



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on
01.02.2022

Judgment Pronounced on
16.02.2022

CORAM:

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

S.A.No.1223 of 2019
and
CMP.Nos.26630 of 2019 & 13101 of 2021

1. M.Selvam
2. Amudha ... Appellants/Appellants/Plaintiffs

..vs..

1. R.Kumar
2. R.Babu rep. by their power agents
i. Anna Poorani
ii. Devi ... Respondents/Respondents/Defendants

This Second Appeal is filed under Section 100 of Civil Procedure Code against the decree and judgment passed in A.S.No.446 of 2018 dated 19.02.2019 by XVII Additional Judge, City Civil Court, Chennai confirming the judgment and decree under O.S.No.3556 of 2014 passed on 06.07.2017 by the XIII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.Ganapathy Thangavel

For Respondents: Mr.K.Sarath Kumar

JUDGMENT

This Second Appeal is filed challenging the judgment of XVII Additional Judge, City Civil Court, Chennai in A.S.No.446 of 2018 confirming the judgment of the XIII Assistant Judge, City Civil Court, Chennai in O.S.No.3556 of 2014.

2. Respondents, through their power agents filed the suit for mandatory injunction directing the appellants/defendants their men, agents, servants, subordinates or persons claiming through them to remove all the superstructure put up over the B



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schedule property and handover the same to them; for the permanent injunction restraining the appellants/defendants from interfering in any way deal with the property, either by putting up any further construction or renovation work or inhabitation in the B schedule property and for costs.

3. The case of the respondents is that their mother Rukmani Ammal was allotted the land measuring an extent of 1216 sq.ft. by the Tamil Nadu Slum Clearance Board under the proceedings of the President vide Se-Mu.No.283/87,Che-/A,G/W.S.S-11 dated 13.10.1988. Through this proceedings the land was allotted under lease cum sale agreement in respect of Plot No.70,Door No.15, Cys Road, Sasthiri Nagar, Mangalapuram, Chennai - 600 012. Rukmani Ammal paid the entire sale consideration on 08.11.1989 to the Tamil Nadu Slum Clearance Board and obtained patta in her name. She allegedly sold 450 sq.ft out of 1216 sq.ft to the appellant's predecessors. She also sold another 168 sq.ft to one Mr.Kaliyamurthy. She was left with 598 sq.ft and in which, she put up a superstructure in 445 sq.ft and kept the remaining 153 sq.ft in the western side (back side) of her house as a vacant land. Rukmani Ammal died on 06.12.2010 leaving the respondents and they became the joint owners of A schedule property. The appellants are the adjacent owners of A schedule property. They erected concrete structure in their land along with the land of the respondents measuring an extent of 153 sq.ft. This portion is shown as B schedule property. Respondents lodged a police complaint on 21.11.2013 but the Police did not take any action. Respondents filed O.S.No.6743 of 2013 on the file of IV Assistant Judge, City Civil Court, Chennai for permanent injunction against the appellants. There was no interim injunction granted and therefore the appellants put up illegal construction over B schedule property. Therefore O.S.No.6743 of 2013 was withdrawn with a liberty to file a fresh suit. Thus, this suit is filed.

4. The case of the appellants is that, the suit filed without seeking the relief of declaration is not maintainable. Rukmani Ammal had also left behind a daughter named Sivakami as her legal heir. She is not impleaded as a party to the suit. Therefore, the suit is liable to be dismissed for non-joinder of necessary party. Rukmani Ammal settled an extent of 450 sq.ft in favour of her daughter Sivakami through a registered settlement dated 13.11.1989. The appellants purchased 450 sq.ft of land with superstructure from Rukmani Ammal and Sivakami on 17.06.1993. Since, there was no sale deed executed by the Tamil Nadu Slum Clearance Board in favour of Rukmani Ammal, the sale consideration was paid through a sale agreement dated



17.06.1993. On the same day Rukmani Ammal and Sivakami executed a General Power of Attorney in favour of the first appellant entrusting to him 450 sq.ft of property. At no point of time appellants included an extent of 153 sq.ft of the respondents' land, either on 21.11.2013 or any other date. Appellants did not encroach the property of the respondents. The allegation that appellants put up construction over the property of respondents is not correct and they put up their construction well within their property. There is no B schedule property exists as claimed by the respondents. The suit has no cause of action and liable to be dismissed.

