

(2011) 06 MAD CK 0362

In the Madras High Court

Case No : S.A. No. 152 of 2008 and M.P. No. 1 of 2008

B. Mahaveer Chand

APPELLANT

Vs

R.D. Shanmugam, S. Velu, S. Palani and S. Ethiraj

RESPONDENT

Date of Decision : 27-06-2011

Acts Referred:

Citation : (2011) 06 MAD CK 0362

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : S. Viswanathan and A. Muthukumar, for the Appellant; N. Damodaran, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This second appeal is focussed by the Plaintiff, animadverting upon the judgment and decree dated 17.07.2007 passed by the learned Additional District and Sessions Judge (Fast Track Court No. II), Ranipet confirming the judgment and decree dated 31.10.2005 passed by the learned District Munsif, Sholingur in O.S. No. 113 of 1998.

2. The parties are referred to here under according to their litigative status and ranking before the trial Court.

3. A "resume" of facts giving rise to the filing of this second appeal would run thus:

[a] The Plaintiff filed the suit seeking the following reliefs:

-to pass a decree and judgment for declaration of the Plaintiff's title to the ABCD wall (thaisuver) of the Plaintiff shown in the plaint plan and morefully described in the plaint schedule in consequence granting a permanent injunction restraining the Defendants and their men or agents from in any way interfering with the Plaintiff's peaceful possession and enjoyment of the ABCD wall inclusive of the fixtures and collopsable gate;

-for a declaration that the impugned agreement dated 05.10.1995 executed between the Plaintiff and first Defendant as a fraudulent one not binding on the Plaintiff as inoperative in consequence granting a permanent injunction restraining the Defendants and their men or agents from in any way enforcing the said impugned agreement against the Plaintiff in detrimental to the Plaintiff's interest and title to the plaint schedule property and for costs. (extracted as such)

[b] Written statement was filed by the Defendants, resisting the suit.

[c] Whereupon issues were framed. On the side of the Plaintiff, he examined himself as PW1 along with P.W.2 and marked Exs.A1 to A12. On the Defendants' side, the third Defendant examined himself as DW1 and marked Exs.B1 to B9. Court documents Exs.C1 and C2 were also marked.

[d] Ultimately the trial court dismissed the suit; as against which, appeal was filed, for nothing but to be dismissed by the appellate court confirming the judgment and decree of the trial court.

4. Being aggrieved by and dissatisfied with the same, the Plaintiff preferred this Second Appeal on various grounds suggesting the following substantial questions of law:

1. When the learned District Judge erred in law in holding that the Plaintiff is not entitled to the suit wall notwithstanding the conveyance of the same in the sale deed in Ex.A1, while the first Defendant's sale deed does not at all refer to the suit wall?

2 Whether mere agreement under Ex.B4 can convey title to the first Defendant in the absence of registered deed of conveyance?

3 Whether the learned District Judge erred in dismissing the suit in its entirety when on the admitted facts the Plaintiff is entitled to the maintenance of the status quo of the eastern wall facing the road as per Ex.B4?

4 Whether the Plaintiff is entitled to a decree for permanent injunction restraining the Defendants from in any way interfering with his possession and enjoyment of the eastern 19" wall from the road side?

(extracted as such)

5. Heard both sides.

6. I am of the considered view that the following substantial questions of law should be framed:

1. Whether the agreement as contained in Ex.B4, based on Ex.B9 is enforceable as on date and whether both the courts below committed error in not taking into account the existence of Ex.B4 and consequently in ignoring to mould the relief and grant it?

2. Whether there is any perversity or illegality in the order passed by both the

courts below?

7. The learned Counsel for the Appellant/Plaintiff would put forth and set forth his arguments, which could succinctly and precisely be set out thus:

(i) The Plaintiff, who is having his business in the ground floor as well as the first floor of his building, which is situated to the West of the Defendants' property, is entitled to retain his property without it being in any manner disturbed or demolished by the Defendants.

(ii) Ex.A1, the sale deed by itself, does not contain any right in favour of the Defendants over the suit wall. The right over the eastern wall of the Plaintiff's property is an exclusive one in his favour as per Ex.A1 and the Defendants simply because they are owning their property to the east of the Plaintiff's property, cannot in the process of raising a new construction after demolition of their building, lay claim over the Plaintiff's eastern side wall. Simply because, Ex.B9 might refer to certain rights in favour of the Defendants, that will not, after four or five decades enable the Defendants to lay claim over the Plaintiff's eastern side wall over which, the Plaintiff is having exclusive right.

