

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :27.02.2019

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.196 of 2013

and

M.P.No.1 of 2013

K. Damodaran (deceased)

D. Kumaresan

...Appellant/Appellants/Defendants

- Vs -

M.S.Kannan

...Respondent/ Respondent/Plaintiff

(Cause title accepted vide order

of Court dated 21.02.2013 made in

M.P.No.1/2013 in SA SR42712 of 2012)

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the V Additional Judge, City Civil Court, Chennai, dated 27.07.2011 in A.S.No.121 of 2011 confirming the judgment and decree of the VIII Assistant Judge, City Civil Court, Chennai dated 16.07.2010 in O.S.No.8490 of 2008.

For Appellant : Mr.J.R.K. Bhavanantham

For Respondent: Mr.T.N. Sugesh

O R D E R

This Second Appeal has been filed by the defendant against the judgment and decree passed by the V Additional Judge, City Civil Court, Chennai, in A.S.No.121 of 2011 dated 27.07.2011 confirming the judgment and decree passed by the VIII Assistant Judge, City Civil Court, Chennai in O.S.No.8490 of 2008 dated 16.07.2010.

2. The respondent herein had filed a suit in O.S.No.8490 of 2008 on the file of the VIII Assistant Judge, City Civil Court, Chennai to grant a mandatory injunction directing the defendants to remove the unauthorised structures and materials including the motor and pipes put up on a portion of the plaintiff's property which is more fully described in the plaint

schedule and also for permanent injunction to restrain the defendants, their men, agents, etc., from interfering with his peaceful enjoyment of the aforesaid property. The VIII Assistant Judge, City Civil Court, Chennai by the judgment dated 16.07.2010 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.121 of 2011 on the file of the V Additional Judge, City Civil Court, Chennai. The learned V Additional Judge, City Civil Court, Chennai, by the judgment dated 27.07.2011 had dismissed the said appeal with costs confirming the judgment and decree passed by the trial court. Feeling aggrieved, the defendants have 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 is the absolute owner of the suit property viz., 14/2, Chinnaya New colony, 2nd main road, Perambur, and the same has been purchased by him under a registered sale deed dated 03.10.2006. From the date of purchase, the plaintiff is in possession and enjoyment of the same. The patta also has been granted in the name of the plaintiff. After purchase, the plaintiff has demolished the superstructure which was in existence and put up a new construction in accordance with an approved plan. The defendants' property is situated on the west of the plaintiff's property. There is a wall which separates the properties of both parties. The plaintiff has left a vacant space measuring about 2 ft x 27 ft on the western side. The defendants, on 18.11.2008, illegally trespassed into the aforesaid vacant space and installed a motor with pumpset and also dumped building materials. When the same was questioned by the plaintiff, the defendants abused him and refused to remove the aforesaid materials and hence, the plaintiff was constrained to file the suit for the aforesaid reliefs.

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

The defendants admitted that the plaintiff is the owner of the properties situated in D.No.14/2, Chinnaya New Colony, 4th Cross St, Perambur, Chennai-11. But they denied the extent of 729 sq.ft of the plaintiff's properties. The defendants denied the allegation that there is a wall in between the properties of the plaintiff and the defendants. The defendants are the owners of the vacant land situated on the eastern side of the property and also owner of the house site measuring 2 ft x27 ft. It is false to state that the defendants encroached the property of the plaintiff and installed the motor with pumpset and also dumped the building materials. The defendants are in possession of the aforesaid vacant land. The first defendant had acquired

land and building measuring 1248 sq.ft in D.No.14/2, Chinnaya New Colony, 4th Cross St, Perambur, Chennai-11, by way of the first defendant's share in a partition suit i.e., in E.P.No.2166 of 1987 in O.S.No.747 of 1987 and also obtained patta in the said land. He took possession as per the order passed in E.P.No.2166 of 1987 and from that date onwards, he is continuously in possession of the aforesaid property including the vacant site which is under dispute. On 06.08.2007, the first defendant had settled the said property in favour of the second defendant under a settlement deed which was registered as Doc.No.3327 of 2007 at S.R.O, Purasawalkam, and from that date onwards, the second defendant is in exclusive possession of the same. There is no cause of action and therefore the defendants prayed to dismiss the suit.

5. Based on the aforesaid pleadings, the learned VIII 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 marked Exs.A1 to A7 as exhibits. On the side of the defendants, the second defendant was examined as DW1 and they also marked Ex.B1 to B5 as exhibits.

