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S.A.No.895 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.895 of 2022
and
C.M.P.No.18568 of 2022

Pachai

...Appellant/Appellant/Defendant

Vs.

Sarada

...Respondent/Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 30.06.2022 in A.S.No.30 of 2021 on the file of the learned XXIII Additional Judge, City Civil Court, Allikulam, Chennai, confirming the Judgment and Decree dated 11.12.2019 in O.S.No.3332 of 2014 on the file of the learned XIII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr. A.J.Mohamed Kassim



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JUDGMENT

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The defendant who has concurrently lost before the Courts below has filed the above Second Appeal. The parties are referred to in the same rank and array as before the trial Court.

2.The brief resume of the facts that has culminated in filing of the present appeal is narrated herein below:

The plaintiff had filed a suit O.S.No.3332 of 2014 on the file of the learned XIII Assistant Judge, City Civil Court, Chennai, for a mandatory injunction directing the respondent to remove the illegal construction and tin sheet roof put up in the encroached portion to an extent of 1' x 30' on the Western end and 5' x 30' on the Eastern end in all 180sq.ft on the Southern side of the plaintiff's property and for permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the suit property by the plaintiff.



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3.The plaintiff's case is that she is the absolute owner of the Plot No.372, Door No.15/29 in Malligaipoo Nagar, O.T.P. 5th Avenue, 16th Street, Ashok Nagar, Chennai – 600 083. The plaintiff was allotted the suit property by the Tamil Nadu Slum Clearance Board (hereinafter referred to as TNSCB) vide allotment letter dated 14.07.1987. On receipt of the entire consideration, the TNSCB had executed a registered Sale Deed dated 24.01.2001 in favour of the plaintiff. After receipt of the allotment, the plaintiff had put up a residential house in the property and she is in occupation of the same from the date of allotment.

4.The defendant who is the neighbour on the Southern side of the property bearing Plot No.373 started putting up construction by encroaching into the plaintiff's property. The plaintiff had requested the defendant not to make any attempt to encroach her property and asked him to confine the construction within his boundaries. Though the defendant had promised not to put up construction in the plaintiff's



property, however, he had failed to adhere to the promise. Hence, the plaintiff was constrained to file a criminal complaint against the defendant. However, the defendants did not pay any heed to the complaint. It is the case of the plaintiff that during the holidays, the defendant had put up constructions by encroaching 1' x 30' at the start and 5' x 30' at the end on the Southern side of the plaintiff's property. This construction is an illegal construction as the defendant had no manner of right to put up the construction in the plaintiff's property. Therefore, the plaintiff has come forward with the current suit.

5.The defendant had filed a Written Statement *inter alia* denying the case of the plaintiff. It is his case that he is in possession of the property for the past ten years and it was a thatched roof house before 1986. Thereafter, the TNSCB has come forward with a new Scheme of lease and sale to regularise the occupation. The defendant on 01.10.1986 had entered into an Agreement with the TNSCB that he shall pay a sum of Rs.44/- as monthly installments for the period of ten years. The defendant had thereafter obtained loan from the TNSCB on



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10.12.2003 and constructed a house. A Sale Deed was executed by the TNSCB on 12.01.2001 after the entire loan was repaid by the defendant. The total measurement was however wrongly entered in Sale Deed as 93.84sq.mts.. The plaintiff did not raise any objection while the defendant was constructing the ground as well as the first floor and this suit is filed only to harass the defendant. Therefore, they sought for dismissal of the suit.

6.The Trial Court had framed the following issues for consideration:

“(1)Whether the defendant has put up construction by encroaching the plaintiff's property?

(2)Whether the plaintiff is entitled to mandatory injunction as sprayed for?

(3)Whether the plaintiff is entitled to a permanent injunction prayed for?

(4)To what reliefs, if any, the plaintiff is entitled for?”



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7. On the side of the plaintiff, the plaintiff had examined herself as PW1 and marked Ex.A.1 to Ex.A.9. On the side of the defendant, the defendant examined himself as DW1 and marked Ex.B.1 to Ex.B.5. The Advocate Commissioner's Report and sketch were marked as Ex.C.1 and Ex.C.2 before the trial Court.

8. The trial Court on considering the evidence on rerecord decreed the suit. Against which the defendant had filed A.S.No.30 of 2021 on the file of the learned XXIII Additional Judge, City Civil Court, Allikulam, Chennai. The Appellate Court taking note of the fact that the second Commissioner's report and sketch had not been marked proceeded to suo moto mark it as Ex.C.3series in the appeal. The learned Judge also concurred with the findings of the trial Court and dismissed the appeal. Challenging the same, the appellant/defendant has filed the above Second Appeal.

9. The learned counsel for the appellant would at the outset contend that the *suo moto* marking of Ex.C.3series by the Court was



totally erroneous, especially, when the second report has been taken on file without scrapping the earlier report. He would further submit that the surveyors plan would show that the area in the possession of the Plaintiff was more on site than what has been sold to her and what is in the layout. This would clearly show that there is no encroachment on the side of the defendant. The learned counsel would further submit that the plaintiff has not filed any suit seeking an injunction at the time of construction of the ground floor and having allowed the construction to be put up, the plaintiff has acquiesced to the construction and cannot question the same at this late stage.

10.Heard the learned counsel appearing for the appellant and perused the papers.

11.The first argument of the appellant is with regard to the marking of the second report of the Advocate Commissioner and sketch. It is seen that the earlier Commissioner has only given a report about the measurement of the property without giving any detail about



any of the physical features of the property, although a direction was given to inspect the suit property, to note down the physical features and to measure both the properties. The Advocate Commissioner has just given a 1 ½ page report containing the details of the measurement alone. Thereafter, it appears that the second Commissioner has been appointed who had given his report noting down the physical features and the extent in the ground floor, first floor and the physical features of the property both in the ground and first floors. The Advocate Commissioner has given details about the plaintiff as well as the defendant's property. The Surveyor's report which is filed along with the first Commissioner's report would clearly show that not only is there a difference in the measurement in the plaintiff's property but also the measurement in the defendant's property to nearly an extent of 4 sq.ft. It is also to be mentioned that the appellant/defendant has not challenged the second Advocate Commissioner's report and sketch. The Appellate Court has also observed that the defendant was allotted an extent of 92.50sq.ft. as per the layout, but however, the house has been constructed to an extent of 96.50sq.ft. The defendant admittedly has not



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lodge any complaint with the Tamil Nadu Slum Clearance Board with reference to the difference in measurement. The encroachment is on the first floor. Therefore, considering the fact that both the Courts below have examined the evidence placed before them in a great detail and decreed the suit. I see no reason to interfere with the concurrent Judgment and Decree of the Courts below. Further, the defendant/appellant has not made out any case for interference and there is no substantial questions of law involved in the above Second Appeal.

This Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

07.11.2022

Index : Yes/No
Internet : Yes/No
Speaking order / Non speaking order
mps



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To

1.The XXIII Additional Judge,
City Civil Court,
Allikulam, Chennai.

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



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P.T. ASHA, J,

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