5. The Trial Court framed the following issues for consideration:-

(i) Whether the claim of the plaintiffs that the defendants put up superstructure in a B schedule property is correct?

(ii) Whether the plaintiffs are entitled for mandatory injunction as prayed for?

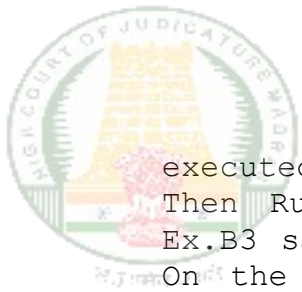
(iii) Whether the claim of the plaintiffs that the defendants are putting up constructions in B schedule property is correct?

(iv) Whether the plaintiffs are entitled for the relief of permanent injunction prayed for?

6. During the course of trial P.W.1 was examined and Ex.A1 to A10 were marked on the side of the respondents/plaintiffs. D.W.1 was examined on the side of the appellants/defendants and Ex.B1 to B4 were marked. That apart, Ex.C1 to C3 were also marked.

7. On considering the oral and documentary evidence, the Trial Court found that appellants have encroached 131 sq.ft in a B schedule property and put up construction and therefore, respondents are entitled for a relief of mandatory injunction for the removal of construction in 131 sq.ft and for possession. The respondents are also entitled for the permanent injunction as claimed in the plaint. Aggrieved against the same, the appellants filed appeal in A.S.No.446 of 2018. The learned Appellate Judge, found no reason to differ from the view taken by the Trial Court, confirmed the judgment of the Trial Court and dismissed the appeal. Challenging the said judgment, this Second Appeal is preferred.

8. Learned counsel for the appellants submitted that Rukmani Ammal's children were not impleaded as parties. Though this fact was raised in the written statement, no issue was framed by the Trial Court. Ex.B1 shows that Rukmani Ammal



executed a settlement deed in favour of her daughter Sivakami. Then Rukmani Ammal and Sivakami joined together and executed Ex.B3 sale deed on 17.06.1993 in favour of the first appellant. On the same day, they also executed Ex.B2 registered General Power of Attorney deed in favour of the first appellant in respect of 450 sq.ft. Therefore, the appellants are entitled to the property in their possession. Both the Court below have relied on the Commissioner's report and plan. The Commissioner and Surveyor have not properly measured the property. Commissioner's report shows that respondents have encroached the road portion. If proper measurements are taken, it will be known that there is no encroachment made by the appellants. Therefore, he prayed for setting aside the judgment of the Courts below and for dismissing the suit.

9. Per contra, learned counsel for the respondents submitted that Rukmani Ammal had no daughter in the name of Sivakami. However, the respondents are not disputing the Ex.B1 settlement deed. The appellants have no valid title deed to claim 450 sq.ft. They produced only Ex.B3 unregistered sale deed and Ex.B2 registered Power of Attorney deed said to have been executed by Rukmani Ammal and Sivakami. The value of the property sold is shown as Rs.50,000/- in Ex.B3. Therefore, this document is not admissible in evidence and through which, no right flows to the appellants. Power of Attorney deed will not confer any title on the appellants. Assuming that they have any right, they cannot claim any right beyond 450 sq.ft. However, even without any valid right and title to 450 sq.ft, they encroached and put up construction in the respondents' property. One co-owner can file the suit in respect of other co-owners also, when the right of the co-owners is affected. Therefore even if other legal heirs of Rukmani Ammal are not impleaded, the suit will not be hit by non-joinder of necessary party. Both the Courts have concurrently found in favour of the respondents and decreed the suit. Therefore the learned counsel for the respondents prayed for confirming the judgment of the Courts below and for the dismissal of this appeal.

