

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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| Reserved on: 08.03.2019 | Delivered on: 30.04.2019 |
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.144 of 2013

S.Vijaya Kumar

... Appellant/Appellant/Plaintiff

Vs.

S.Mohan

...Respondent/Respondent/Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 03.09.2012 made in A.S.No.415 of 2010 on the file of the III Additional Judge, City Civil Court, Chennai reversing the judgment and decree dated 17.03.2010 made in O.S.No.4682 of 2008 on the file of the XVI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.V.Jayaraman, Senior Counsel  
For C.Venkatesan

For Respondent : Mr.J.Karthick Srinath  
for M/s. K.M.Vijayan Associates

JUDGMENT

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the III Additional Judge, City Civil Court, Chennai, in A.S.No.415 of 2010 dated 03.09.2012 reversing the judgment and decree passed by the XVI Assistant Judge, City Civil Court, Chennai, in O.S.No.4682 of 2008 dated 17.03.2010.

2. The appellant herein had filed a suit in O.S.No.4682 of 2008 on the file of the XVI Assistant Judge, City Civil Court, Chennai, to declare that the construction made by the defendant on the northern side of the suit property is illegal and in violation of the Building Rules and Regulations and to remove the said construction by means of mandatory injunction and to restrain the defendant, his men, etc., from putting up any such construction in the said place in violation of the Building

Rules and Regulations. The learned XVI Assistant Judge, City Civil Court, Chennai, by the judgment dated 17.03.2010 had decreed the suit as prayed for. Aggrieved by the same, the defendant had filed an appeal in A.S.No.415 of 2010 on the file of the III Additional Judge, City Civil Court, Chennai. The learned III Additional Judge, City Civil Court, Chennai, by the judgment dated 03.09.2012 had allowed the said appeal and set aside the judgment and decree passed by the trial Court and dismissed the suit. Aggrieved by the same, the plaintiff has filed the present Second Appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

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

The plaintiff's parents had purchased the suit property under a registered sale deed dated 11.12.1967. Subsequently, the plaintiff's father released his half share in favour of the plaintiff's mother vide, a registered release deed dated 06.19.1973. Thereafter the plaintiff's mother had executed a settlement deed dated 29.11.2006 in favour of the plaintiff and from that date onwards, the plaintiff is in possession and enjoyment of the said property. On the northern side of the suit property, there is a small space of half feet, which is used for rain water harvesting and the same has been used by the plaintiff for a long period. The defendant is the neighbour of the plaintiff and residing on the northern side of the plaintiff's residence. After purchasing the property, the defendant had put up a construction encroaching half feet of the rain water harvesting place on the northern side of the plaintiff's property. Due to the said illegal construction made by the defendant, the plaintiff's right to harvest the rain water is totally affected. The defendant had put up the said construction in violation of the Building Rules and Regulations. Due to the said illegal construction, the entire rain water came into the residence of the plaintiff and there is no other way to remove the rain water from the suit property. Hence, the plaintiff was constrained to file the above suit for declaration, mandatory injunction and for permanent injunction.

4. The averments made in the written statement filed by the defendant are in brief as follows:-

(a) The defendant's property is situated at Old No.34, New No.14, Hyder Garden 4<sup>th</sup> Street, Perambur, Chennai 600 012. He had purchased the said property in the year 1989 from one Sivagnanam and the said Sivagnanam in turn purchased the same in the year 1973 from one Kandasamy Chettiar. The said Kandasamy Chettiar had purchased the same in the year 1957, through Court auction

and sale deed was executed by the City Civil Court, Chennai, on 29.01.1958. The previous vendor Kandasamy Chettiar had purchased the said property along with building. Since the defendant's building is an old one, he renovated the same, after purchase in the year 1989 itself. He has not constructed any new building or any new construction as stated by the plaintiff. The plaintiff's sisters had already filed a suit for partition against the plaintiff and the same is pending before the City Civil Court, Chennai. The defendant has not encroached half feet as alleged in the plaint. It is only, the plaintiff who constructed the building adjacent to the defendant's building and hence, the defendant had lodged a police complaint and the police also strictly warned the plaintiff to remove his unauthorized construction. Only with a view to harass the defendant, the plaintiff has filed the above suit and therefore, the defendant prayed to dismiss the above suit.