6. The learned VIII Assistant Judge, City Civil Court, Chennai, after considering the materials placed before her found that the vacant space which is under dispute belongs to the plaintiff and the defendants have encroached the said portion and hence they are bound to remove the said encroachment. Accordingly, she decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.121 of 2011 on the file of the V Additional Judge, City Civil Court, Chennai. The learned V Additional Judge, City Civil Court, Chennai had dismissed the said appeal with costs confirming the judgment and decree passed by the trial court. Feeling aggrieved, the defendants have filed the present second appeal.

7. This court initially has not admitted the second appeal and ordered only notice. After receipt of the notice, the respondent entered appearance through counsel. After hearing the arguments of both sides and perusing the appeal memorandum and judgments of the courts below, this court has admitted the second appeal on 11.02.2019 and formulated the following substantial questions of law.

"1. Whether the finding of the lower court is perverse for non-appreciation of oral and documentary evidence?

2. Whether the burden of proof was on the respondent/plaintiff to prove that the disputed

portion in the plaint schedule property which formed part and parcel of the plaint schedule property allotted to the plaintiff/respondent i.e., predecessor in the partition suit in O.S.No.141 of 1981 on the file of V Assistant Judge, City Civil Court, Chennai and E.P.No.2166 of 1987.?

3. Whether the suit for bare injunction is maintainable on failure to establish prima facie title to the disputed portion in the plaint schedule property?

4. Whether the respondent/plaintiff can take advantage of the lacuna if the defence evidence in the absence of proof to the title relating to the disputed portion in the plaint schedule property?"

8. Heard Mr.J.R.K. Bhavanantham, learned counsel for the appellant and Mr.T.N.Sugesh, learned counsel for the respondent.

9. Substantial Questions of law 1 to 4:

The learned counsel for the appellants has submitted that the defendants in their written statements have specifically denied the title of the plaintiff over the suit property and that being so, the plaintiff ought to have amended the plaint for the relief of declaration, but he has not amended the plaint. He further submitted that since the defendants are in possession of the suit property, the plaintiff should have asked for the relief of recovery of possession and without asking for the relief of possession, the suit for mandatory injunction and permanent injunction, is not maintainable. He further submitted that since the plaintiff has approached the court seeking certain reliefs, the burden is upon him to establish the title over the suit property and he cannot pick up holes in the defence taken by the defendants. He further submitted that when the defendants disputing the title over the suit property, it is for the plaintiff to prove that his predecessor-in-title is entitled to convey a title for the extent of 729 sq.ft, but he has not produced any parent document to show that his predecessor-in-title got title the extent of 729 sq.ft. He further submitted that the courts below erred in holding that since the said disputed area is situated on the east of the wall, the said area belongs to the plaintiff. He further submitted that the trial court erred in decreeing the suit without considering the objection raised by the defendants with regard to the commissioner's report and the first appellate court also mechanically confirmed the trial court's judgment and decree and therefore, he prayed to allow the second appeal and dismiss the suit which was filed by the plaintiff. In support of his contentions, he relied upon the decision in Anathula

10. Per contra, the learned counsel for the respondent/plaintiff has submitted that in the written statement, the defendants have specifically admitted the fact that the plaintiff is the owner of the properties situated in D.No.14/2, Chinnaya New Colony, 4th Cross St, Perambur, Chennai-11, but they denied only the fact that the plaintiff is entitled to the extent of 729 sq.ft. He further submitted that even though the defendants have denied the entitlement of the plaintiff to the extent of 729 sq.ft, the defendants have not stated under which document they are entitled to have a right over the aforesaid disputed area of 2 ft X 27 ft. He further submitted that the plaintiff had purchased the suit property under Ex.A1 sale deed with specific measurements of 27 ft x 27 ft and also with specific boundaries. He further submitted that the Advocate Commissioner's report and plan would show that the said disputed area comes only within the boundaries and measurements mentioned in Ex.A1 sale deed. He further submitted that even if there is any discrepancy with regard to measurement, it is well settled that the boundary will prevail over the measurements. He further submitted that in Ex.A1 sale deed, it is clearly stated that on the western side, the property belonging to Damodaran (first defendant) is situated. He further submitted that the Advocate Commissioner's report and plan would clearly show that there is a wall in between the properties of both parties and that the aforesaid disputed area situated only on the eastern side of the said wall and that being so, the defendants cannot claim right beyond the said wall. He further submitted that even though the defendants have stated in their written statement that the first defendant had taken possession of his property through court as per the order passed in E.P.No.2166 of 1997 in O.S.No.747 of 1987, he has not produced any order which is passed in the said E.P to show what was the extent of the property actually allotted to him. He further submitted that the plaintiff has not picked up holes in the defendants' case; On the contrary, he has proved his case positively by producing oral and documentary evidence. He further submitted that merely because the defendants have stated in their written statement that they are denying the entitlement of the plaintiff with regard to the extent of property as 729 sq.ft, the plaintiff need not amend the plaint for declaration. He further submitted that there must be an assertion of title over the disputed area by citing the document of title and then only the plaintiff is bound to amend the plaint for the relief of declaration. He further submitted that the trial court after taking into consideration of the aforesaid facts, has rightly decreed the suit as prayed for and the first appellate court also confirmed the same and in the said concurrent factual

findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal. It is seen from Ex.A1 sale deed dated 03.10.2006 that the plaintiff had purchased the suit property from one E.Vinayagamurthy. In the said sale deed, it is stated that the house with land measuring about 729 sq.ft has been sold. Further, in the said document, measurement also given on all four sides. On all the four sides, it is having 27 ft. Further, boundaries also given, especially on western side the first defendant's property has been shown as boundary. Subsequently, on 25.05.2007, a rectification deed has been executed and the same has been marked as Ex.A3. In the said document, only the survey number has been rectified and the other aspects not disturbed. The defendants also admitted in their written statement that the plaintiff is the owner of the building bearing D.No.14/2, Chinnaya New Colony, 4th Cross St, Perambur, Chennai-11, but they denied only the extent of which the plaintiff is entitled to. As already pointed out that the plaintiff had purchased the suit property with specific measurements and also with specific boundaries. Though the defendants have denied the plaintiff's entitlement to the extent of 729 sq.ft, they have not placed any documentary evidence except the settlement deed (Ex.B1) and patta (Ex.B2) to show to what extent they are entitled to. Admittedly Ex.B1 is the document executed by the first defendant in favour of the second defendant. So, it is a self serving document and based on the said document, they cannot claim any right over the disputed area. Further, the Advocate Commissioner's report and plan would show that there is a wall in between the properties of both parties and the disputed area is situated only on the western side of the said wall. Though the defendants have filed objection to the Commissioner's report, they have not taken any steps to re- issue the warrant of the Commissioner to measure their property also. Under the said circumstances, they cannot blame the Commissioner that he has not measured their property.

11. In the written statement and also in the appeal memorandum filed before this court, the defendants have not taken a plea that the plaintiff's predecessor-in-title is not having title over the entire extent of 729 sq.ft and therefore, it is not open to the defendants for the first time to argue in the second appeal that the plaintiff's vendor is not having title over the entire extent of 729 sq.ft. The defendants have simply denied the entitlement of the plaintiff with regard to the total extent of 729 sq.ft but they have not specifically asserted title over the disputed area with reference to any title deed.

12. In Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs & Others (supra), the Honble Supreme Court in paragraph No.12 has held as follows:-

"12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title. "

13. From the aforesaid decision, it is clear that the prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. Further, it is clear that where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and in such a case it would not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient.

14. In this case, the plaintiff has proved his title by producing Ex.A1 sale deed. The defendants denied the title in respect of the disputed area alone. They have not produced any document in support of their case. So, in view of the aforesaid

decision, it cannot be said that there is a cloud over the title of the plaintiff. Therefore, it is not necessary for the plaintiff to sue for declaration and a suit for injunction is sufficient. The trial court taking into consideration of all the aforesaid facts has rightly found that the plaintiff is the absolute owner of the suit property and the defendants have encroached his disputed area measuring about 2ft x 27 ft and installed electric motor and pumpset and also dumped the building materials and hence, they are bound to remove such encroachment and accordingly, decreed the suit as prayed for. The first appellate court also concurred with the findings of the trial court and in the said concurrent factual findings, this court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant. Therefore, the second appeal is liable to be dismissed.

15. In the result, the second appeal is dismissed No costs. Consequently, connected miscellaneous petition is closed.
gv

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The V Additional Judge, City Civil Court, Chennai.
2. The VIII Assistant Judge, City Civil Court, Chennai

+1cc to M/s.J.R.K.Bhavanantham, Advocate, SR.No.18613
+1cc to Mr.T.N.Sugesh, Advocate, SR.No.18393

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Kak (21/05/2019)