



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **24.07.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)NO.238 OF 2004

RM.Poomayil :Plaintiff/Appellant/Appellant

.VS.

1.S.Vairathal(died)

2.R.Vasanthi

(Second respondent is brought on record as legal representative of the deceased first respondent as per order of this Court made in C.M.P(MD)Nos.2144 and 2145 of 2024 in S.A(MD)No.238 of 2004, dated 4.6.2024.)

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.4 of 2002, dated 25.11.2002, on the file of Subordinate Judge, Devakkottai modifying the judgment and decree made in O.S.No.25 of 2000, dated 31.7.2001, on the file of District Munsif, Devakkottai.

For Appellant :Mr.R.Surinarayanan

Respondent No.1 :Died

For Respondent-2 :Mr.R.Sundar Srinivasan

JUDGMENT

The Second Appeal is directed against the judgment and decree made in A.S.No.4 of 2002, dated 25.11.2002, on the file of



Subordinate Judge, Devakkottai, modifying the judgment and decree made in O.S.No.25 of 2000, dated 31.7.2001, on the file of District Munsif, Devakkottai.

2.The plaintiff in the suit is the appellant. The suit was filed seeking permanent injunction restraining the defendant from demolishing the sunshades and windows in the northern main wall of the plaintiff's house and for injunction restraining the defendant from putting up any construction on the sunshades and windows of the plaintiff.

3.The defendant filed a counter claim seeking declaration of his title in respect of the portion of the property in which the northern main wall of the plaintiff stands and also for mandatory injunction to remove the construction of the plaintiff together with sunshades.

4.The trial Court dismissed the suit and partly allowed the counter claim by directing the plaintiff to remove the sunshades in his northern wall and to close down the windows in the northern main wall. The trial Court also directed the plaintiff to pay the defendant the value of the defendant's land encroached by the plaintiff while putting up his northern wall. Aggrieved by the said



judgment and decree, the plaintiff preferred an appeal before the First Appellate Court. The First Appellate Court affirmed the dismissal of the suit, however, the decree granted by the First Appellate Court directing the plaintiff to pay the value of the encroached portion to the defendant, was set aside. The First Appellate Court confirmed the decree passed by the trial Court directing the plaintiff to remove the sunshades and to close down the windows in his northern wall. Aggrieved by the same, the plaintiff has come forward by way of this Second Appeal.

5. According to the appellant/plaintiff, he purchased the property with east-west measurement of 100 ft and north-south measurement of $24 \frac{3}{4}$ feet in T.S.No.116, situated in Raghunathapuram West Street, Block No.4, Devakkottai. After purchase of the said property as a vacant site, on 11.10.1999, the plaintiff put up a west facing house thereon. In the northern main wall of the plaintiff, there are three big windows and three small windows. The defendant owns a row of house on the northern side of the plaintiff's property. After the plaintiff occupied the newly constructed house, the defendant issued a notice as if the plaintiff had encroached $1 \frac{3}{4}$ feet on the southern line of his property and requested the plaintiff to remove the encroachment. The plaintiff issued a reply denying the allegation contained in the defendant's



notice. Since the defendant made an attempt to remove the sunshades and windows, the suit was filed for the relief of injunction as prayed for.

6.The defendant filed a written statement and claimed that he purchased the property with an east-west measurement of 100 ft and north-south measurement of 66 ft in T.S.No.116 situated at Raghunathapuram West Street. It was claimed by the defendant that he put up a compound wall leaving a two feet lane on the southern side of his property. The plaintiff purchased the property which lies on the further south. It was also claimed by the defendant that taking advantage of his absence in the locality, the plaintiff encroached the southern portion of the two feet lane on the south of his compound wall and put up his northern main wall and projected his sunshades towards his property. Therefore, the defendant in his counter claim sought for declaration of his title over the property in which the northern wall of the plaintiff situate and also for mandatory injunction to remove the offending construction and encroached portion of the defendant property.

7.Before the trial Court, the plaintiff was examined as P.W.1 and his father was examined as P.W.2. On behalf of the plaintiff, 14 documents were marked as Ex.A1 to Ex.A14.The defendant was



examined as D.W.1 and one Kaneswaran was examined as D.W.2.

On behalf of the defendant, six documents were marked as Ex.B1 to Ex.B6. The Advocate Commissioner's reports and plans were marked as Ex.C1 to Ex.C4.

8. The trial Court, on consideration of oral and documentary evidence available on record, dismissed the suit. However, the trial Court partly decreed the counter claim of the defendant by directing the plaintiff to remove the sunshades and windows put up by him in the northern main wall of his house. The trial Court also directed the plaintiff to close down the windows put up in the northern wall. He was further directed to pay the market value of the land of the defendant over which the encroached constructions are put up by the plaintiff. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.4 of 2002, on the file of Subordinate Court, Devakkottai and the First Appellate Court modified the decree passed by the trial Court by setting aside the direction issued to the plaintiff to pay the value of the defendant's land over which encroached constructions were made by the plaintiff. Further direction issued by the trial Court to remove the sunshades and to close down the windows in the northern wall was affirmed by the First Appellate Court. Aggrieved by the same, the plaintiff is before this Court.



9. At the time of admission, this Court formulated the following substantial question of law for consideration, by order dated 13.10.2004.