5. Based on the aforesaid pleadings, the learned XVI Assistant Judge, City Civil Court, Chennai, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he has also examined one more witness as PW2. He has marked Exs.A1 to Ex.A6 as exhibits. On the side of the defendant, the defendant examined himself as DW1, but he has not marked any exhibits on his side. The Advocate Commissioner's report and plans were marked as Ex.C1.

6. The learned XVI Assistant Judge, City Civil Court, Chennai, after considering the materials placed before her, found that the defendant had encroached half feet of the property of the plaintiff and put up a construction, which had been made in violation of the Building Rules and Regulations. Accordingly, she decreed the suit as prayed for. Aggrieved by the same, the defendant had filed an appeal in A.S.No.415 of 2010 on the file of the III Additional Judge, City Civil Court, Chennai. The III Additional Judge, City Civil Court, Chennai, had allowed the said appeal and set aside the judgment and decree passed by the trial Court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present Second Appeal.

7. This Court, at the time of admitting the second appeal, has formulated the following substantial question of law:-

"Whether the lower Appellate Court is right in dismissing the suit based on the Commissioner's report alone when the defendant has not let in any documentary evidence in support of his pleadings?"

8. Heard, Mr.S.V.Jayaraman, learned Senior Counsel assisted by Mr.C.Venkatesan, the learned counsel for the appellant and Mr.J.Karthick Srinath for M/s.K.M.Vijayan Associates, the learned counsel for the respondent.

9. Substantial Question of law :

The learned senior counsel for the appellant/plaintiff has submitted that the first Appellate Court erred in reversing the well considered judgment of the trial Court. He further submitted that the first Appellate Court failed to consider that in the Advocate Commissioner's report and plan it is clearly stated that the defendant had encroached half feet. He further submitted that the first Appellate Court failed to consider the photograph (Ex.A4) produced by the plaintiff, which clearly shows that the defendant had encroached the plaintiff's property. He further submitted that the plaintiff has produced as many as six documents and marked as Ex.A1 to A6 in support of his case, but the defendant has produced not even a single document in support of his case and therefore, he prayed to allow the Second Appeal and set aside the judgment and decree passed by the first Appellate Court and restore the judgment and decree passed by the trial Court.

10. Per contra, the learned counsel for the respondent/defendant has submitted that when the plaintiff himself has not constructed his building by obtaining necessary plan from the corporation, he cannot complain that the defendant has violated the Building Rules and Regulations. He further submitted that the Advocate Commissioner's report and plan would clearly show that there is no encroachment made by the defendant. He further submitted that the trial Court without considering the evidence in a proper prospective had mechanically decreed the suit but the first Appellate Court taking into consideration of the evidence in a proper prospective had rightly reversed the trial Court's judgment and decree and dismissed the suit. In the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

11. There is no dispute that the plaintiff's parents had purchased the suit property under a registered sale deed dated 11.12.1967 (Ex.A1) from one Kandasamy Chettiar and subsequently the plaintiff's father had released his right through a registered release deed dated 06.09.1973 (Ex.A2) in favour of the plaintiff's mother. It is also not disputed that the plaintiff's mother had executed a registered settlement deed

dated 29.11.2006 (Ex.A3) in favour of the plaintiff. The suit property admeasuring 3616 ½ sq.ft., situated in Old R.S.Nos.269, 270 and 272 new R.S.Nos.268/8 and 269/2 of Hyder Garden IV Street, Krishnadoss Road, Perambur, Chennai-600012. It is also not disputed that the defendant had purchased the property situated on the south of the plaintiff's property i.e., in R.S.No.269/83. The Advocate Commissioner's report and plan (Ex.C1) would clearly show that the defendant has not encroached any portion of the plaintiff's property.

