



S.A.No.953 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	13.11.2024
Pronounced On	28.11.2024

Coram:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

**S.A.No.953 of 2015
and M.P.No.1 of 2015**

1.C.Delli Kumar
2.C.Mohan Kumar
3.C.Linga Kumar
4.C.Kumudha

...Appellants

Versus

1.M/s.Poomalai Housing Pvt. Ltd.,
Plot No.118, Door No.10,
5th Cross Street, Kamaraj Nagar,
Tiruvanmiyur, Chennai – 41.

2.M/s.Subashaya Constructions,
23/2, 2nd Floor, Subashaya Nest,
P.S.Sivasamy Salai,
Near Nilgris Departmental Stores,
Mylapore, Chennai – 4.

3.R.Shanthi

...Respondents

Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 09.04.2015 in A.S.No.313 of 2012 on the file of XVI Additional City Civil Court, Chennai confirming the judgment and decree dated 05.07.2012 in O.S.No.8975 of 2008 on the file of XVII Assistant City Civil Judge, Chennai.



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For Appellants	:	Mr.R.Subramanian
For Respondent – 1	:	Mr.M.Nandan
For Respondent – 2	:	Ms.S.Deepika for Ms.M.Sumithra
For Respondent – 3	:	Mr.T.K.Kulasekaran for Ms.Abirami

JUDGMENT

The plaintiffs are the appellants herein. The plaintiffs filed a suit in O.S.No.8975 of 2008 for the relief of permanent injunction against the defendants restraining them from altering the physical features of the suit property. The trial Court had dismissed the said suit. Aggrieved over the same, the plaintiffs preferred a First Appeal in A.S.No.313 of 2012 before the First Appellate Court. However, the First Appellate Court has dismissed the First Appeal and confirmed the judgment of the trial Court. Hence, the plaintiffs have filed the present Second Appeal before this Court.

2. The short facts pleaded by the plaintiffs in the plaint are as under:

The plaintiffs' mother filed a suit in O.S.No.5445 of 1990 for partition and separate possession of 1/5th share in the suit property, in which, a preliminary decree was passed on 27.09.2001. After the preliminary decree



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was passed, the plaintiffs' mother died. Thereafter, as her legal heirs, the plaintiffs filed an application in I.A.No.2117 of 2003 for final decree and the final decree was passed on 08.01.2004. The plaintiffs filed E.P.No.820 of 2005 for execution of the final decree. In the meantime, it was found that in the execution warrant, the survey number was wrongly mentioned. Hence, the plaintiffs filed an application in I.A.No.15808 of 2006 for substituting the correct survey number. After appointing an Advocate Commissioner and obtained fresh report from him, the final decree orders were passed. However, the Court had re-opened the matter for clarification vide notice dated 17.11.2008. As the suit property is vacant, the defendants are trying to trespass in the same and trying to put up a construction and hence, the plaintiffs filed the suit in O.S.No.8975 of 2008 before the trial Court.

3. The brief averments in the written statement of the 1st defendant are as under:

The 1st defendant is only a builder engaged in construction of building by the property owners, upon due authorization given by the actual owners. One Mr.V.Murugan was in actual possession of the suit property. The 1st defendant had obtained the legal clearance from the authority for



construction and the construction is in half way. The plaintiffs are not in possession of the suit property and hence, the suit may be dismissed.

4. The brief averments in the written statement of the 2nd defendant are as under:

The 2ⁿ defendant was engaged for development and for the proposed building to be constructed in the suit property. Since there was misunderstanding between the 2nd defendant and the owner of the property in the initial stage itself, the 2nd defendant had terminated the work subsequently and the owner of the property had engaged some other persons for the construction work. The suit is not maintainable due to non-joinder of owner of the suit property and hence, the same may be dismissed.

5. The brief averments in the written statement of the 3rd defendant are as under:

The 3rd defendant was not aware of the partition suit and final decree proceedings and she is a *bonafide* purchaser of the suit property. She purchased the suit property for a valuable consideration by virtue of a Sale Deed dated 20.11.1995. Subsequent to the execution of said Sale Deed, she



is in possession and enjoyment of the suit property. She obtained Patta on 26.08.2002.

