



S.A. Nos.474 & 475 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.03.2024

Pronounced on: 12.04.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.Nos.474 & 475 of 2018

and

CMP. No.12757 of 2018

Mrs.Yaseen Bee

...Appellant in both S.As.

Vs.

Mr.G.Chandrasekaran

...Respondent in both S.As

COMMON PRAYER : Second Appeals filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 23.08.2017 made in A.S. Nos.261 & 262 of 2016 on the file of the learned XV Additional Judge, City Civil Court, confirming the judgment and decree dated 11.04.2016 made in O.S. Nos.9444 & 5699 of 2009 on the file of the learned XIII Assistant Judge, City Civil Court at Chennai.

For Appellant : Mr.G.Ashokapathy
for M/s.Pass Associates in both S.As.

For Respondents : Mr.Gijesh Gopal in both S.As.



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COMMON JUDGMENT

These Second Appeals arise out of two Original Suits in O.S.Nos.5699 of 2009 & 9444 of 2009.

2. The parties are described as per their litigative status before the Trial Court in O.S.No.5699 of 2009, for the sake of convenience.

3. The plaintiff in O.S.No.5699 of 2009 is the defendant in O.S.No.9444 of 2009. The Appellant/Plaintiff suffered concurrently before the Trial Court as well the First Appellate Court and aggrieved by the same the above Second Appeals have been preferred by the plaintiff.

4. Before hearing the learned counsel on either side for final hearing, upon arguments of the learned counsel for the appellant and the respondent, on 26.03.2024, I have admitted the above Second Appeals on the following substantial questions of law.

“a. Whether the factual finding of the revenue authority and the evidence rendered be not accepted without any substantial evidence against the same?

b. Whether the respondent can claim title and possession of a property which was not in his possession at the time of the sale in his favour?”

Thereafter, I proceeded to hear the learned counsel for the appellant,



Mr.G.Ashokupathy, and Mr.Gijesh Gopal, learned counsel for the respondent on the above substantial questions of law.

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5. The Appellant/Plaintiff filed suit in O.S.No.5699 of 2009 claiming to be the absolute owner of Plot No.6, Jamuna Bai Street, Jamunabai Nagar, Sembium, Chennai 600 011, the said Plot measuring 2400 sq.ft. According to the plaintiff, she has purchased the said plot by way of a sale deed dated 03.09.1984 and she has been in continuous possession and enjoyment of the same ever since her purchase. The defendant owns property bearing Plot No.5 which is lying to the East of the plaintiff's property. The defendant has purchased the property from Mr.Anandan on 22.10.1998. The said Plot No.5 has been subdivided as Plot Nos.5-A and Plot 5-B and Plot 5-B is owned by the defendant having purchased the same under sale deed dated 09.07.2004 and the property measures 1200 sq.ft. As the defendant attempted to interfere with the plaintiff's possession, claiming that there was a 3 feet shortage in the linear measurements of suit property, the plaintiff was constrained to file the suit.

6. The defendant filed the suit in O.S.No.9444 of 2009 for the relief of declaration, mandatory injunction and permanent injunction. The



case of the defendant is that the linear measurements to an extent of 3 feet is short in his property and is in excess in the plaintiff's property. Therefore, the plaintiff had encroached on the defendant's property to an extent of 3 ft. The defendant therefore, sought for dismissal of suit in O.S.No.5699 of 2009 and decree in his favour in O.S.No.9444 of 2009.

7. The suit in O.S.No.9444 of 2009 was resisted by the plaintiff on the ground that the suit was barred by limitation and it is not the plaintiff's case that the plaintiff was trying to encroach into Plot No.5-B and on the other hand the defendant's case was specifically on the ground that the plaintiff had already encroached into the Plot No.5-B. Thus, according to the plaintiff, the relief of permanent injunction cannot be granted. The plaintiff had also contended that the defendant purchased the property only in 2004 and well before the defendant's purchase, the plaintiff had raised a compound wall and had been enjoying her property absolutely. In the written statement in O.S.No.9444 of 2009, the plaintiff has also specifically averred that she purchased 3 ft from one Sharfuddin who owns Plot No.7 and therefore the same justified the excess land available at the hands of the plaintiff.

8. The Trial Court dismissed the plaintiff's suit and decreed the suit filed in O.S.No.9444 of 2009. The First Appellate Court confirmed the



findings of the Trial Court and dismissed both the Appeals preferred by the plaintiff. It is aggrieved by the concurrent findings in both the suits, the plaintiff in O.S.No.5699 of 2009 and defendant in O.S.No.9444 of 2009, has preferred the above Second Appeals.

