



S.A.No.698 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T.ASHA

S.A.No.698 of 2021
and
C.M.P.No.13943 of 2021

S.Rukmani

... Appellant

-Vs-

K.Dakshinamoorthy

... Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, to set aside the judgement and decree dated 31.03.2021 in A.S.No.48 of 2018 passed by the learned XX Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 09.10.2017 in O.S.No.2757 of 2013 passed by the learned III Assistant Judge, City Civil Court, Chennai.

For appellant : Mr.S.Sathish Rajan

For respondent : Mr.Shivakumar



S.A.No.698 of 2021

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JUDGMENT

The plaintiff is the appellant before this Court.

2. The suit has been filed for permanent injunction and the facts of the case are extracted hereinbelow briefly with the parties to the *lis* being referred to in the same ranking as before the Trial Court.

FACTS OF THE CASE:

2.1. The suit in O.S.No.2757 of 2013 was instituted by the plaintiff on the file of the III Assistant City Civil Court, Chennai, seeking injunction restraining the defendant, his representatives, men or whomsoever claiming under him from in any way interfering with her peaceful possession and enjoyment of the suit schedule property either by demolishing any portion constructed in the suit property or by any other means.



S.A.No.698 of 2021

WEB COPY

2.2. The property in question is described as a vacant site measuring an extent of 855 sq.ft. comprised in S.No.28/1A, T.S.No.104, bearing Door No.20/4, Lakshmipuram 3rd Lane, Villivakkam, Chennai – 600 049, within specified boundaries.

2.3. It is the case of the plaintiff that she is the absolute owner of the above property which was settled upon her by her mother, Krishnammal under a settlement deed dated 02.05.2008. The plaintiff is residing in the said premises along with her sons. The plaintiff had demolished the existing structure and had put up a construction in the suit property.

2.4. The plaintiff would contend that the defendant is her neighbour and his property is on the southern side of the suit property at Door No.24/3, Lakshmipuram 3rd Lane, Villivakkam, Chennai – 600 049 and there was a space kept on the southern side.



S.A.No.698 of 2021

WEB COPY

The defendant, after the plaintiff had put up the construction, had pressurized the plaintiff to remove the sun shade and the toilet which are constructed in the property. The defendant had also constructed ground plus 2 floors in his property and none of these constructions had been affected by the construction made by the plaintiff in the suit property. The northern side of the suit property is a wall and the plaintiff had left adequate space for the maintenance of her wall.

2.5. While so, on 16.05.2013, the defendant, along with some anti-social elements, had come into the property and threatened the plaintiff. On 17.05.2013, the plaintiff had lodged a police complaint which was not acted upon as the police were of the opinion that the dispute was civil in nature. Therefore, the plaintiff has come forward with the suit in question.

2.6. The defendant had filed a written statement *inter alia* contending that he had purchased an extent of 1,729 sq.ft. in Plot



S.A.No.698 of 2021

No.C-1 comprised in S.No.28/1A within the following boundaries.

EAST-WEST:

On the north 35 ft. 9 inches;

On the south 34 ft. 9 inches;

NORTH-SOUTH:

On the east 47 ft. 6 inches;

On the west 51 ft.

2.7. The defendant would submit that the larger extent of the suit property belongs to Duraisingam, but, the plaintiff's mother had not purchased the property from Duraisingam. Further, the plaintiff has not produced any of the parent documents of the property. On the contrary, the defendant had produced the patta obtained by him in the year 1997. The defendant would submit that the plaintiff had encroached into his property by putting up the staircase in the passage. He would submit that before the police, the plaintiff had voluntarily agreed to settle an equivalent property in the north



S.A.No.698 of 2021

WEB COPY

eastern side of the plaintiff's property as compensation towards the encroached area. However, the plaintiff had reneged on this undertaking. Therefore, the defendant had filed a counter claim for permanent injunction and mandatory injunction to demolish the structures put up by the plaintiff and hand over the property to the defendant ie., to demolish the wall and the toilet constructed in the suit property.

2.8. The plaintiff had filed a reply statement refuting the allegations of the defendant and would submit that the staircase has been constructed only within the plaintiff's property.