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6. On the basis of the above pleadings, the following issues were framed:

“1. Whether the plaintiff is entitled for permanent injunction as prayed for?”

2. Whether there is no cause of action for this suit?

3. Whether the suit is bad for non-joinder of necessary parties?

4. To what other relief is the plaintiff is entitled for?”

7. Before the trial Court, on the side of the plaintiffs, only one witness was examined viz., P.W.1 and 12 documents were marked viz., Exhibits A1 to A12. On the side of the defendants, two witnesses were examined viz., D.W.1 & D.W.2 and 15 documents were marked viz., Exhibits B1 to B15.

8. At the conclusion of the trial and on considering the evidence available on record, the trial Court had dismissed the suit. The First Appellate Court had also dismissed the plaintiffs' First Appeal and



confirmed the judgment of the trial Court. Hence, the plaintiffs have filed the present Second Appeal challenging the judgment of the First Appellate Court by raising the following substantial questions of law:

(a) Whether in law are not the decree and judgment of the Lower Appellate Court in that the Appellate Court has virtually sat in judgment against preliminal and final decree proceedings in the earlier suit, which warrants inference under Section 100 of C.P.C?

(b) Whether in law, is not the Lower Appellate Court wrong in holding that the amended decree is not valid, when the preliminal and final decree had reached finality?

(c) Whether in law are not the Courts below erred in overlooking that the third respondent is a pendente lite purchaser and therefore, the sale deed in his favour is not binding?

(d) Whether in law have not the Courts below failed to see that admittedly during the subsistence of the injunction order, when construction have been put up in violation of the same, then, it is the duty of the Court to set the wrong right and restore statusquo anti?"

9. During the pendency of the suit, the 1st defendant had entered into a compromise with the plaintiffs. Hence, the suit was dismissed as against 1st defendant. Though the 2nd defendant is the agent of the 1st defendant, the only contesting party is the 3rd defendant and M/s.Subashaya Constructions



who has been impleaded as 2nd defendant is an unnecessary party to the appeal.

10. Arguments of the learned counsel for the appellants:

(i) Even when the partition suit filed by the plaintiffs' mother in O.S.No.5445 of 1990 was pending, the defendants 1 & 2 had purchased the suit property and the Court has held that the sale deeds would not bind the interest of the plaintiff. The purchase of 3rd defendant is during the pendency of the earlier partition suit. Hence, the defendants 1 & 2 could not pass any the valid title in favour of 3rd defendant.

(ii) On the basis of the above findings, the preliminary decree has been passed in favour of the plaintiff and thereafter, final decree application was filed and final decree also came to be passed in *ex-parte*. Subsequently, the property allotted to the share of the plaintiff has also been demarcated and divided by metes and bounds and the plaintiff was put into possession over the same. Those properties which were allotted to the plaintiff's share in the earlier partition suit is the subject matter of the suit. Since the defendants have attempted to put up construction in the suit property, the plaintiffs have filed a suit for permanent injunction. However,



the 1st defendant has entered into compromise with the plaintiff and hence, the suit against the 1st defendant was dismissed.

(iii) In respect of Item No.II of the suit property, there is no dispute.

So far Item No.III of the suit property is concerned, S.No.303/2(14) comprising in 1,755 Sq.ft is the property in dispute. Both the Courts below have observed that during the execution proceedings filed in pursuant to the final decree, the amendment petition filed to change the survey number did not come to the knowledge of the 3rd defendant. Hence, the final decree will not bind upon the 3rd defendant.

11. Arguments of the learned counsel for the respondents:

(i) When the final decree was passed, the fact that there were some actual discrepancies in the measurements of the property's total extent available in S.Nos.296/1A, 297/1B, 297/1C & 303/2 was not brought to the notice of the Court and the Court had directed the Commissioner to divide the 46,130 Sq.ft into five equal shares and allot one share to the appellants. But, the total extent available was only 40,062 Sq.ft. The Advocate Commissioner without reporting the discrepancies to the Court, had divided the total extent and allotted 1/5th share measuring 9,225 Sq.ft to the



appellants.

