



IN THE HIGH COURT OF JUDICATURE AT MADRAS

05.08.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.143 of 2019 &  
CMP. No.2721 of 2019

1.Katheeja  
2.K.Ismail

... Appellants/Appellants/Defendants

Vs.

K.Basheer Ali

... Respondent/Respondents/Plaintiff

PRAYER: Second Appeal filed under section 100 of the Civil Procedure Code against the Judgement and Decree dated 20.09.2018 made in A.S.No.26 of 2015 on the file of the learned III Additional Subordinate Judge, Coimbatore, confirming the judgment and decree dated 03.03.2015 made in O.S.No.1912 of 2009 on the file of the learned Additional District Munsif Judge, Coimbatore.

For Appellants : Mr. S.Saravanan  
For Respondent : Mr.L.Mouli

JUDGEMENT

The defendants are the appellants before this Court. The second appeal arises out of suit filed for mandatory injunction directing the defendants to remove the unauthorized and illegal construction raised by them within the suit property and which had been described morefully as the second item of the suit property and for injunction restraining the defendants their men, agents and servants from interfering with the plaintiff's peaceful possession and enjoyment of the first item of the suit property.

2. The facts in brief that are necessary for disposing of the above Second Appeal are herein below narrated:

The plaintiff had filed a suit in O.S.No.1912 of 2009 on the file of the learned III Additional District Munsif, Coimbatore, contending that he is the absolute owner of the suit property having purchased the same as a vacant site under two sale deeds dated 20.09.2004, one executed by Krishnamoorthy under which an extent of 1 cent and 422 sq. ft. was purchased and the other sale dated 06.04.2009 executed by one Selvaraj for an extent of 2 cents and 182 sq.ft.. In fact, the plaintiff had earlier entered into an agreement with the said Selvaraj in



respect of the property measuring 2 cents and 182 sq.ft. The second defendant is the brother of the plaintiff and the first defendant is the wife of the second defendant. The defendants had purchased the property North of the suit property in the year 2006. They had also purchased the property situate to the East of the suit property. The properties have been purchased in the name of the first defendant.

3.The defendants had started construction of their house within their property on the North of the suit property, While constructing, the defendants encroached into the plaintiff's property in the month of December, 2008 on its north-eastern side. The plaintiff immediately directed the second defendant to restrict the construction within his property. The second respondent/defendant had contended that he was not constructing thereon and was only dumping building materials and would remove them immediately. The plaintiff was taken in by this assurance. However, contrary to the assurance, they started illegally constructing in the plaintiff's property as well. The construction consisted of both the ground and first floor and a staircase was placed in the suit property. The plaintiff had encroached into an extent of 35 ft. The defendants had taken advantage of the plaintiff's absence from the place, the construction had taken place in August, 2009. Therefore, the plaintiff had come forward with the above suit.

4.The defendants had filed a written statement inter alia denying all the allegations contained in the plaint. The defendants would contend that the plaintiff and the second defendant had a very friendly relationship between each other and they had been jointly conducting a business in the name and style of 'R.A.Traders'. The second defendant had worked hard for the development of the business. Both brothers had jointly decided to purchase the properties and the second defendant had paid the amounts to the said Selvaraj on a installment basis. Selvaraj executed power of attorney in favour of the second defendant on 02.03.2006. The second defendant trusting the plaintiff allowed the property to stand in his name though both of them were jointly in possession of the properties. The defendant would further submit that the plaintiff had orally gifted his  $\frac{1}{2}$  share in the suit property to the second defendant and also handed over possession to him. Therefore, it was only with the knowledge and approval of the plaintiff that the construction had been commenced by the defendants. In fact, the plaintiff assured that he would sign all necessary documents as and when requested. However, the business ran into losses as a result of which, disputes arose between the plaintiff and the second defendant. With a view to taking revenge on the second defendant, the above suit had come to be filed. In fact, the defendant would go on to state that they had expressed their



willingness to compensate the plaintiff for the area encroached and constructed upon by them. However, the plaintiff refused it and demanded a higher amount. The plaintiff being a Muslim, after gifting his share, he cannot have any right over the same. The defendants would further submit that the plaintiff has retained the custody of all the original documents and the defendants have lodged a complaint with the Pothanur Police Station regarding the same. The defendant therefore sought to have the suit dismissed.