“Had not the defendant acquiesced in the conduct of the plaintiff in putting up construction in the suit property which would disable him from getting mandatory injunction as prayed for in the counter claim?”

10. The learned counsel for the appellant contended that the defendant purchased the property under Ex.B1 together with compound wall and therefore, he cannot claim any right over the lane portion which is situate on the south of the compound wall. It is further submitted that when he put up northern wall with windows and sunshades, the plaintiff failed to make any objection and hence, he is prevented by the doctrine of acquiescence from seeking removal of sunshades and windows.

11. The learned counsel for the second respondent by taking this Court to the findings rendered by the Courts below, submitted that the findings of the Courts below that the plaintiff has encroached the portion of the defendant's property by extending his sunshades, is based on proper appreciation of evidence available on record and hence, the same need not be interfered



with. The learned counsel also submitted that the Advocate Commissioner found that the plaintiff put up his northern wall abutting the southern compound wall of the defendant without leaving any space and hence, the plaintiff is not entitled to claim opening of windows as a matter of right.

12. It is not in dispute that the defendant purchased the suit property on the northern side of the plaintiff's house with a measurement of 100 ft x 66 feet north-south under ExB1. The Plaintiff subsequently purchased the property on the southern side with an measurement of 100 ft east-west and 24 $\frac{3}{4}$ feet north-south. The Advocate Commissioner appointed by the Court measured the properties and filed his reports and plans marked as Ex.C1 to Ex.C4. A perusal of Advocate Commissioner's plan Ex.C3 would suggest that the north-south measurement of property under occupation of the plaintiff construction measures about 26.4 ft on the northern side and 24.3 ft on the southern side. The property under occupation of the defendant measures about 64 ft north-south on the western side and 64.11 ft on the southern side. Therefore, it is clear that the defendant is in occupation of the property less than what he purchased. Though he purchased north south measurement of 66 ft, he is in occupation of property with lesser measurement on the north-south direction. As far as the



plaintiff is concerned, though he purchased property with north-south measurement of 24 $\frac{3}{4}$ ft, he is in occupation of property on the western side of his property with measurement of 26.4 ft. However on the eastern side, his property measures 24.3 ft. Therefore, it appears that there is encroachment on the western side, however, the encroachment into the property of the defendant got reduced and in the eastern side, there is no encroachment. However, the sunshades constructed by the plaintiff in his northern wall are protracting towards the property of the defendant and abutting his constructions. Taking into consideration the measurements of the poperties purchased by the respective parties as per the title documents and also the measurements available on ground as per the Advocate Commissiner's report and plan, the First Appellate Court came to the conclusion that the sunshades of the plaintiff constitute clear encroachment on the property of the defendant and hence, the same have to be removed. The First Appellate Court also found that the plaintiff constrution in the northern main wall on immediate south of the compound wall of the defendant is without leaving any space for ventilation or light. Therefore, the First Appellate Curt held that the plaintiff is not entitled to claim any right of light or air and therefore, he has to close down the windows put up by him in his northern wall,since it will cause inconvenience and nuisance to the



defendant. As far as the encroachment of northern wall by the plaintiff into the property of the defendant is concerned, the First Appellate Court found that there is no encroachment on the eastern side. There is slight encroachment on the western side. Therefore, the direction issued by the trial Court to remove the offending portions of the northern wall was set aside by the First Appellate Court. Against the said portion of the judgment, the defendant has not filed any cross appeal, therefore, the same has become final. The directions issued by the First Appellate Court to remove the sunshades and to close down the windows etc are all passed based on proper appreciation of measurement found in the title documents and measurements as noted down by the Advocate Commissioner on ground under Ex.C3 and Ex.C4. Therefore, there is no error in the findings arrived at by the First Appellate Court and the same need not be disturbed while exercising the jurisdiction under Section 100 of Civil Procedure Code.

13.It is seen from the records that the plaintiff purchased his property only on 11.10.1999 and started construction immediately. The defendant issued a notice seeking removal of the offending portions of the construction on 1.6.2000 as exhibited by Ex.A5. A reply was issued by the plaintiff on 19.6.2000. Immediately, the suit was filed on 20.7.2000. It is also stated by the defendant that at the



time of construction of the northern wall sunshades, the defendant was not in the locality and he was in his native place. Immediately after the reply by the plaintiff, the suit was filed. There is no delay or laches on the part of the defendant in filing the suit. In order to invoke the doctrine of acquiescence, the person who put up construction should have done the same on the belief that the property in which the construction is made belongs to him. In the case on hand, the Advocate Commissioner's report and plan would suggest that the sunshades put up by the plaintiff are protruding towards the property of the defendant and attached with the compound wall of the defendant. In such circumstances, the plaintiff is not entitled to take shelter under the doctrine of acquiescence. The Substantial questions of law formulated at the time of admission are answered against the appellant and in favour of the respondents.

14. In view of the answer to the substantial questions of law, the Second Appeal stands dismissed, confirming the judgment and decree of the first appellate Court. No costs.

24.07.2024



Index:Yes/No

Internet:Yes/No

NCC:Yes/No

vsn

To

- 1.The Subordinate Judge,
Devakkottai.
- 2.The District Munsif,
Devakkottai.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

vsn

JUDGMENT MADE IN
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