



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 17.03.2021

CORAM

WEB COPY

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

SA(MD)No.255 of 2015

1.V.Karthi
2V.Vaishnavi

...Appellants/Respondents/Plaintiffs

Vs.

Natarajan

..Respondent/Appellants/Defendant

PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree made in A.S.No.5 of 2014 dated 27.10.2014 on the file of the Principal Sub Court, Tenkasi reversing the judgment and decree of the District Munsif cum Judicial Magistrate Court, Shencottah in O.S.No.74 of 2011 dated 16.12.2013.

For Appellants : Mr.R.Murali for Mr.M.Suresh Kumar
For Respondent : Mr.P.Santhana Krishnan

JUDGMENT

The plaintiffs in O.S.No.74 of 2011 are the appellants. The plaintiffs sued for declaration of title of the suit second item and for mandatory injunction to remove the wall put up by the defendant, which, according to them, is an encroachment over their property.

2. According to the plaintiffs, the defendant, who is none other than their paternal uncle, was allotted the property situate on the west and the plaintiffs' father was allotted the property situate in the east under a compromise decree made in O.S.No.44 of 1984 on the file of the Sub Court, Tenkasi.

3. The plaintiffs would claim that the plaintiffs' father had relinquished his interest in the suit property in their favour under a registered release deed dated 02.05.2011. Contending that the defendant had encroached upon the 'Carnish' in the western wall of their property and put up a construction, the plaintiffs have sought for mandatory injunction.

4. The suit was resisted by the defendant contending that there is no encroachment over the property and the construction has been put up only in the property that was allotted to the defendant in the partition suit. It is also claimed that western wall is a common wall between the plaintiffs and the defendant. It is further case of the defendant that no new building has been constructed and he has



only renovated a toilet that was already in existence. As regards the claim that the defendant put up a bathroom, it was contended by the defendant that the bathroom has been constructed in the place where there was a bathroom earlier.

5. At trial, the first plaintiff was examined as P.W.1 and Exs.A1 to A.5 were marked. The defendant was examined as D.W.1 and one Ganapathy was examined as D.W.2. While no documentary evidence was produced on the side of the defendant, two Commissioners were appointed and their reports and plans were marked as Exs.C.1 to C.4. FMB sketch for Survey Nos.405 and 1054 were marked as Exs.C5 and C.6.

6. Upon a consideration of evidence on record, the trial Judge came to the conclusion that the construction put up by the defendant is actually an encroachment over the plaintiffs' property and granted a decree for mandatory injunction. The trial court also declared the title to the second schedule property.

7. Aggrieved by the said judgment and decree, the defendant preferred an appeal in A.S.No. 5 of 2014. The learned Principal Subordinate Judge, Tenkasi, who heard the appeal, upon a re-consideration of evidence on record, found that the plaintiffs have not made out an encroachment as alleged by them. The lower appellate court relied upon the second Commissioner's report and concluded that the entire area, which is shown as AEFD in the plaint rough plan, is not within the plaintiffs' property. On the aforesaid finding, the lower appellate Judge found that the alleged encroachment has not been made out. On the said conclusion, the learned appellate Judge allowed the appeal and dismissed the suit. Aggrieved, the plaintiffs have come up with this Second Appeal.

8. The following questions of law have been framed by this Court at the time of admission:

i) Whether the judgment and decree of lower appellate court in reversing the well considered judgment and decree of trial court without reversing the findings is sustainable?

ii) Whether the judgment and decree of lower appellate court in reversing the trial court judgment without considering Exs.C.1 to C.4 is sustainable?

iii) Whether the judgment and decree of lower appellate court is sustainable in reversing the trial court judgment without considering Ex.A1 whereby and whereunder the title and possession of the plaintiff's father is proved beyond doubt?



9. Heard Mr.R.Murali, learned counsel appearing for the appellants and Mr.P. Santhanakrishnan, learned counsel appearing for the respondent.

10. Elaborating on the questions of law, Mr.R.Murali, learned counsel appearing for the appellant would contend that once it is found that the 'Carnish' belongs to the plaintiffs and the constructions have been made on the 'Carnish', the appellate court was not right in concluding that the plaintiffs have not made out a case for declaration of title. He would also point out that as per the compromise decree, the plaintiffs are entitled to 4.8 metres east-west and as per the actual measurements, the property in their occupation is less than their entitlement. Therefore, according to him, the 'Carnish' should also be in the plaintiffs' property and the plaintiffs should have been granted a declaration of title and mandatory injunction.

11. Contending contra, Mr.P.Santhanakrishnan, learned counsel appearing for the respondent, relying upon the second Commissioner's report and plan which have been marked as Ex.C.3 and C.4, would submit that as per the actual measurement, the plaintiffs' property is situated within ' MNM1N1 ' as shown in Ex.C.4 the second Commissioner's plan. If 'MNM1N1' is the plaintiffs' property, then, the alleged encroachment is not over the plaintiffs' property. The suit second schedule property cannot be held to belong to the plaintiffs absolutely since the defendant is also entitled to certain portion of it, which is on the west of M1N1 and the west of RT in Ex.C.4 plan. The lower appellate court had only adverted to the Commissioner's report and concluded that the plaintiffs have not made out their title in the portion AEFD in the rough plan which is shown R1X1Y1T in Ex.C.4 plan. May be the plaintiffs are entitled to some land on the east of their property, just because the plaintiffs have built their house little towards west leaving out small portion on the east would not entitle them to claim a right over the property that was allotted to the defendant in the compromise decree. Once it is found that the entire suit second schedule shown as AEFD does not belong to the plaintiffs, they cannot be favoured with the decree for declaration and mandatory injunction. Ofcourse, there appears to be a small encroachment over the property of the plaintiffs by the defendant while putting up the construction in the area shown as PQ in Ex.C.4 plain. Such small encroachment will not justify a decree for mandatory injunction. Mandatory injunction, being a discretionary relief, need not be granted merely for their asking unless it is shown that the plaintiffs would be prejudiced by non-granting of mandatory injunction. The learned appellate court has rightly exercised his discretion and found that the plaintiffs are not entitled for mandatory injunction. The lower appellate court has considered the evidence and has come to the conclusion that because the plaintiffs



have not proved their absolute right to the suit second schedule property they would not be entitled to declaration and mandatory injunction. Therefore, the question of law Nos.1 and 3 are answered against the appellants.

12. So far as the second question of law is concerned, the lower appellate court has based its conclusion only on Ex.C.4 to deny the declarative relief prayed for by the plaintiffs. Therefore, the second question of law is also answered against the appellants.

13. In view of the answers to the questions of law, this Second Appeal fails and the same is dismissed. The Judgment and Decree made in A.S.No.5 of 2014 dated 27.10.2014 on the file of the Principal Sub Court, Tenkasi reversing the judgment and decree of the District Munsif cum Judicial Magistrate Court, Shencottah in O.S.No.74 of 2011 dated 16.12.2013 is confirmed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

CM

To

1. The Principal Sub Judge, Tenkasi
2. The District Munsif cum Judicial Magistrate, Shencottah.

Copy to

The Section Officer,V.R.Section,
Madurai Bench of Madras High Court, Madurai.(2 copies)

+1 CC to M/s.M.SURESH KUMAR, Advocate SR-12304[F] dated 18/03/2021

+1 CC to M/s.P.SANTHANA KRISHNAN, Advocate (SR-12390[F] dated 19/03/2021)

SA(MD)No.255 of 2015

17.03.2021

KMK(CO)

TR(20.05.2021) 4P 7C