(iii) Ex.B4 is not an enforceable document for the reason that the Plaintiff, who was not conversant with Tamil, was made to sign such a document, which is capable of eroding the Plaintiff's right over the eastern wall. Both the courts below, without applying, the correct provision of law, simply based on Ex.B4 and Ex.B9, dismissed the suit.

(iv) Any right over the immovable property could be conveyed by one to the other, only by way of registered document and not by a document like Ex.B4. Both the courts below failed to consider the fact that the Plaintiff is entitled to maintain status quo even as per Ex.B4.

(v) The Plaintiff's building is an old one and if as claimed by the Defendants, the eastern side wall, which is a load bearing wall of the Plaintiff's building is demolished, certainly the entire structure would get crumbled.

Accordingly, the learned Counsel for the Plaintiff would pray for setting aside the judgments and decrees of both the courts below and for decreeing the original suit.

8. In a bid to mincemeat the arguments of the Plaintiff, the learned Counsel for the Defendants would advance his argument, which could pithily and precisely be set out thus:

[a] Ex.B9 is an ancient document, which emerged between the vendors of the predecessors-in-title of the Plaintiff as well as the Defendants, touching upon the rights of the parties over the disputed wall.

[b] Unambiguously and unequivocally, the respective predecessors-in-title of the parties to the lis agreed that the suit wall and the land over which, the suit wall is standing, belonged to the Defendants' predecessor-in-title and the Plaintiff's

predecessor-in-title was allowed to raise additional wall over the said then existed wall and rest his roof over it. As such, the Plaintiff, who stepped into the shoes of his predecessor-in-title, cannot claim any more right than his predecessor and he is very much bound by the agreement as contained in Ex.B9.

[c] Ex.B4 emerged, based on Ex.B9 and in such a case, Ex.B4 coupled with Ex.B9 is enforceable in the eye of law and both the courts below were right in dismissing the suit of the Plaintiff claiming exclusive right over the suit wall, warranting no interference in the second appeal.

[d] According to the learned Counsel for the Defendants, his clients are only trying to raise a new wall in the place of the old wall after providing adequate support to the super structure of the Plaintiff and after completion of the newly built wall by the Defendants, the Plaintiff could continue to enjoy the same support as he is now enjoying and in such a case, the Plaintiff without any rhyme or reason went to the extent of making a tall claim as though the suit wall belongs to him in entirety, which claim was correctly rejected by both the courts below.

[e] In one breadth, the Plaintiff disputed the very genuineness of Ex.B4, but in another breadth, he wants to place reliance on it.

Accordingly, the learned Counsel for the Defendants would pray for dismissal of the second appeal.

9. The indubitable and indisputable or at least the undeniable facts relating to this case would run thus:

It appears at one point of time, one family happened to be the absolute owner of the property belonging to the Plaintiff and the Defendants herein and there were some partitions, which emerged among them. It so happened that the Defendants' predecessor-in-title viz., Duraisamy Chettiar and the Plaintiff's predecessor-in-title Hemant Achariar entered into an agreement as contained in Ex.B9, which would speak to the effect that the suit wall should be deemed to be the wall of the Defendants' predecessor-in-title including the land on which it stands. The Plaintiff's predecessor-in-title, was permitted to raise additional construction over the then existed wall and put up his super structure thereon. However, the consensus ad idem between them was to the effect that the newly built wall as well as the then existed wall should be taken as the wall belonging to the Defendants' predecessor-in-title.

10. The sum and substance of Ex.B9 was to the effect that the Plaintiff was given only the right of support on the Defendants' predecessor's wall.

11. I recollect and call up the following adage:

Tigni immittendi ? In the civil law, the name of a servitude which is the right of inserting a beam or timber from the wall of one house into that of a neighbouring house, in order that it may rest on the latter, and that the wall of the latter may

bear this weight.

It is a legal concept, which is self explanatory.

12. The relevant provision from the Indian Easements Act, 1882 is also extracted here under for ready reference:

13. Easements of necessity and quasi-easements ? Where one person transfers or bequeaths immovable property to another, -

(a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, Clauses (a) (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations:

(a)...

(b)...

(c)...

(d)...

(e)...

(f)...

(g)...

(h)....