10. From the case of the parties set out in their pleadings and the submissions made by the counsel appearing for the parties, it can be gathered that there cannot be a dispute regarding the fact that Rukmani Ammal was allotted 1216 sq.ft by the Tamil Nadu Slum Clearance Board. The respondents filed Ex.A2-the proceedings of the President of the Tamil Nadu Slum Clearance Board, Ex.A3-receipt, Ex.A4-sketch, Ex.A5- No Objection Certificate for getting drainage facility, Ex.A6-No Objection Certificate for the purpose of raising loan to



construct the building in the property allotted to her. These documents establish that Rukmani Ammal was allotted 1216 sq.ft. It is claimed that Rukmani Ammal sold 450 sq.ft out of 1216 sq.ft to the appellants' predecessors. It is seen from Ex.B3 that appellants' predecessors are Rukmani Ammal and Sivakami. In Ex.B1, Rukmani Ammal claims Sivakami as her daughter and settled 450 sq.ft in her favour. Then Rukmani Ammal and Sivakami joined together and executed Ex.B2 and B3 documents in favour of the first appellant.

11. There is a dispute as to whether Sivakami is the daughter of Rukmani Ammal or not. The respondents produced Ex.A10 legal heir certificate of Rukmani Ammal. Her death certificate is produced as Ex.A8. Ex.A10 shows that Rukmani Ammal has four children namely (i) Kumar (ii) Sasikala (iii) Malarvizhi (iv) Babu. There is no reference about a daughter Sivakami in the Legal Heir Certificate. Be that as it may. Since, the respondents are not disputing Ex.B1 settlement deed executed by Rukmani Ammal in favour of Sivakami, investigation as to whether Sivakami is the daughter of Rukmani Ammal or not necessary for the purpose of disposal of this Second Appeal.

12. As said above appellants claim title to the property only through Ex.B3-sale deed. They relied on Ex.B2 General Power of Attorney to enforce their claim. Ex.B1 is the settlement deed in favour of Sivakami. Only through these documents, appellants claim their right in the property. Perusal of Ex.B3 sale deed shows that it is an unregistered sale deed. The sale consideration is shown as Rs.50,000/-. Therefore, this document is not admissible in evidence. Appellants cannot claim any right on basis of this document. Ex.B2 is the General Power of Attorney deed executed by Rukmani Ammal and Sivakami in favour of first appellant. It is not known why Rukmani Ammal had joined in executing Ex.B2 Power of Attorney deed after settling the property in favour of Sivakami. However, the description of the property given in Ex.B1, B2 and B3 shows that within the four boundaries an extent of 450 sq.ft was settled in favour of Sivakami by Rukmani Ammal through Ex.B1, Ex.B2 Power of Attorney deed was executed for the same property. Similar is the case with Ex.B3. The description of property given for the property concerned in these documents are an extent of 450 sq.ft of land with building measuring North-South 18 ft. East -West 25 ft. bounded on, North by house of Nanthanial, South by house of Selamuthu, East by lane, West by the remaining property of Rukmani Ammal in Sastri Nagar, Door No.15, Plot No.17, survey No.324/IPT 329 in Perambur Village. Thus, it is clear from these documents that whatever the right



the appellants have, that is only with reference to the aforesaid property to an extent of 450 sq.ft within the four boundaries mentioned above.

