

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Reserved on	Delivered on
06.02.2020	13.02.2020

CORAM:

THE HONOURABLE MRS. JUSTICE V.PARTHIBAN

S.A.No.866 of 2007

C.Ramakrishna ... Appellant/Defendant in Trial Court
versus

C.Chandrasekhar ...Respondent/Plaintiff in Trial Court

Prayer: Second Appeal is filed under Section 100 of CPC, against the judgment and decree dated 01.11.2004 in A.S.No.26 of 2004 on the file of IV Addl.City Civil Court, Chennai confirming the judgment and decree dated 29.04.2003 in O.S.No.13600 of 1996 on the file of II Asst.City Civil Court, Chennai.

For Appellants :: Mr.M.S.Murali for
M/s.Rangarajn & Prabhakaran

For respondents :: Mr.D.Rajagopal

JUDGMENT

This Second Appeal has been directed against the judgment and decree dated 01.11.2004 in A.S.No.26 of 2004 on the file of IV Addl.City Civil Court, Chennai confirming the judgment and decree dated 29.04.2003 in O.S.No.13600 of 1996 on the file of II Asst.City Civil Court, Chennai.

2. The appellant herein is the defendant in the suit and the respondent herein is the plaintiff. The plaintiff approached the trial Court for permanent injunction, restraining the defendant and his men, etc., from any way continuing the construction in any manner whatsoever in the existing open yard.

3. According to the plaintiff, the plaintiff and defendant are brothers and both of them had acquired title to the respective properties situated adjacent to each other under a deed of partition dated 24.08.1967. The plaintiff was allotted present premises situated at No.24/2, Govindappa Naicken Street, Madras-600 001 and the defendant was allotted the premises situated at No.19, Parish Venkatachala Iyer Street, Madras-600

001 with a common dividing wall. 'A' suit schedule property belonged to the plaintiff and 'B' suit schedule property belonged to the defendant. The case of the plaintiff was that to the east of his bedroom in his premises, there is a big open space or yard open to sky measuring 14' x 24' and there were three big windows measuring 5 ½ x 3 ½ each with doors open outside facing the open yard in the first floor of the defendant's premises and through the said three windows, air and light passes through from the open yard. According to the plaintiff, he has been in enjoyment of free flow of air and light passing through the said three windows opening from the open yard in the first floor of the defendant premises without any interruption over 50 years since the partition took place in 1967.

4. While so, according to the plaintiff, the defendant was taking steps to put up additional construction and also carrying out certain structural alterations and additions in the first floor of the premises and if he was allowed to continue with the construction, the plaintiff would be deprived of his right to enjoy free flow of air and light from the open yard. According to him, he would be deprived of most valuable easementary right to air and light and his bed room would become unfit for living. Therefore, the plaintiff approached the trial Court, seeking for permanent injunction.

5. The suit was resisted by the defendant by stating that A schedule property was allotted to the plaintiff and B schedule property was allotted to him in pursuance of the partition. According to the defendant, three windows were in the defendant's occupation and the plaintiff has no right over the same and like wise, the defendant has come forward with several averments in the Writ Statement denying the claim of the plaintiff.

6. The trial Court, after framing the issues and after perusing the evidence and material placed on record, had come to the categoric conclusion that the plaintiff has made out the case based on the partition deed which is marked as Ex.A5 dated 24.08.1967, wherein, Clause (6) reads as under:

"(6) The Wall E, F, G, H, I, J shown in the plan shall be the common wall and the property of both the parties. No party will be entitled to open any new door or window in the said wall, except in the portion G, H, where there are three windows. The parties hereto agree to keep the said three windows open for the convenient and comfortable enjoyment of their respective portions."

7. Subsequently, vide Memorandum of Understanding dated April, 1977 which was marked as Ex.A6, wherein, it was agreed to by the parties, viz., the plaintiff and the defendant as under:

"Whereas by the said deed of partition, the parties hereto agreed that the Wall EFGHIJ shown in the plan attached to deed of partition would be the common wall and property of both the parties and that except in the wall G H in the 1st floor where there are three windows, the parties hereto agreed not to open any new door or windows."