TRIAL COURT:

3. The learned III Additional Judge, City Civil Court, Chennai, had framed the following issues.

“(1)Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?”



S.A.No.698 of 2021

(2)Whether the defendant is entitled for the relief of permanent injunction as prayed for in the counter claim?

(3)Whether the defendant is entitled for the relief of mandatory injunction as prayed for in the counter claim?

(4)To what other claim?”

4. The plaintiff has examined herself as P.W.1 and marked Exs.A1 to A3. On the side of the defendant, the defendant has examined himself as D.W.1 and marked Exs.B1 to B6.

5. The learned Judge has dismissed both the suit and the counter claim. The learned Judge has observed that the plaintiff had not produced any document to prove title to the property. Further, the plaintiff who pleads that the property is the ancestral property of her mother has not filed any document to show possession of the same. The plaintiff had pleaded that she had left an open space between the property which, however, was not found when the Advocate Commissioner visited the site. On the contrary, there was



S.A.No.698 of 2021

a construction put up on the suit property.

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6. That apart, the plaintiff has not produced any plan approval. Further, the defendant had put forward an agreement under Ex.B4 which was totally denied by the plaintiff. The defendant had not examined the attesting witness to the document under Ex.B4. The said document contained only the signatures of the plaintiff and her two sons and not the signature of the defendant or any other person.

LOWER APPELLATE COURT:

7. Challenging the said judgment and decree, the defendant alone has preferred an appeal in A.S.No.48 of 2018 on the file of XX Additional City Civil Court, Chennai, only against the decree in the counter claim.

8. The main thrust of challenge of the defendant was that the plaintiff, in Ex.A1, has not explained as to how her mother had



S.A.No.698 of 2021

WEB COPY

acquired title to the property. Further, when serious dispute regarding title had been raised, the plaintiff has not sought for declaration of her title to the property. The measurement of the land as found in Ex.A1 – settlement deed, was not available on ground. The Trial Judge has overlooked the fact that the defendant's property measures an extent of 1,729 sq.ft. and this property belonged to Duraisingam and Krishnamurthy originally and the suit property had become the property of the defendant under the sale deed dated 23.11.1983.

9. The Advocate Commissioner's report would clearly show that the plaintiff had encroached into the defendant's property to the extent of 1 ½ ft. on the north eastern side. The Lower Appellate Court, on considering the evidence on record, allowed the appeal and set aside the judgment and decree of the Trial Court with reference to the counter claim and the counter claim was decreed.



S.A.No.698 of 2021

WEB COPY

10. The Lower Appellate Court, on considering the evidence, held that the plaintiff has not been able to prove as to how her mother had got right to the property which she settled on the plaintiff. No document has been filed on the side of the plaintiff to prove that the property in question was her ancestral property. Further, the patta of the property does not stand in the name of the plaintiff. The Lower Appellate Court has rendered a finding that despite they having a serious challenge to title to the property and its possession, both the parties have not taken any steps to amend the suit to include the relief of declaration. The Lower Appellate Court has found that Ex.B4 was a valid document, since the plaintiff has not assailed the same and specifically denied it. Ex.B4 contains the signatures of the plaintiff and her two sons. This document came into existence on 15.04.2013, and relates to the property measuring 1 ft. 15 inches.

11. The learned Judge observed that the Trial Court has



S.A.No.698 of 2021

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committed an error in simply rejecting Ex.B4. The Advocate Commissioner's report which was not marked before the Trial Court was marked before the Lower Appellate Court as Exs.C1 and C2. In the light of Exs.B2, B4, B6 to B8, C1 and C2, the Lower Appellate Court held that the defendant is entitled to the decree in the counter claim. The learned Judge observed that title was not in dispute. Ultimately, the learned Judge allowed the appeal.