9. The learned counsel for the Appellant, Mr. Mr.G.Ashokapathy would take me through the oral and documentary evidence, especially the communication issued by the Tahildar, which clearly established that the plaintiff is in occupation of additional 3 ft, which was carved out of Plot No.7 and would contend that unfortunately neither the Advocate Commissioner nor the Courts below have adverted to the material documentary evidence issued by the competent Revenue Authority. He would further state that the defendant having filed the suit in O.S.No.9444 of 2009 for declaration and mandatory injunction ought to have established his title independently and there is absolutely no evidence forthcoming on the side of the defendant in that regard.

10.The learned counsel for the appellant would challenge the findings of the Courts below on the ground that they have merely approached the issues from a mathematical angle by finding that there



was a shortage in the defendant's property and an excess in the plaintiff's property and therefore, came to a presumption that the plaintiff had encroached into the defendant's property. He would also further state that, the RTI information which was relied on by the defendant was for an earlier period relating to 1998 and 1999 on which date, S.No 12/20 was not even in existence and therefore, the reply issued by the Tahsildar to the RTI query that no Patta is recorded/mutated in the name of the appellant or her husband would be of no avail. He would therefore, pray for the second appeal being allowed.

11. Per contra, the learned counsel for the respondent, Mr.Gijesh Gopal would submit that both the Courts have clearly found that there was a shortage of 3 ft in the property of the defendant and correspondingly there being an excess of 3 ft (linear measurements) in the plaintiff's property, the only logical conclusion would be that the plaintiff has encroached into the defendant's property which has resulted in the excess available land in his property. He would further contend that the Courts below have appreciated the oral and documentary evidence in a proper manner and the same do not warrant interference under Section 100 of the Code of Civil Procedure. He would therefore, pray for dismissal of the above Second Appeals by confirming the judgment and



decree of the Courts below.

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12. I have carefully considered the rival submissions advanced by the learned counsel on either side. I have also independently gone through the pleadings, oral and documentary evidence as well as the judgment of the Trial Court and the First Appellate Court.

13. Admittedly Plot No.5-B belongs to the defendant and Plot No.6 belongs to the plaintiff. The ownership of the respective plots by the plaintiff and the defendant is admitted by both parties. The dispute is only in respect of a shortage of 3 ft to a the length of 30ft in the eastern side.

14. Admittedly the appellant filed the suit in O.S.No.5699 of 2009 earlier to the suit filed by the defendant seeking declaration, mandatory injunction and permanent injunction. In O.S.No.5699 of 2009, the plaintiff has only sought for a permanent injunction to restrain the defendant from interfering with the plaintiff's peaceful possession and enjoyment of the suit property. The plaintiff has approached the Court on the ground that on 27.06.2009, the defendant along with his henchman attempted to demolish the compound wall and trespass into the suit property. Only later when the defendant filed the suit in O.S.No.9444 of 2009, the defendant had claimed that the plaintiff had encroached an



extent of 3 ft by 30 ft totalling in all 90 sq.ft from north to south on the western side of the plaintiffs' property. In view of the said allegations made by the defendant, the plaintiff by way of her written statement to O.S.No. 9444 of 2009 stated that there was no encroachment at any point of time and the plaintiff has raised a compound wall even before the defendant had purchased the property in Plot No.5-B.

15. I find that, the Advocate Commissioner had also taken the assistance of the Taluk Surveyor. In fact, I find that the Taluk Surveyor has been examined as C.W.1 and Exs.C1 to C5 have been marked before the Trial Court. The said evidence of C.W.1 and Exs.C1 to C5 assume significance in the light of the narrow and specific dispute relating to 3 ft to 30 ft (90 sq.ft) of land. The Advocate Commissioner has stated that he has measured Plot Nos.11 to Plot No.5B and has found Plot No.6 to have 43 ft and Plot No.5B to have 36.8 ft. He has also annexed the report of the surveyor and a sketch and sought for the same to be treated as part and parcel of his final report.

16. In the communication sent by the Tahildar, Purasawalkam, Perambur Taluk to the Advocate Commissioner dated 10.01.2012, I find that, the Tahsildar has mentioned that Plot No.7, was originally owned by



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Sharfuddin and the linear measurement of her property was 40 ft out of which she sold 37 ft in the year 1985 and that in the year 1995, the remaining 3 ft retained by the said Sharfuddin was sold to the plaintiff herein. The Tahildar, has also confirmed that Patta has been issued to the plaintiff in respect of the 3 ft by 30 ft even as early as on 15.12.1988.

