் சகிதம்” .

13. According to the evidence let in by the plaintiffs, both Ex.A.2 and the document executed infavour of the minor Sidheeshwaran were executed on the same day. But, without producing the said document as the plaintiffs' side exhibit, the marking of the other documents does not disclose the correct measurement of the said property. However, the 1st Appellate Court did not consider the said aspect and came to the firm conclusion that Ex.A.3 was a valid document and binding upon the plaintiffs and therefore, the plaintiffs were entitled for the relief of injunction.

14. The learned Counsel appearing for the appellants/defendants would contend that without reversing the order in regard to the excess land, the 1st Appellate Court delivered the Judgment by fixing the burden on the defendants and decreed the Suit. The 1st Appellate Court did not set aside the findings arrived at by the trial Court. Further, Ex.A3, which was a crucial document for deciding this case, has compulsorily to be registered under Section 17 1 (b) of the Registration Act, since the said document is an unregistered one, and does not confer any right in favour of the plaintiffs. Accordingly, the Judgment rendered by the 1st Appellate Court was liable to be set aside.

15. On the other hand, the learned Counsel appearing for the respondents/plaintiffs would contend that Ex.A.3 was the adjustment document executed between the plaintiffs and the defendants.

16. Now, considering the arguments advanced by the either side, it is a basic law, since a petition was filed by the plaintiffs for the relief of injunction, they were duty bound to prove their title and possession in respect to the suit property.

17. Sections 101 to 103 of the Indian Evidence Act clearly speaks in support of the defendants that the plaintiffs are duty bound to prove their title and possession in respect to the suit mentioned property. In the said circumstances, the

non-production of the Sale Deed, which stands in the name of the defendants pertaining to the property owned by them is no way helpful to the case of the plaintiffs.

18. It is the case of the defendants that since they dispute the ownership of the Suit property, it is the duty of the plaintiffs to file a Suit for the relief of declaration, consequently, for injunction. But in this case, the plaintiffs did not ask any relief of declaration, since the injunction simplicitor is a discretionary relief, it can not be granted in the said circumstances. Now, on going through the said contention raised by the defendants in the written statement filed by the 2nd defendant and adopted by the 1st and 3rd defendants, it was clearly pleaded on the side of the defendants that the plaintiffs were attempted to grab the property, which was belonging to the defendants.

19. It is a settled position of law, if the title of the Suit property challenged by the other side, the plaintiffs, who asked for the relief of injunction have to be proved by placing an acceptable and reliable title deeds with regard to the same. As already discussed, in the Judgment rendered by the trial Court, it was clearly observed that the measurement mentioned in Exs.A.1 and Ex.A.2 was not tallied with the Sale Deeds Ex.A.4 to Ex.A.7, which were the documents in respect to the suit property executed between the predecessors of the plaintiffs. In the said situation, it is the duty of the defendants to amend the plaint as per the plea taken by the defendants in the written statement. But, in this case, for the reasons best known to them, on the side of the plaintiffs, no such steps were taken for amending the plaint, particularly, for the relief of declaration.

20. Further, in the Judgment rendered by the 1st Appellate Court, it was held that Ex.A.3, which was an agreement executed between the 1st plaintiff and the 1st defendant confers the title infavour of the plaintiffs. It was further held that even though, the 2nd and the 3rd defendants were not the parties to the said document, since the 1st defendant was the Karta of the Family, he was entitled to enter into an agreement on behalf of the defendants 2 and 3. Accordingly, the said document binding upon the defendants and thereby, the plaintiffs were entitled to the relief of injunction.

21. In this regard, during the time of giving evidence as DW 1, the 1st defendant stated in his cross examination that the property, which was a house situated on the eastern side of the suit property was purchased by his father in the year 1948. Further, he admitted that the Sale Deed stands in the name of his father, as of now, the same is available with him. Further,

he has stated that he is having 5 brothers. In 1951, a partition was effected between him and his brothers, in which, the property stands on the eastern side of the Suit property was allotted in his favour.

22. According to the evidence given by DW1, the property which was a house situated on the eastern side of the Suit property was absolutely belonging to the 1st defendant. In the said circumstances, on 12.05.1997, being the owner of the property situated on the eastern side of the Suit property, the 1st defendant entered into an agreement with the plaintiffs in respect to the right having by them in the Suit property. In the said document, it was clearly mentioned that the Suit property was belonging to the 1st plaintiff. In such a way, after admitting the title of the plaintiffs, now, the defendants contended that the Suit property was belonging to them. In fact, they were estopped in claiming the title over the suit property, since the property was allotted in favour of the 1st defendant as he was an absolute owner of the same. The non inclusion of the 2nd and the 3rd defendants in respect to the agreement i.e., Ex.A.3 was no way affected the case of the plaintiffs.

23. It was the contention of the defendants that the said document has to be compulsorily registered, according to Section 17 of the Registration Act 1908. Now, on going through the said provision, the following documents are compulsorily to be registered.

- (a) Instruments of gift of immovable property;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.
- (c) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
- (d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
- (e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or a award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and

upwards, to or in immovable property:]

24. But, in the present case, the document executed between the 1st plaintiff and the 1st defendant does not confer any right in favour of any one of the parties. After the agreement, the right alleged to be acquired in earlier was admitted by the 2nd defendant. So also the compulsory registration of the said document is not necessary. In the said circumstances, it is necessary to look into Section 115 of the Indian Evidence Act. The said provision is clearly relevant for answering the substantial question of law arose in this case.

25. As correctly pointed out by the counsel appearing for the respondents/plaintiffs, since the said document does not confer any right in favour of any party, the Registration is not compulsory. In this case also, the agreement deed executed between the 1st plaintiff and the 1st defendant does not confer any right in favour of the plaintiffs, to establish the admission made by the 1st defendant alone.

26. Accordingly, the substantial question of law is answered in favour of the respondents/plaintiffs.

27. In fine, this Second Appeal is devoid of merit and accordingly, stands dismissed. No costs.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

vrn/dn

To

1. The II Additional District Munsif, Bhavani.
2. Fast Track Court No.IV, Erode at Bhavani
3. The Section Officer, VR Section, High Court, Madras

S.A.No.982 of 2007

KAN(CO)
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