8. Moreover, the defendant who was examined as DW.1 in the suit proceedings, admitted the execution of this document including the Clause as extracted above. On the basis of clear evidence available in support of the plaintiff's claim, the trial Court decreed the suit in favour of the plaintiff. As against that, the defendant preferred an appeal in A.S.No.26 of 2004 on the file of IV Additional City Civil Court, Chennai. The lower appellate Court which dealt with the appeal had agreed with the findings, judgment and decree of the trial Court on the same reasoning that Exs.A5 and A6 would clinchingly prove the claim of the plaintiff since both the documents Exs.A5 and A6 have been admitted by the parties and therefore, any construction put up by the defendant would obstruct the status quo as agreed, would result in denial of the established right of the plaintiff to have free flow of air and light.

9. When the execution of the documents was admitted and defendant himself had agreed that such understanding has been existing between the brothers, the lower appellate Court felt that the judgment and decree of the trial Court was perfectly in order and therefore, the lower appellate Court dismissed the appeal on 01.11.2004. As against that, the present Second Appeal has been preferred by the defendant.

10. The learned counsel appearing for the appellant/defendant would argue that as far as Ex.A6 is concerned, the same was only a copy and the original was not marked and therefore, the Courts below could not have placed reliance on the same. The learned counsel for the respondent/plaintiff would submit that Ex.A6 was in the custody of the defendant and notice to produce the same was issued on behalf of the plaintiff which was marked as Ex.A7. Since the original was not produced, the plaintiff produced a copy of the same before the trial Court which was accepted by the Courts below. The learned counsel for the appellant would also submit that there was no easementary right existing between co-sharers and therefore, such right cannot be the basis for seeking injunction.

11. On the contrary, the learned counsel appearing for the respondent/plaintiff would submit that Exs.A5 and A6 documents which are very clear about common right to be enjoyed by both the plaintiff and defendant. In fact, the defendant has admitted this position in his deposition when he was examined as DW.1 and when in the face of such admission, the judgments and decrees of both the Courts below cannot be assailed by the defendant before this Court. The arguments in regard to non-production of original in respect of Ex.P6 has to be negated for the simple reason that the defendant who was in possession of the document refused to produce the same after being called upon to produce and therefore, the plaintiff was constrained to produce the copy of the same. Moreover, once the document as well as the contents therein were admitted by the defendant himself, the non-production of the original cannot be construed as fatal to the plaintiff's case. In any event, in the face of these documents, viz., Exs.A5 and A6, the present appeal cannot be sustained.

12. Considered the rival submissions of the learned counsels and perused the pleadings and materials placed on record.

13. As rightly contended by the learned counsel appearing for the respondent/plaintiff that Exs.A5 and A6 have clearly stipulated a common right of the plaintiff as well as the defendant and the common right has been admitted by the defendant himself. In fact, while perusing the averments contained in the Written Statement which was the basis of opposition to the claim of the plaintiff by the defendant, this Court is unable to appreciate the stand of the defendant. On the other hand, the plaintiff has come out with a clear case for grant of injunction as prayed for in the suit.

14. Once Ex.A5 Partition Deed has clearly held that the plaintiff has right to have free flow of air and light through three big windows of B schedule property, such right is not only recognized by the partition deed dated 24.08.1967, but also the subsequent Memorandum of Understanding entered into between the plaintiff and defendant in April, 1977 which was marked as Ex.A6 and therefore, this Court finds that it was a open and shut case for the plaintiff and the stand of the defendant and the resistance put up by him cannot be countenanced either in law or on facts.

15. In these circumstances, this Court finds that both the Courts below have rightly appreciated the evidence, namely, the documents, viz., Exs.A5 and A6 coupled with clear evidence of the defendant himself admitting the common right to be enjoyed by both the plaintiff and himself, have passed the judgments and decrees in favour of the plaintiff. This Court does not find

even an iota of infirmity in the approach of the trial Court and the lower appellate Court and therefore, necessarily the judgments and decrees of both the Courts below have to be upheld. Accordingly, the substantial questions of law framed while admitting the Second Appeal have to be answered against the appellant/defendant.

In the result, the Second Appeal is dismissed as devoid of merits. The parties shall bear their own costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The Additional Judge
IV Additional City Civil Court
Chennai

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

+2 Ccs to Mr.D.Rajagopal, Advocate sr 12023.

+1 CC to Mr. Rangarajan, Advocate sr 11934.

S.A.No.866 of 2007

RSV(CO)
SP(10/11/2020)

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