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(ii) Pursuant to the final decree, an execution petition was filed in E.P.No.820 of 2005 and the delivery was ordered in the said petition. Only at the time of delivery, the mistakes in the survey numbers were noticed. Hence, the appellants have filed I.A.No.15808 of 2006 and thereafter, the Commissioner was directed to eliminate the shaded portion of land measuring to an extent of 3,040 Sq.ft from the sketch attached to the final decree and the same is not a part of the the suit property; by substituting the correct survey numbers, its sub-divisions, block number and T.S.Numbers correlated to them and the Advocate Commissioner was also directed to take the assistance of the Surveyor to identify the suit survey number. Thereafter, the order was passed in I.A.No.15808 of 2006 which was marked as Exhibit A11. While substituting the survey numbers, the very nature of the suit goes to the root of the case. But, even then, some of the respondents in the final decree were not given with notice and the decree was amended in their absence. As they were not given with any notice, no appeal has been filed against the order. Further, even according to the plaintiffs' pleadings, when the suit was filed, the 3rd defendant had put up a construction and hence, she was not in possession of the same.



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12. Discussion:

The fact that there was a suit filed by the plaintiffs' mother for partition and separate possession of the 1/5th share of the suit property has not been denied. The preliminary decree which was passed on 27.09.2001 has evolved the final decree status in pursuance to the order passed on 08.01.2004 in the final decree application made in I.A.No.2116 of 2003. Both the trial Court and the First Appellate Court have ventured to investigate the correctness of the binding nature of the execution proceedings that has been effected in E.P.No.820 of 2005.

13. In pursuant to the final decree, when the delivery was ordered, Bailiff went to execute the warrant and found that there is some mistakes in the survey number and thereafter, an Interlocutory Application has been filed to make certain amendments in the final decree by giving direction to the Advocate Commissioner to eliminate the shaded portion of his report with the assistance of the concerned jurisdictional Surveyor. The Advocate Commissioner has identified the survey number and effected necessary corrections in his plan. Even though, the extent of vacant land found in



S.Nos.296/1A, 297/1B, 297/1C & 303/2 was shown as 46,130 Sq.ft in the preliminary decree passed basing upon the suit schedule, on ground only 40,062 Sq.ft is available. The said fact was also not denied by the plaintiffs.

14. Since 1/5th share allotted to the plaintiffs' mother was calculated in the final decree as 9,225 Sq.ft, subsequent alterations were made in view of some discrepancies in actual measurements on the site. Even though, the Advocate Commissioner found the discrepancies on land, he proceeded to divide 1/5th share out of the total extent of 46,130 Sq.ft and shown an extent of 9,225 Sq.ft to the share of the plaintiffs' mother.

15. The First Appellate Court found certain discrepancies between the final decree and the suit schedule property. There is no convincing answer given by the plaintiffs to show how they have claimed right over S.Nos.296/1A, 297/1B, 297/1C & 303/2, which was not specifically mentioned in the final decree. As the suit has been filed subsequent to the final decree and the termination of execution proceedings, there is a possibility that properties which have been allotted to the plaintiffs' mother in S.No.303/2 could have been sub-divided.



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16. The main issue is only in respect of the subsequent amendments made to the final decree during the pendency of the execution proceedings.

17. The defendants were respondents in the execution proceedings and they remained *ex-parte*. While the survey numbers were amended, the defendants were not given with notice and hence, they have stated that they could not even challenge the changes effected in pursuant to the order passed in I.A.No.15808 of 2006. In fact, the trial Court ought to have ordered notice irrespective of the fact whether some of the respondents in the proceedings had remained *ex-parte*. In the absence of any notice, the respondents remained *ex-parte* cannot know that there are some changes made in the schedule of the properties behind their back. Had notice been ordered in I.A.No.15808 of 2006 and the defendants remained *ex-parte* thereafter also. It could be safely presumed that the amendments effected would bind the respondents in the final decree also. The above exercise was done by the trial Court and the First Appellate Court by sitting as an Appellate Authority over the final decree proceedings to find out whether the amendments made in the final decree would bind the parties against



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whom notice was not ordered. However, even after coming to know about the changes made in the final decree, the affected parties did not choose to file any suit to declare the final decree as null and void. Whether the wrong decree or right decree, it very much binds the parties to the proceedings. It is interesting, but, in the instant case, though the respondents 1, 3, 9 & 10 have been impleaded, notice against them has been dispensed. When the corrected survey number did not form part of the suit schedule property, the notice against some of the respondents were dispensed.

