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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2021
PRONOUNCED ON : 16.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.1044 of 2010
and M.P. No.1 of 2010

S.Ajas Sheriff

...Appellant/Respondent/Plaintiff

versus

1.A.Sheik Hyder
2.Kamrunnisa

...Respondents/Appellants/Defendants

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 22.01.2010 made in A.S.No.132 of 2008 on the file of the learned II Additional Subordinate Judge, Salem, reversing the judgment and decree dated 09.08.2008 made in O.S.No.254 of 2007 on the file of the learned II Additional District Munsif, Salem.

For Appellant : Mr.S.Mukunth
for M/s.Sarvabhauman Associates

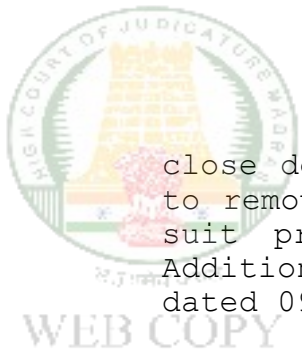
For Respondent No.1 : Mr.B.Ramamoorthy

For Respondent No.2 : No Appearance

J U D G M E N T

The present appeal is directed against the judgment and decree dated 22.01.2010 passed in A.S.No.132 of 2008 on the file of the learned II Additional Subordinate Judge, Salem, reversing the judgment and decree dated 09.08.2008 passed in O.S.No.254 of 2007 on the file of the learned II Additional District Munsif, Salem.

2. The appellant / plaintiff has filed the suit as against the defendants / respondents before the learned II Additional District Munsif, Salem, in O.S.No.254 of 2007, seeking the relief of declaration, declaring that the suit property is his absolute property and for consequential injunction, mandatory injunction, directing the defendants to



close down the hole made in their western side wall and also, to remove the door frame etc. which was fixed overlooking the suit property, within the specified time. The learned II Additional District Munsif, Salem, by judgment and decree dated 09.08.2008, had allowed the suit, as prayed for.

3. Aggrieved over the same, the defendants 1 and 2 have preferred an appeal, in A.S.No.132 of 2008 on the file of the learned II Additional Subordinate Judge, Salem, wherein, the learned II Additional Subordinate Judge, Salem, by judgment and decree dated 22.01.2010, reversed the findings arrived at by the learned II Additional District Munsif, Salem and ultimately, dismissed the suit. Being dissatisfied, the plaintiff, is before this Court with the present Second Appeal.

4. For the sake of convenience, hereinafter, the parties, are referred to, as per their litigative status before the trial Court.

5. The laconic averments made in the plaint, are as follows:

(i) The suit property and other properties are contiguous on the north and west of it. Originally, it was belonged to one Fathima Begum, who had executed the Settlement Deed dated 25.12.1980 in favour of Mohammed Shaffiullah. The said Mohammed Shaffiullah had executed the Sale Deed dated 20.01.1983 in respect to the eastern portion in favour of plaintiff's mother, namely, Razzia Begum.

(ii) Thereafter, the said Shaffiullah had executed a Hiba in respect of rear portion inclusive of the suit property in favour of Razzia Begum, which was confirmed by a Court decree in O.S.No.868 of 1999. Later, Razzia Begum had executed the Gift Settlement Deed dated 23.05.2006 [Ex.A.3] in favour of the plaintiff. A separate plan is also appended with the Settlement Deed dated 23.05.2006, wherein, the 4 blocks, are clearly mentioned. On the east of Block Nos.3 and 4, the houses of Athakar Saheb, are situated. He is not having any right in Block Nos.3 and 4. In Block No.3, there is a well and half portion of which lies in the third block and half portion of the area belongs to Athakar Saheb.