12. Challenging the same, the plaintiff is before this Court.

13. Heard the learned counsel on either side and perused the materials available on record.

14. Mr.S.Sathish Rajan, learned counsel appearing for the appellant would submit that the Lower Appellate Court has received the additional documents both from the plaintiff as well as from the defendant. However, without following the provisions of Order XLI



S.A.No.698 of 2021

Rules 27(2) and 28 of C.P.C., the Lower Appellate Court had proceeded to allow the appeal. He would further submit that the Lower Appellate Court has committed an error by accepting Ex.B4-affidavit of undertaking, though there were so many discrepancies in the document and the plaintiff had denied executing the same. He would further submit that under Ex.B2 – Town Survey Register Extract, the extent of the property is much more than the extent which was purchased by the defendant. He would also submit that the decree for mandatory injunction without decree for a declaration is not maintainable.

15. Mr.Shivakumar, learned counsel for the respondent would refute the aforesaid statements. He would submit that not only the documents of the defendant were marked, but also, the documents of the plaintiff were also taken on record and marked as exhibits. He would submit that Ex.B4 has been executed by the plaintiff and contend that stating that it has not been executed is not



S.A.No.698 of 2021

correct. He would further submit that the plaintiff has not proved her title; on the other hand, the defendant had produced documents to prove title of his vendor, Duraisingam and a mere perusal of Ex.B1 would clearly prove that the property purchased by the defendant belonged to the said Duraisingam.

DISCUSSION:

16. As regards the first argument on the provisions of Order XLI Rules 27(2) and 28 of C.P.C., it is the contention of the respondent/defendant that the plaintiff's documents were also taken on record and that the document under Ex.B8 was already marked as Ex.B2 before the Trial Court. Ex.B7 – partition deed dated 21.06.1960 has not been refuted by the plaintiff.

17. That apart, a mere perusal of the Advocate Commissioner's report together with Exs.B1 and A1 would clearly prove the encroachments. Under Ex.B1, the defendant had



S.A.No.698 of 2021

WEB COPY

purchased an extent of 1,729 sq.ft. in S.No.28/1A. The northern boundary in the said land has been described as the vendor's property which means that Duraisingam had a property to the north of the property sold to the defendant. Ex.A1 is the settlement deed in favour of the plaintiff. The northern boundary is clearly described as the property of the defendant. Therefore, it is crystal clear that the property over which the plaintiff claims right was originally the property of Duraisingam. However, no document has been produced on the side of the plaintiff to show that her mother had purchased the property from Duraisingam.

18. The Advocate Commissioner's report clearly proves that there has been an encroachment on the side of the plaintiff. When the sketch given by the Surveyor regarding the property is compared with the sketch as per the documents, it clearly shows that the plaintiff has encroached into the common property and beyond. The defendant is entitled to the extent of north-south 51 ft., whereas, the



S.A.No.698 of 2021

plaintiff is entitled to the extent of north-south 21.10 ft. However, as on date, the defendant's property measures 46 ft. north-south on the west and the plaintiff's property measures 3.9ft + 24.3ft. north-south on the west. The measurements in north-south on the east as per the documents are 21 ft. 9 inches for the plaintiff and 47 ft. 6 inches for the defendant. However, as on date, the measurement is 22 ft. for the plaintiff and 46 ft. 6 inches for the defendant which clearly shows that the plaintiff has encroached into the defendant's property.

19. That apart, the suit is one for bare injunction. The plaintiff has not let in any evidence whatsoever to show the possession of the property and the document that has been relied upon by the plaintiff is the settlement deed executed by her mother where her mother would state that the property is the ancestral property. However, as stated *supra*, the property described as the suit property, on perusing the boundaries described in Exs.A1 and B1, it is clearly seen that it is the property of Duraisingam who is the



S.A.No.698 of 2021

WEB COPY

vendor of the defendant. The Lower Appellate Court has rightly come to the conclusion that the defendant has proved his counter claim by proving the encroachments made by the plaintiff. I see no reason to interfere with the judgment of the Lower Appellate Court.

Accordingly, this second appeal stands dismissed as no substantial question of law arises for consideration. Consequently, connected C.M.P. stands closed. No costs.

26.03.2024

Internet : Yes
Index : Yes/No
Speaking order/Non-speaking order
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To

- 1.The XX Additional Judge, City Civil Court, Chennai.
- 2.The III Assistant Judge, City Civil Court, Chennai.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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S.A.No.698 of 2021

P.T.ASHA, J.,

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S.A.No.698 of 2021

26.03.2024