

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07 - 07 - 2015

Coram

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 591 of 2009

and

M.P. No. 1 of 2009

D. Rukmani

.. Appellant/Plaintiff

vs.

S.H. Halammal

... Respondent/Defendant

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 30.03.2009 in A.S. No.35 of 2008 on the file of the Court of Subordinate Judge, Uthagamandalam, reversing the judgment and decree dated 29.07.2008 made in O.S. No. 1 of 2005 on the file of the District Munsif, Kothagiri.

For Appellant : Mr. R. Subramanian
for Mr. Ma. P. Thangavel

For Respondent : Mr. S. Kingston Jerold

JUDGMENT

This second appeal is filed by the plaintiff inveighing the judgement and decree dated 30.03.2009 passed by the learned Subordinate Judge, Uthagamandalam, in A.S. No. 35 of 2008 wherein and by which the judgment and decree dated 29.07.2008 recorded in O.S. No. 1 of 2005 by learned District Munsif, Kothagiri, were reversed allowing the First Appeal at the instance of the defendant.

2. The plaintiff filed the suit for declaration that the A Schedule property belonged to her and for recovery of possession of B Schedule property after demolishing the illegal construction put up by the defendant by decree of mandatory injunction and for permanent injunction.

3. The suit property is an extent of 12 $\frac{3}{4}$ cents in S. No. 881/1B in Kothagiri Town Panchayat. As per the family arrangement in the family of the plaintiff, the said property was allotted to the plaintiff. Originally, the suit property was purchased by the husband of the plaintiff from one V.T.Ramachandran by way of two sale

deeds dated 24.5.1977 and 22.11.1977. Schedule A is the house property allotted to the share of the plaintiff in the family arrangement. According to the plaintiff, she had been in possession of the property till October 2003 during which period the defendant, who is the neighbouring owner, had encroached on the western and southern side of the suit property to an extent of 1 cent. Admittedly, the defendant had purchased an extent of 3 1/2 cents on 31.01.1995 from the plaintiff's husband. As the defendant had encroached upon the plaintiff's property, the suit has been filed for the above said reliefs.

4. The suit was contested by the defendant contending that the construction alleged was only within his property. The defendant further denied that the plaintiff was not out of station during the period of construction and she was very much living in the next door. As there was no construction, the suit relief cannot be granted as prayed for and sought for dismissal of the suit.

5. Before the trial Court, the husband of the plaintiff and the husband of the defendant were examined as P.W.1 and D.W.1 respectively. While Exs. A.1 to A.16 were marked on the side of the plaintiff, no document was marked by the defendant. Ex. C.1 Commissioner's report and sketch were marked.

6. The trial Court / learned District Munsif, Kothagiri, on consideration of the evidence adduced and the materials available thereon, decreed the suit as prayed for. Challenging the same, the defendant preferred appeal in A.S. No. 35 of 2008. The Lower Appellate Court, after appreciating the facts, reversed the judgment of the trial Court and allowed the appeal dismissing the suit. Feeling aggrieved, the plaintiff has come up with this Appeal.

7. When the Second Appeal was posted for admission, only notice was ordered on 26.6.2009.

8. The question that has be decided in this appeal is whether the plaintiff had acquiesced to the construction made by the defendant and if so, whether the plaintiff is entitled to the relief sought for in the suit.

9. Heard Mr. R. Subramanian, learned counsel appearing for the appellant / plaintiff and Mr. S. Kingston Jerold, learned counsel for the respondent / defendant and perused the records.

10. Admittedly, the parties are neighbouring owners. The defendant is claimed to have purchased an extent of 3 ½ cents from the husband of the plaintiff. It is the contention of the plaintiff / appellant that she had put up the construction within her land. If the defendant / respondent had encroached upon the plaintiff's land and put up the construction, being the neighbouring

owner, the plaintiff could have objected to the same at the earliest point of time. No doubt, the plaintiff had issued a legal notice on 27.10.2003 under Ex. A.5 and also gave a complaint to the Kothagiri Police station under Ex. A.6 on 19.10.2003. It is alleged by the plaintiff that inspite of the complaint, no action has been taken by the Police as well as the Kothagiri Town Panchayat. The plaintiff also claimed to have lodged a complaint with the Kothagiri Inspector of Police under Ex. A.10 on 19.11.2004 alleging trespass and construction over the plaintiff's property.

11. A mere perusal of the records would show that the said Ex. A.10 complaint was also given more than a year after the alleged trespass. The Lower Appellate Court had considered Ex. A.5 legal notice and held that the said notice was not issued by the plaintiff but it was by her husband. It is seen that in the said notice, there is no mention about the encroachment by the defendant in S. No. 881/1B and it relates to encroachment of 1 cent. The Lower Appellate Court further has found that the documents Exs. A.7, A.8, A.10 and A.11 only go to indicate the encroachment by the defendant with regard to the extent of 1 cent but the encroachment alleged by the plaintiff on her land does not find mention in the same. The above said documents have been issued at the instance of the plaintiff's husband. It is also not disputed by the plaintiff that the properties belonging to her husband are also lying adjacent to the defendant's property. While so, when the plaintiff comes up with the specific case of encroachment and construction, the burden is on her to establish the same positively.

12. Learned counsel for the appellant pointing out the averments made in paragraph 6 of the written statement, contended that there was an admission by the defendant. However, this Court, on perusal of the written statement, finds that it is only a mistake.

13. Even presuming for a moment that the defendant had encroached upon the plaintiff's land and put up construction by putting up a supporting wall, the plaintiff, being the neighbour, had acquiesced to the construction. Though it is specifically stated in the complaint that the defendant had encroached upon her property and put up construction when the plaintiff was away from home, it is not specifically pleaded the period during which she was not there in her house and the period taken by the defendant for putting up the alleged construction. As stated earlier, though the alleged encroachment and construction was in October, 2003, the plaintiff seems to have given the complaint with the Police only in November 2004. The above said delay on the part of the plaintiff clearly indicates that there is an act of acquiescence by her. As such, having allowed the defendant to put up pucca construction without raising any objection, the plaintiff is estopped from claiming the

relief of mandatory injunction and recovery of possession.

14. In the above factual matrix, this Court of the considered opinion that the plaintiff has not established that the defendant had encroached into her property and put up construction. Even if the encroachment is established, having acquiesced to the act of construction, the plaintiff cannot claim the right of recovery of possession and mandatory injunction. The Lower Appellate Court also has categorically found that the plaintiff has not proved the encroachment by the defendant in her property and accordingly, dismissed the suit as the plaintiff is not entitled to any relief. In such circumstances, this court finds no material illegality or infirmity with the finding of the Lower Appellate Court, fact finding authority, warranting interference. The point is answered accordingly.

In the result, the Second Appeal fails and the same stands dismissed confirming the judgment and decree dated 30.03.2009 passed by the learned Subordinate Judge, Uthagamandalam, in A.S. No. 35 of 2008. However, in the circumstances of the case, there shall be no order as to cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

gri
To

1. Subordinate Judge
Uthagamandalam
2. District Munsif
Kothagiri
3. The Section Officer
V.R. Section
High Court
Madras.

1 cc to Mr. Ma. P. Thangavel , Advocate Sr.No.34138
1 cc to Mr. S.K.Rakhunathan, Advocate Sr.No.33823

S.A. No. 591 of 2009

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