

(2009) 02 MAD CK 0190

In the Madras High Court

Case No : C.R.P. (PD) No. 958 of 2006 and M.P. No. 1 of 2006

Smt. S. Alish and Soundararaj

APPELLANT

Vs

Chandran and Lakshmi

RESPONDENT

Date of Decision : 17-02-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A

Citation : (2009) 02 MAD CK 0190

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : No appearance, for the Appellant; No appearance, for the Respondent

Judgement

G. Rajasuria, J.—Inveighing the order dated 13.12.2005 passed in I.A. No. 16570 of 2005 in I.A. No. 7993 of 2003 in O.S. No. 2047 of 2003 passed by the 16th Asst. Judge, City Civil Court, Chennai, this civil revision petition is focussed.

2. A "resume" of facts, which are absolute necessary and germane for the disposal of this revision petition, would run thus:

The revision petitioners/plaintiffs filed the suit O.S. No. 2047 of 2003 seeking the following reliefs:

(i) to grant permanent injunction restraining the defendants herein, their men, assigns, agents or anybody claiming through them from putting up any further construction by encroaching plot (tenament No. 109) belonging to the plaintiffs of an extent of 100.0 sq.ft.(or) 1076 sq.ft.) in VOC Nagar, Tondiarpet, Chennai-81, morefully set out in the schedule hereunder.

(ii) to grant mandatory injunction directing the defendants herein to remove the illegally erected cement concrete two pillars in the plaintiff's tenament area by encroaching the one foot service lane left by the plaintiffs on the western side of their house in plot/tenament No. 109, VOC Nagar, Tondiarpet, Chennai-81, more fully set out in the schedule here under.

During the pendency of the suit, the plaintiffs filed I.A. No. 7993 of 2003 and obtained an order of interim injunction, so as to restrain the defendants from proceeding further with the construction in the suit property. According to the plaintiffs, even thereafter, in violation of the injunction order, the defendants raised construction, obstructing the air and light to the plaintiffs' building. Whereupon I.A. No. 16570 of 2005 was filed seeking amendment of the plaint:

(i) Para 9(a) the plaintiffs submit that after granting interim injunction the respondents/defendants high handedly constructed the parent wall closely along the western side wall of the plaintiffs and because of such construction, the window on the western side measuring 4" x 4" on the southern corner is completely closed and the light and air enjoyed by us have been arrested. Therefore it has become essential for us to have the prayer suitably amended by asking for the relief of mandatory injunction to remove the entire illegal construction high handedly put by the defendants both before and after the grant of interim injunction.

(ii) In para 12(ii) after the words, plaintiffs' tenement area, to add the following:

and the illegal construction abutting the plaintiffs' western side wall to a width of 15 cms and length of 14.30 mtrs.

Upon hearing both sides, the lower Court dismissed the application. Being disconcerted by and dissatisfied with, the said order of the lower Court, this revision is focussed by the plaintiffs on various grounds inter alia thus:

The lower Court committed error in not allowing the I.A. for amendment, which was one for incorporating the prayer for mandatory injunction, so as to demolish the additional construction made during the pendency of the suit.

3. Despite printing the names of both sides, no one appeared.

4. A bare perusal of the order of the lower Court and the typed set of papers would leave no doubt in the mind of the Court that the order of the lower Court is far from satisfactory and the lower Court also has mis applied the precedent of the Sikkim High Court reported in AIR 2005 Sikkim 1 - Karma Denka Bhutia and Anr. v. Sarki Lamu and Anr. appropriately.

5. The precedent referred to in the lower Court's order emerged relating to a title suit and in the facts and circumstances of that case, according to the learned Judge of Sikkim High Court, the doctrine of lis pendens would be applicable and that even without deciding the fact relating to construction, the title to the property could be decided. As such, it is obvious and axiomatic that the ratio decidendi of that precedent is not applicable to the facts and circumstances of this case.

6. Here it is the specific contention of the plaintiffs that during the pendency of the suit and that too, in violation of the interim injunction, the defendants continued the construction and prevented the air and light to enter into the

property of the plaintiffs and that the plaintiffs seek demolition of that additional construction also. Put simply, without getting the plaint amended the plaintiffs would not be able to obtain the relief of mandatory injunction so as to get demolished the new construction, which prevents the air and light entering into the property of the plaintiffs. Even though the facts are as clear as day, nevertheless, the lower Court has not understood the concept ratio decidendi in the precedent referred to supra.

7. The lower Court also has not taken into account the specific averment in the affidavit that the Advocate Commissioner appointed in the suit already submitted his report pointing out the physical features and the then existed state of construction. Now the same affidavit points out that over and above the then existed construction, the defendants raised further construction and completed it, preventing the air and light entering into the plaintiffs' property. The lower Court should have applied its mind on all those aspects and allowed the application.

8. It is pertinent to note that the aforesaid specific averments relating to appointment of Advocate Commissioner visiting the suit property and observing the then existed state of construction have not been denied at all by the defendants in the counter filed in I.A. No. 16570 of 2005. In the facts and circumstances of this case, ample opportunity should have been given to the plaintiffs for getting the plaint amended, but the lower Court misdirected itself at the behest of defendants and simply dismissed the application.

9. The observation made by the lower Court that no proceedings have been taken for contempt as against the defendants, at the instance of the plaintiffs, is not at all germane for deciding the I.A. seeking amendment of the plaint. As it is manifest that simply because the plaintiffs, for various reasons, have not taken any contempt proceedings under Order 39 Rule 2(A) of C.P.C. the Court cannot jump to the conclusion that there was no violation of injunction order at all and that there was no merit in the application seeking amendment.

10. For all the above reasons, the order of the lower Court is not sound and accordingly, the order dated 13.12.2005 passed in I.A. No. 16570 of 2005 in I.A. No. 7993 of 2003 in O.S. No. 2047 of 2003 is set aside by allowing this civil revision petition and consequently, the I.A. No. 12570 of 2005 is allowed. No costs. Connected miscellaneous petition is closed.