5. The trial Court framed the issues as to whether the plaintiff was entitled to the decree for mandatory injunction and permanent injunction. The plaintiff was examined himself as PW1 and he had marked Exs.A1 to A5. On the side of the defendants, the second defendant had adduced evidence as DW1 and Kadharmohideen as DW2. They had also marked Exs.B1 to B3.

6. The trial Court, on a detailed appreciation of the evidence on record held that there was no oral partition and that the defendants had encroached in to the suit property and therefore, the plaintiff was entitled to a decree as prayed for.

7. This judgment and decree was taken up on appeal filed by the defendants to the III Additional Subordinate Court, Coimbatore in A.S.No.26 of 2015. The learned Judge also confirmed the findings of the trial Court and dismissed the appeal. Aggrieved by the same, the defendants are before this Court.

8.Mr.S.Saravanan, learned counsel appearing on behalf of the appellants/defendants would primarily canvass that once the plaintiff had gifted the property to the second defendant, he cannot claim a right over the same. He would submit that PW1 in his cross-examination, has admitted the oral gift in favour of the second defendant. He would further submit that the plaintiff who was living close by i.e., hardly 100 mts. away from the property had not objected to the construction and had allowed the construction to go on which would only confirmed the plea of oral hiba put forward by the defendants.

9.Per contra, Mr.L.Mouli, learned counsel appearing on behalf of the respondent/plaintiff would submit that the defendants had not proved the oral hiba at all. On the contrary, in the written statement, the defendant had come forward to state that they are willing to compensate the plaintiff for the construction put up by them which would itself go to show that the Hiba is nothing but a false statement created for the sake of the defence. DW2 who was examined as the witness to the Hiba, was not able to give any evidence in support of the same. He was unable to state as to what was the extent of land that was offered as gift and when the hiba had taken place. He would submit that the Courts below have in very great detail considered the plea of oral hiba taken by the



plaintiff and after considering the evidence, rejected the claim. The appellate Court has also followed the suit and he would therefore submit that this Court sitting in Second Appeal cannot interfere with the concurrent judgment and decree of the courts below.

10. Heard the learned counsel and perused the records.

11. The purchase of the property separately in the name of the second defendant and the plaintiff is admitted by both parties. The fact that the construction which has been put up by the defendant has encroached into the plaintiff's land is also an admitted fact. The defendant seeks to justify the same by stating that the plaintiff has orally gifted [granted a hiba] the portion into which the defendant has encroached and put up construction. This defence has not been proved by the defendants. DW2 who has been examined as witness to this oral arrangement, has not been able to give details of the date on which the said arrangement had taken place and the extent of property that has been gifted, the Courts below had extensively considered the evidence. Since the witness has not been able to prove the statement of the defendants, the evidence of DW2 has not been taken into consideration. Apart from DW2, the defendants have not let in any other evidence to sustain the plea of oral partition. Having failed to prove the hiba, the defendant is estopped from claiming any right to the portion encroached upon by them in the plaintiff's property. Once it is held that the defendants have encroached into the plaintiff's property and the property belongs to the plaintiff, the plaintiff is entitled to the relief as prayed for.

12. The Courts below have considered the evidence both oral as well as documentary in very great detail before pronouncing the judgment and I do not find any reason whatsoever to interfere with this concurrent view. The appellant has not made out any question of law much less of substantial questions of law warranting interference by this Court. In these circumstances, the Second Appeal stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

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Sub Assistant Registrar

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To

1. The III Additional Subordinate Judge,  
Coimbatore.

2. The learned Additional District Munsif Judge,  
Coimbatore.

+1cc to Mr.L.Mouli, Advocate, S.R.No.38369

S.A.No.143 of 2019 &  
CMP. No.2721 of 2019

PMK (CO)  
GN (28/09/2021)