18. It is right for the trial Court to hold that the above changes made by way of amendments will only bind the parties who were taken notice of the petition. There has been observation in the judgment of the First Appellate Court that the order confirming the delivery effected in pursuant to the execution proceedings was not produced. The property which has been allotted to the share of the plaintiffs' mother as per the final decree was said to be situated in S.Nos.297/1A & 297/1B, but, it was actually situated in S.No.296/1. Despite all these confusions, the plaintiff has not produced the sketch attached to the final decree.



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19. The 3rd defendant has purchased the property in the year 1995 from the legal heirs of one Selvaraj who is second defendant in the partition suit in O.S.No.5445 of 1990. As the 3rd defendant's purchase was made prior to the passing of the final decree which had effected changes in the description of the property, the 3rd defendant claims that the amended final decree will not bind her. Even the plaintiff who was examined as P.W.1 has stated that the 3rd defendant who had purchased the Item No.III of the suit property has started to put up a construction therein. The plaintiffs had filed the suit for the relief of permanent injunction has an obligation to prove that they have better title and possession over the Item No.III of the suit property. As the 3rd defendant has purchased the Item No.III of the suit property even before the amendments effected in the final decree from the legal heirs of one Selvaraj (2nd defendant in O.S.No.5445 of 1990), the subsequent inclusion of S.No.303/2 made in the final decree cannot bind the interest of the 3rd defendant. Even though, the plaintiffs have admitted that a construction has been put up by the 3rd defendant after she purchased the property, they did not choose to file the suit for declaration and recovery of possession, but, for permanent injunction.



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20. Though in normal course, the trial Court or the First Appellate Court cannot sit as an Appellate Court over the decrees passed in the earlier suits, but, such violation can be made to find out whether the subsequent amendment that has been done in the absence of any notice to the interested parties would bind the concerned parties and their subsequent purchasers. If the plaintiffs sought the relief of declaration, in view of the above complicated position, it would have been possible to make a detailed analysis. But, the plaintiffs have restricted their relief for permanent injunction by admitting the 3rd defendant's purchase and possession. The Courts below has gone into the binding nature of the final decree as against the 3rd defendant by making a detailed analysis of the developments, that had happened subsequent to the amendment of the final decree made in O.S.No.5445 of 1990. Such exercise done by the Courts below cannot be presumed as an assumption of undue appellate power over the preliminary decree or final decree. Hence, the first substantial question of law is answered against plaintiffs.

21. Even though, the preliminary and final decree have reached the finality, so far as the vendor of 3rd defendant is concerned, he was not given



with notice about the subsequent amendment that was made in the final decree and the petition filed by the plaintiffs' mother. Hence, in view of the extraneous circumstances and the reasons stated by the Courts below, it is correct to hold that the amended decree will not bind the interest of the 3rd defendant and his vendor. As the trial Court did not hold that the final decree is invalid, but, had dealt with the binding nature, the second substantial question of law will not arise.

22. The 3rd defendant is in the shoes of his vendor, even though, he has purchased the property during the pendency of the final decree proceedings. In fact, at the time when the 3rd defendant purchased the property, there is no dispute pending in respect of the title of the property, but, only in respect of the shares in the suit property involved in O.S.No.5445 of 1990. Hence, the question of *pendente lite* purchaser cannot be applied to the 3rd defendant.

23. Though it is pleaded by the plaintiffs that a construction has been put up during the subsistence of the order of injunction, the plaintiffs have admitted in the evidence that after purchasing the suit property, the 3rd



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defendant has started to put up a construction. Hence, the fourth substantial question of law will not arise in the light of the evidence of P.W.1 and other materials placed before this Court.

24. In view of the above, this Second Appeal is dismissed and the judgment and decree dated 09.04.2015 passed in A.S.No.313 of 2012 by the learned XVI Additional Judge, City Civil Court, Chennai is confirmed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

28.11.2024

mrr

Index : Yes

Speaking Order

Neutral Citation: No

To

- 1.The XVI Additional City Civil Judge,
Chennai.
- 2.The XVII Assistant City Civil Judge,
Chennai.



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R.N.MANJULA, J.

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**Pre-Delivery Judgment
in S.A.No.953 of 2015**

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