13. Advocate Commissioner visited the suit property and filed his report and plan as Ex.C1 to C3. Perusal of Ex.C1 to C3 shows that the appellants are in possession of more than what they are entitled i.e., they are in possession of 581 sq.ft. Advocate Commissioner inspected the property along with the Surveyor and found that the appellants are in possession and enjoyment of land measuring 581 sq.ft. It was also found that respondent encroached some portion in the road. That was also marked in the sketch. In the case like this especially where the claim of encroachment is made, the report of Advocate Commissioner and Surveyor plan are vital in deciding the issue. The appellants cannot claim any right more than 450 sq.ft. The report of the Advocate Commissioner and plan filed as Exs.C1 to C3 show that the appellant is in possession of 581 sq.ft. They are in possession of 131 sq.ft, more than their entitlement of 450 Sq.ft. On the other hand, the respondents are in possession of only 467 sq.ft. against their claim of 598 sq.ft. in the suit survey number, viz., 'A' schedule property. The encroachment made by them in the road is not the subject matter of litigation. It is for the authorities to take actions for the removal of the encroachment. It is proved by the respondents that the appellants encroached an extent of 131 sq.ft of land of respondents in 'A' schedule property. Therefore both the Courts below rightly found that appellants have encroached the land of the respondents and put up construction and decreed the suit. This Court finds no reason to take a different view of the matter.

14. It is settled proposition of law that one co-owner can maintain the suit for the benefit of other co-owners also. Therefore, only because other legal heirs of Rukmani Ammal were not impleaded, it cannot be considered that the suit is bad for non-joinder of necessary parties. In AIR 2002 Delhi 81 (Smt. Krishna Prakash & Anr. vs Dilip Harel Mitra Chenoy), the Delhi High Court, in para-18, held as follows:-

"18. In "Mahavir Prasad Vs. Sukhdev Mongia & Another, 1990 (2) RCJ 254 Delhi, relying on the case "Currimbhoy & Co. Ltd. Vs. L.A.Creet & Others, AIR 1930 Calcutta 133; Ram Niranjana Das Vs. Loknath Mandal, ; Ajmer Singh Vs. Shamsher Singh, ; and Pal Singh (supra), also held that a suit for possession by a co-owner against a trespasser without impleading



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the other co-owners is maintainable. There is, thus, no substance in the plea raised against the maintainability of the suit. As a matter of fact, while making her oral submissions, the learned counsel for the defendants/appellants concluded her arguments giving up the said plea against maintainability of the suit. In any case, the plea against maintainability of the suit is not well founded and the plaintiff/respondent is held to be fully competent to maintain the suit."

15. The Hon'ble Supreme Court in (2017) 5 SCC 451 (Om Prakash and another ..vs.. Mishri lal (dead) represented by his legal representative Savitri Devi) held as follows: -

"32. The judicially propounded proposition is that when the property forming the subject-matter of eviction proceedings is owned by several co-owners, every co-owner owns every part and every bit of the join property along with others and thus it cannot be said that he is only a part owner or a fractional owner of the property and that he can alone maintain a suit for eviction of the tenant without joining the other co-owners if such other co-owners do not object. In the contextual facts, not only the compromise decree, as aforementioned, has declared the appellants to be the joint owners of the suit premises, their status as such has not been questioned at any stage by anyone interested in the title thereto."

16. Thus, this Court is of the considered view that both the Courts have rightly found that appellants have made encroachment in the property of the respondents and put up construction and thus decreed the suit. There is no substantial question of law arises for the consideration of the Second Appeal.

17. In this view of the matter, this Court confirms the judgment of the first appellate Court in A.S.No.446 of 2017 on the file of XVII Additional Judge, City Civil Court, Chennai



confirming the judgment of XIII Assistant Judge, City Civil Court, Chennai in O.S.No.3556 of 2014 and dismisses this Second Appeal with the costs of the respondents through out. Consequently, connected Miscellaneous Petitions are closed.

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ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

Vm

To

1. The XVII Additional Judge,
City Civil Court, Chennai.
2. The XIII Assistant Judge,
City Civil Court, Chennai.

Copy to

The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.G.Thangavel, Advocate Sr.10154
+2cc to Mr.K.Sarathkumar, Advocate Sr.10475

S.A.No.1223 of 2019
and
CMP.Nos. 26630 of 2019 & 13101 of 2021

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