12. It is the contention of the plaintiff that the defendant had constructed his building violating the Building Rules and Regulations, without getting any sanctioned plan from the concerned Authority. But he has not stated that he has constructed his building by obtaining any sanctioned plan. Further even if it is assumed that the defendant had put up a construction violating the Building Rules and Regulations, the plaintiff cannot file a suit before the civil court. It is for the concerned Authorities to take appropriate action. He cannot take the role of Authorities and question the constructions made by the defendant in his property. If the said constructions affected his easementary rights, then he can file a suit. But in this case, the plaintiff has not pleaded that his easementary rights are affected. Therefore, the suit is not maintainable. The trial Court without taking into consideration of the aforesaid facts has erroneously decreed the suit. However, the first Appellate Court after considering the evidence in a proper prospective has rightly reversed the findings of the trial Court and dismissed the suit. In the said factual findings, this Court cannot interfere. Accordingly, the substantial question of law is answered against the appellant/plaintiff.

13. In the result, the Second Appeal is dismissed. No costs.

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Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1.The III Additional Judge,  
City Civil Court, Chennai.

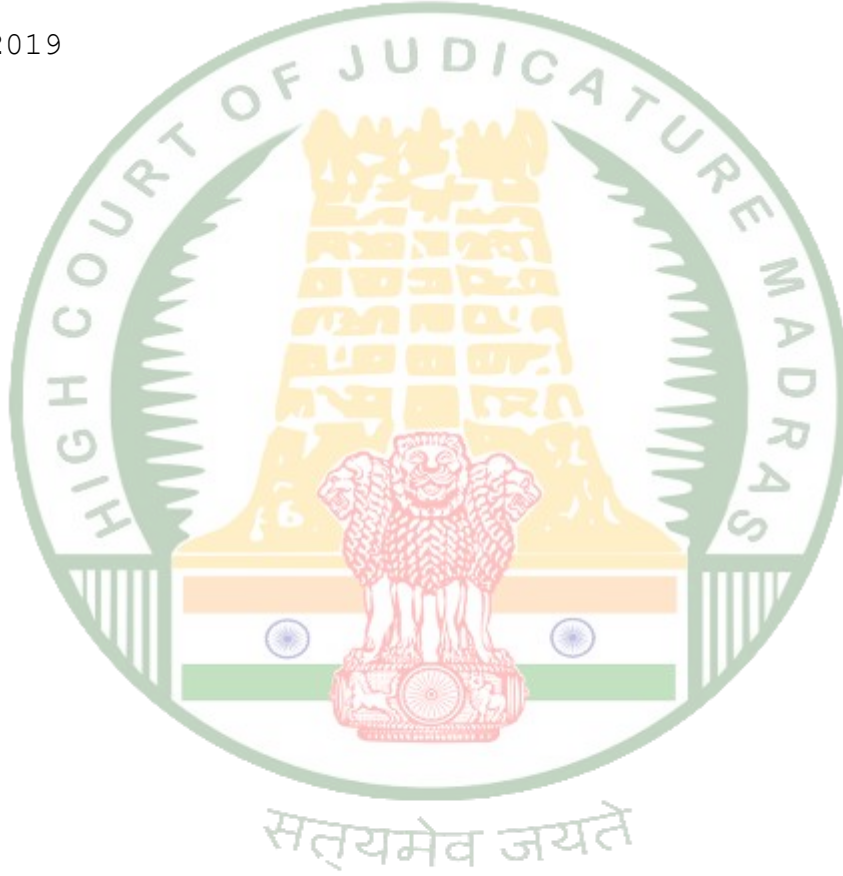
2.The XVI Assistant Judge,  
City Civil Court, Chennai.

3. The Section Officer,  
V.R Section,  
High Court, Madras

+2cc to Mr.C.Venkatesan, Advocate sr.42421  
+1cc to M/s.K.M.Vijayan, Advocate sr.42664

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nr 15/11/2019



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