(iii) After the death of Athakar Saheb, the portion having by him was divided into two portions, the southern side fell to the share of the first defendant and northern side fell to the share to the Aleema Bi, who is the sister of the first defendant. As per the settlement, the plaintiff has got half share in the said well, on the western side. There is a dividing wall over the well, which bifurcated the well into two portion on the east and west. In Block No.4, a latrine portion was situated in the suit property and on the east of it, the house of the first defendant is situated. His



house is also bifurcated by North-South wall and on the west of which, the 4th block of the suit property is situated. There is no access or opening from the house of the first defendant to the 4th block or 3rd block on the west. After the Settlement, the plaintiff intended to construct a new building in his portion, he obtained an approval plan from Salem Municipal Corporation.

(iv) In October 2006, the plaintiff demolished the old structure and started construction. While so, in the first week of February 2007, the defendants objected the construction and made a hole in their western wall and put up a small window. On 21.02.2007, the defendants tried to put up a old door in their wall overlooking the suit property, which was prevented by the plaintiff. Hence, the suit.

6. The case of the first defendant, as averred in the written statement, is as follows:

(i) The suit is false, frivolous, unsustainable in law and on facts. The description of the property, is misleading and not correct. The plaintiff, is not the owner of the entire suit property. This defendant owns and is in possession of S.No.99/1 and 2. This defendant's right had been determined in an earlier suit filed in O.S.No.854 of 1998.

(ii) Now, the plaintiff on the instigation of the said Hussain Baig had made a novel claim in the property and wanted to put up a pillar and the same was objected by the defendants. The alleged blocks are the invention of the plaintiff. The well is situated in S.No.99/1 and this defendant has the absolute right over the entire S.No.99/1. This defendant had kept quiet as long as the plaintiff had put up the construction in his property.

(iii) Suddenly, the plaintiff had inserted a beam in the wall of this defendant's property, without any right, title or interest and hence, the same was objected. The plaintiff had caused damage to the wall which situated in the defendants' property and in order to get away from the illegal act, has come forward with false allegations as if this defendant had damaged the wall. It is for the plaintiff, who has encroached upon and put up the construction. The suit, is misconceived and not maintainable. The plaintiff, is not entitled to any relief as claimed. Hence, the suit filed by the plaintiff, is liable to be dismissed.

7. Based on the above said pleadings, the learned II Additional District Munsif, Salem, framed necessary issues and tried the suit. On the side of the plaintiff, plaintiff examined himself as P.W.1 and marked 8 documents, as Ex.A.1 to Ex.A.8. Similarly, on the side of the defendants, first defendant examined himself as D.W.1 and marked 6 documents, as Ex.B.1 to Ex.B.6. Apart from those documents, the reports and



plans submitted by the learned Advocate Commissioner were marked as Ex.C.1 to Ex.C.4.

8. Having considered the materials placed before him, the learned II Additional District Munsif, Salem, vide judgment and decree dated 09.08.2008, accepted the case of the plaintiff and allowed the suit. In the appeal filed by the defendants 1 and 2 in A.S.No.132 of 2008, the learned II Additional Subordinate Judge, Salem, reversed the findings arrived at by the trial Court and ultimately, the suit was dismissed.

9. Feeling aggrieved over the said findings of the Court below, the plaintiff, is before this Court with the present Second Appeal. The Second Appeal was admitted on file after formulating the following substantial questions of law;

"a. Whether the learned appellate Court is correct in law in non-suiting the appellant by failing to consider the evidence on record in the form of the evidence of D.W.1 ?

b. Is the learned appellate Court correct in wrongly applying the principal measurement prevail over boundary instead of boundary prevails over measurement ?

c. Is the learned appellate Court correct in basing reliance on a Commissioner's report (C3 and C4) without considering Exhibits C.1 and C.2, the earlier report and plan of the Advocate Commissioner ?"

10. Heard Mr.S.Mukunth, learned counsel for M/s.Sarvabhauman Associates appearing for the appellant and Mr.B.Ramamoorthy, learned counsel appearing for the first respondent and also perused the materials available on record.

11. Vide Settlement Deed [Ex.A.1] dated 25.12.1980, the suit schedule property and other properties, are settled in favour of one Mohammed Shaffiullah. Later, vide Sale Deed [Ex.A.2] dated 20.01.1983, he sold the portion of the suit property to one Razzia Begum, who is the mother of the plaintiff.