17. Even though the plaintiff has not produced any registered document of title pertaining to the said 90 sq. ft, (3 ft by 30 ft), it is established that the plaintiff has been in physical position of the said 3 ft by 30 ft even as early as from 1988. Admittedly, the plaintiff purchased Plot No.6 in 1984 and has been in peaceful possession and enjoyment of Plot No.6 and also a portion of Plot No.7 namely 3 ft x 30 ft. from 1998. The plaintiff has successfully established the same by production of the Patta, which is in fact confirmed by the Tahsildar as well. On the other

hand, the defendant, in his suit in O.S.No.9444 of 2009 only states that he went to the suit property on 27.06.2009 for putting up construction of building. He was shocked and surprised to find that the plaintiff had trespassed into his property by an extent of 3 ft by 30 ft on the western side of the defendant's property and had built a compound wall. There is absolutely no allegation specifically setting out the date on which the



alleged encroachment or trespass took the place or when the plaintiff constructed the compound wall. The defendant having filed the suit in O.S.No.9444 of 2009 ought to have placed material particulars before the Court in the pleadings with regard to the alleged date on which the plaintiff had encroached into the defendant's suit property. This would assume significance for the simple reason that without such specific allegations being made, the Court would not be in a position to even test whether the suit has been filed in time or not.

18. Unfortunately, both the Courts proceeded to place reliance on the report of the Advocate Commissioner, finding that there is an excess 3 ft in the plaintiff's property and shortage of approximately 3 ft in the defendant's property and therefore, proceeded to grant a decree in favour of the defendant and dismissed the suit filed by the plaintiff. The Courts below have not applied their mind to the material evidence namely, the Patta issued in favour of the plaintiff which is also been marked before the Court, besides also being confirmed by the Tahsildar Purasawalkam, Perambur Taluk. The defendant also admits that the plaintiff has put up a compound wall and has been in possession of the 3 ft x 30 ft alleged to have been trespassed/encroached by the plaintiff. In a suit for declaration and mandatory injunction, without specific pleadings regarding the nature



of trespass or encroachment, the specific date on which the alleged trespass or encroachment happened, the plaintiff cannot succeed. On the other hand, the defendant has placed sufficient materials before the Court to show that right from 1988, the plaintiff has been in possession of the 3 ft x 30 ft land for which the revenue has also issued a Patta, recognising possession of the plaintiff. Thus viewed from this angle, the suit filed by the defendant seeking declaration in mandatory injunction is clearly barred by Law of Limitation, especially when it is shown to the Court that the defendant has been in possession right from 1988.

19. The Courts below have failed to advert their attention to the specific case of the plaintiff that he has acquired 3 ft by 30 ft from Plot No.7. Unless the defendant had clearly pleaded and satisfied that the plaintiff had encroached an extent of 3 ft by 30 ft adjoining Plot No.5B, the defendant cannot succeed. Even with regard to the RTI information which has been produced before the Trial Court, it is seen that the Application has been made by the defendant regarding Patta No.2111 pertaining to the period 1998 to 1999. In response to the RTI request, the Tahildar has only stated that there is no such patta in the name of the plaintiff on the said date or in the said Patta No.2111. The Courts below have lost sight of the fact that survey No.12/20 was issued much later, in



C.A.No.376/2015 and the excess extent of 3 ft by 30 ft by stating that he has purchased the same from owner of Plot No.7, one Sharfuddin. However, in the settlement deed in Ex.B9, it is contended that the property was acquired ancestrally, I do not find the same to be fatal to the case of the plaintiff in a suit for injunction to protect his possession.

20. In any event, it is the defendant who has filed a suit for declaration and mandatory injunction and the plaintiff has only sought for the relief of permanent injunction to protect his possession and enjoyment of the suit property, Plot No.6. There is no dispute that Plot No.6 belongs to the plaintiff and it is the admitted case of the defendant as well that the plaintiff is the owner of Plot No.6. As already stated, the only issue is with regard to the 3 ft x 30 ft piece of land. The defendant who has prayed for relief of declaration and mandatory injunction has to independently establish his right, title and interest in and over Plot No.5-B and cannot pick holes in the case of the plaintiff. The Courts below, without appreciating this settled legal position has magnified the said contradictions on the side of the plaintiff and has chosen to render findings based on the same, without noticing that the defendant has failed to establish his case of encroachment/trespass. In fact the plaint in O.S.No.9444 of 2009 is very vague and as already discussed, way short



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of material particulars and pleadings which are mandatory in a suit of declaration as well as mandatory injunction. Thus the Courts below have rendered perverse findings, especially without appreciating the material evidence available on record. I am therefore, constrained to interfere with the findings of the Courts below.

21. In fine, the substantial questions of law are answered in favour of the Appellant and both the Second Appeals are allowed and the judgment and decree in Courts below in A.S.Nos.261 and 262 of 2016 and the judgment and decree in O.S.Nos.5699 of 2009 & O.S.No.9444 of 2009 are set aside. In the result, O.S.No.5699 of 2009 is decreed and O.S.No.9444 of 2009 is dismissed. Consequently, connected Civil Miscellaneous Petition is closed. There shall be no order as to costs.

12.04.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No.
Speaking order/Non-speaking order
rkp
To

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



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P.B.BALAJI, J.

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Pre-delivery Judgment in

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