(i) A, the owner of two adjoining buildings, sells one to B retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(j) A, the owner of two adjoining buildings, sells one to B, and the other to C, C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(k)

(l)

(m) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it, A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

I would also like to extract the relevant portions from Ramaswamy Iyer's the Law of Torts, Ninth Edition:

Chapter 7 ? Nuisance

7.1.2.2.1.2 Natural right of support .-

... "In regard to a building there is no natural right of support but an easement of support by other land or building may be acquired. The natural right of support of land, however, continues though there are buildings on it. When by reason of a neighbour's act, a building and its foundation have collapsed, it is open to its owner to show that the foundation would have sunk even in the absence of superincumbent weight. In such a case, in addition to damages or injury to the land he may also claim compensation for the injury to the building on it as an item of consequential damage due to a wrongful act. He cannot, however, do so if it could be proved that the fall of the building was due only to its inherent defect or its own weight.

(i) Easement of support: An easement of support of a building by another's land or building may be acquired by grant or prescription. On the latter mode of acquisition the leading authority is Dalton v. Angus. The Plaintiff's house was nearly a hundred years old but 27 years before, it had been altered into a coach factory, in a manner which increased the weight on the wall near the Defendants' premises and the lateral pressure on the Defendants' soil. The

Defendants who house was contiguous to the Plaintiff's pulled it down for building a new one and dug foundations which were deeper than those of the Plaintiffs with the result that the soil near the Plaintiffs' foundations was exposed to air and gave way, bringing down a considerable portion of the factory. The House of Lords held that the Plaintiffs were entitled to damages for the loss as they had acquired a right to support by open and peaceable enjoyment for 20 years. An action for disturbance of the easement of support of a house like that for disturbance of the natural right of support of land does not depend on proof of negligence, nor is absence of negligence or the fault of a contractor any excuse, nor the fact that a person was required by a local authority to demolish his premises which supported his neighbour's. The Defendant is however not liable if he had no notice of his duty as when by pulling down his wall, he injured a hidden vault of his neighbour which required support, but of which he had no means of knowledge. If an easement has not been acquired, a house has no right to the support of an adjacent land or building. In the case of such a house usually called a "modern house", the owner has no right to complain if at any time within 20 years of its building the owner of adjacent land digs away the soil and allows the house to tumble down. He has, however, a right of action against a person who is not the owner of adjacent soil but a wrongdoer or a trespasser who causes damage. Even the owner of adjacent soil is under a duty to avoid needless injury to a neighbour's new house by operations on his own land. He is not of course bound to take active steps for its support, eg., by shoring it up. However, there may be in the circumstances, a duty to avoid injury by giving notice of the works to the owner of the house.

A mere perusal of it would display and demonstrate that the arrangement as contained in Ex.B9 is not something anathema to justice and fair play, or alien to law. Hence Ex.B9 cannot be taken as a document on which disaster is found written on it; it is *ex facie* and *prima facie* a legal and valid document. In such a case, it would not open for the successors of those parties to the agreement to dispute the legality or enforceability of Ex.B9.

13. I hark back to the following maxim:

just superveniens auctori accrescit successori ? A right growing to a possessor accrues to the successor.

14. The Plaintiff, who purchased the property concerned as per Ex.A1 is deemed to have stepped into the shoes of his predecessor-in-title. Ex.B9 bespeaks that the vendor of the Plaintiff had only limited right over the eastern wall and in such a case, it would not lie in the mouth of the Plaintiff based on Ex.A1 to contend that he was not bound by the limited right conferred on his purchaser as per Ex.B9, over the eastern wall.

15. At this juncture, my mind is reminiscent and redolent of the maxim, *Nemo dat qui non habet* (He who hath not cannot give). Under Ex.A1, the predecessor-in title could not have conveyed more right than what he himself had over the

eastern wall. Hence, harmoniously, if the evidence is understood and interpreted, it is clear that the Plaintiff is bound by Ex.B9. By way of reiterating the agreement as contained in Ex.B9, the Plaintiff and the Defendants entered into another agreement as contained in Ex.B4. More or less, it is a replica of the terms and conditions as found in Ex.B9.

16. My above discussion supra would display and demonstrate that for the very same reason attributed for upholding the validity of Ex.B9, the subsequent document Ex.B4 also should be countenanced as one enforceable in the eye of law. No doubt, at one point of time, the stand of the Plaintiff was to the effect that ignoring Ex.B4 and Ex.B9, only Ex.A1 should be relied upon by the court and his exclusive right over the eastern suit wall should be declared. But, in my considered view, such a plea is not based on any evidence.

17. I recollect and call up the following maxim also:

In re dubia magis infitatio quam affirmatio intelligenda ? [In a doubtful matter, the negation is to be understood rather than the affirmation].