12. It is also admitted that the said Mohammed Shaffiullah executed a Hiba in favour of the above said Razzia Begum, through which, he bequeathed the portion of the suit schedule property, in favour of her. Further, the same was confirmed by a decree in O.S.No.868 of 1999. Accordingly, in view of the above documents, the plaintiff's mother Razzia Begum having the right and title over the suit schedule property.



13. It is the case of the plaintiff that, through the Settlement Deed [Ex.A.3] dated 23.05.2006, the said Razzia Begum settled the suit schedule property, in favour of the plaintiff, further for easy understanding, along with the said Settlement Deed, a copy of the Rough Plan was annexed. According to the said document, the property in S.No.97/2, Block No.9, Ward-K, Salem Corporation, alone settled in favour of the plaintiff.

14. On the other hand, it is not in dispute that, the defendants, are having the property in S.No.99/1. Accordingly, the property owned by the plaintiff and the defendants, are having separate Survey Numbers.

15. In otherwise, the Reports and Plans submitted by the learned Advocate Commissioner and the Settlement Deed executed by the mother of the plaintiff would sufficient to resolve the dispute having by the appellant and the respondents. In the Reports and Plans [Ex.C.1 to Ex.C.4] submitted by the learned Advocate Commissioner, he has stated that, there was a well situated in between S.Nos.97/2 and 99/1. He has also mentioned that there was a dividing wall is found in the well. In the Settlement Deed [Ex.A.3] stands in the name of the plaintiff also, after mentioning the well in Block No.3, the settlor gave $\frac{1}{2}$ right alone to the plaintiff. Therefore, in respect to the title over the well, both the plaintiff and the defendants, are having the equal right.

16. In respect to the alleged damage committed by the appellant, while at the time, the plaintiff was examined as P.W.1, he gave evidence as, in a wall situated on the eastern side of S.No.97 [block 4], the defendants put up a hole and fixed window. Further, on 21.02.2007, they attempted to fix a door and the same was managed. On the other hand, in the plaint, it was averred that the plaintiff alone after getting permission from the Municipality attempted to start new construction. Hence, in this regard, in order to prove the plaintiff's case, it is for him to show that the wall now alleged to damaged by the defendants, is the absolute wall belongs to him.

17. In this regard, on going through the plan, annexed with the Settlement Deed [Ex.A.3], through which, the plaintiff obtained the suit property, it was mentioned that, the alleged damage wall, is the common wall to both the plaintiff and the defendants. Therefore, it is apparent that the recital found in the document relied on by the plaintiff, is against his case. The First Appellate Court has also considered the case of the plaintiff in the same line and came to the conclusion that, the plaintiff, is unable to prove the total extent, which is having by himself in the suit property.



18. As already observed, after came to the knowledge of this Court that, the disputed wall belongs to both the plaintiff and the defendants, the plaintiff, is not entitled to the reliefs of declaration and consequential injunction. The First Appellate Court has also decided the issue in the same line. Further, without any evidence in respect to the damage caused to the said wall by the defendants, it is not appropriate to issue the relief of mandatory injunction against them. Therefore, I am of the opinion that, the First Appellate Court has correctly held that, the plaintiff has not proved his case. Hence, in view of the above, the substantial questions of law, are all answered as above.

19. In fine, the Second Appeal is dismissed. The judgment and decree dated 22.01.2010 passed in A.S.No.132 of 2008 on the file of the learned II Additional Subordinate Judge, Salem, is hereby confirmed. Consequently, connected Miscellaneous Petition is closed. However, there is no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

sri

To

1.The II Additional Subordinate Judge,
Salem.

2.The II Additional District Munsif,
Salem.

+1cc to M/s.Sarvabhauman Associates, SR. No.68094

S.A. No.1044 of 2010
and M.P. No.1 of 2010

SS (CO)
PR (31/03/2022)