Evidence is lacking in support of the Plaintiff's claim for exclusive right over the suit wall. As such, in the wake of Exs.B9 and Ex.B4, the claim of the Plaintiff to have exclusive right over the eastern side wall, turned out to be untenable. As such, both the courts below, were right in their approach in analysing the evidence and arrive at the consistent conclusion that the Plaintiff's tall claim cannot be accepted.

18. The learned Counsel for the Plaintiff would appropriately and appositely, convincingly and acceptably put forth and set forth his argument to the effect that even though both the courts below might not have decided in favour of the Plaintiff based on the existing evidence, yet, they could have very well granted the limited relief as contained in Ex.B4 backed by Ex.B9.

19. The learned Counsel for the Defendants would submit that, that was not the argument before the for a below and for the first time, such an argument is put forth before this Court.

20. I recollect and call up the following maxims:

1 Boni iudicis est ampliare jurisdictionem ? It is the part of a good judge to enlarge (or use liberally) his remedial authority or jurisdiction.

2 Boni iudicis est ampliare iustitiam - It is the duty of a good judge to enlarge or extend justice.

3 Boni iudicis est lites diremere, ne lis ex lite oritur, et interest reipublicae ut sint fines litium ? It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation.

The sum and substance of these three maxims are to the effect that a Judge is

expected to decide the lis finally without 18 paving the way for further litigation. Accordingly, if viewed, once the parties are locked up in a litigation, the court should try to resolve it by deciding the suit justly. It is quite obvious that parties should not be left in the lurch to fight it out once again in the street. The Defendants obviously did not pray for any relief at all. However, the Plaintiff, who approached the court met with his waterloo and in such a case, the dispute between them did not get settled before lower for a. In such a situation, the High Court which is seized of the matter should necessarily think of resolving the dispute by granting appropriate findings and reliefs.

21. Ex.B4, in my considered opinion has to be enforced reasonably. I hark back to the maxim ? Cessante ratione legis, cessat et ipsa lex ? The reason of the law ceasing, the law itself also ceases. If rationality ceases then the law itself ceases. Here, the court should not simply and blindly enforce Ex.B4 without thinking of the hardships, which the Plaintiff would be put into.

22. The learned Counsel for the Plaintiff convincingly highlighted the difficulties, which the Plaintiff might be made to face, if the Defendants simply enforce Ex.B4 without taking precautions. The records would speak by themselves that the Plaintiff's building is at least more than 60 years" old and if the eastern wall of that building, which is the load bearing wall is meddled with, certainly, it would have disastrous consequences. It is also obvious that the Plaintiff is running his jewellery shop there. Wherefore, the learnerd counsel for the Defendants would convincingly suggest ways and means of enforcing Ex.B4. He would submit that an Engineer might be appointed as Commissioner for visiting the suit property and note down the physical features and he may be asked to suggest the ways and means of raising a new wall in the place of the said existing suit wall without disturbing the super structure of the Plaintiff. However, the learned Counsel for the Plaintiff would put forth his views to the effect that in the event of the Engineer coming to the conclusion that without causing material loss to the super structure of the Plaintiff, such a new wall cannot be built, the court has to come to his rescue by passing order that till such time, the necessity arises for demolishing the Plaintiff's old structure and raise a new one by him, the Defendant should wait.

23. In view of the submissions made by the learned Advocates on both sides, I am of the considered view, that a balance has to be struck between the two. Accordingly, I would like to remand the matter back to the first appelalte court with the following directions:

The first appellate court shall do well to see that an Advocate Commissioner is appointed with a mission to take the assistance of a qualified civil engineer so as to note down the physical features of the suit property and to suggest ways and means to enforce Ex.B4 without causing damage to the super structure of the Plaintiff. If the Engineer feels that such Ex.B4 could not be enforced without causing serious damage to the Plaintiff's building and if the court also comes to such a conclusion, then the court should prescribe a time limit within which, the

Plaintiff should demolish the necessary portion of his building so as to enable the Defendants to raise new wall and on that, the Plaintiff would once again have the right to rest his super structure as per Ex.B9 and Ex.B4.

24. In the result, the substantial question of law No. 1 is decided to the effect that both the courts below committed error in not taking into account the existence of Ex.B4 and consequently in ignoring to mould the relief and grant it.

25. In view of the ratiocination adhered to in deciding the substantial question law No. 1, the judgment and decree of the first appellate court is set aside and the matter is remitted back to the first appellate court to deal with the matter as mandated supra in para No. 23 of this judgment. The first appellate court shall do well to see that the matter is disposed of within a period of six months. The parties shall appear before the first appellate court on 25.07.2011. Expenses of the Commissioner shall be borne by both sides equally. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.