

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.721 of 1997

K.Ganapathy

.. Appellant

-Vs-

1. A.Palanisamy(died)
 2. A.Ramasamy
 3. A.Durai
 4. A.Thangavelu@A.Palaniappan
 5. A.Sundaram
 6. A.Ganapathy
 7. P.Parvadha
 8. P.Maheswari
 9. P.Sasi
 10. Minor P.Latha
- ... Respondents

(Represented by mother and guardian vide as per order dated 31.12.2002 made in C.M.P. No.2466 of 1999)
(RR 7 to 10 brought on record as LR's of the deceased 1st respondent vide as per order of court dated 31.12.2002 made in CMP. Nos 2463 to 2466 of 1999)

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 01.08.1995 in A.S.No.2 of 1994 on the file of the I Additional District Judge's Court, Coimbatore and confirming the judgment and decree dated 30.06.1993 in O.S.No.669/87 on the file of I Additional District Munsif's Court, Coimbatore.

For Appellant : Mrs.M.Chitra Gomathy
for M/s. R.N.Amarnath

For Respondents: R2 - Mr.V.Ayyapparaja
for Mr.R.Bharathkumar

R3 to R5 & R7 to R10 - No Appearance

J U D G M E N T

The unsuccessful plaintiff who lost the case before the lower court as well as the lower appellate court is the appellant before this court.

2. The plaint averments are as follows:-

The suit property is an extent of 1.32 acres. The suit property was purchased by his father under a Sale Deed dated 11.07.1927. The defendants are the adjacent land owners in Survey No.735/4 on the Eastern side of the plaintiff's lands. In the year 1977 the defendants have put up temporary structures along with bifurcating ridge for housing their foundry Ramakrishna Industries. There was an encroachment to the extent of 2½ cents on the Southern side and 8 feet on the Northern side. When the said encroachment was brought to the notice of the defendants, the defendants have promised to remove the temporary structures. However, the defendants have resiled from their promise and have put up permanent constructions by encroaching the plaintiff's property to an extent of 3.6 cents. Even after persuasion by the plaintiff was of no avail.

3. Thereafter, the plaintiff had applied for resurveying the entire extent of property in the year 1986. The Taluk Surveyor also confirmed the nature and the extent of encroachment made by the defendants. The defendants have put up Septic tank foundry buildings and also the stone pillars after exchange of notice in the year 1986 and 1987. Left with no other option, the plaintiff had filed the suit for mandatory injunction directing the defendants to remove encroachments and alternatively to pass a decree awarding the compensation by ascertaining the quantum of damages.

4. The sum and substance of the averments made in the written statement are as follows:-

The defendants have stoutly denied the encroachment and the illegal construction etc., The constructions put up by the defendants at any point of time were not temporary ones and they are pucca and permanent constructions. There is no encroachment as alleged by the plaintiff. There is a well defined boundary line in between the property of the plaintiff and the defendants, which would clearly show that there was no encroachment by the defendants. In fact, the defendants have put up the stone pillars and the barbed wire fencing by covering their lands.

5. The plaintiff is not the owner of the entire extent of 1.32 acres, as the plaintiff had sold a portion of his property to one Periasamy. The plaintiff had not measured his lands accurately and it is not open to the plaintiff to allege that

the defendants have encroached into his lands. The said Periasamy was not included in the plaint.

6. Initially three issues were framed by the lower court, the main contention is whether there was any encroachment by the defendants was not prayed and the lower court had also not recorded its findings, whether there is any encroachment or not? The lower appellate court answered the issues against the plaintiff/appellant and held in favour of the respondent/defendant against which the present second appeal is filed.

7. At the time of admission of the second appeal, this court has framed the following substantial questions of law:

1. Having held that the defendants trespassed into the suit property, whether in law the courts below are right in refusing the relief of mandatory injunction, on the ground that this was acquiescence on the part of the appellant, overlooking that there was no such plea on the side of the respondents.
2. Whether in law the courts below were right in refusing to award damages, inspite of serious nature of the invasion of the plaintiff's right by the defendants.
3. Having held that there is no acquiescence on the plaintiff's side, has not the lower appellate court erred in law in holding that the defendants had prescribed title by adverse possession, overlooking Ex.A-3 and A-4.

8. The learned counsel appearing for the appellant would submit that admittedly the properties belong to his father and the same was purchased on 11.07.1927. The entire extent of land is situated in Survey No.735/4. Admittedly the said land is adjacent to the defendants land. In the year 1977, the defendants encroached the portion of the property by constructing temporary structures. The same was questioned by the plaintiff/Appellant. However, they promised to remove the construction and without keeping the promise they proceeded with the permanent construction.

9. In view of the amicable settlement, the plaintiff had not taken steps to file a suit in time. However, the plaintiff filed a suit in the year 1987, as against the alleged encroachment made in the year 1977. Though, the prayer in the suit is for mandatory injunction, however the lower court as well as the lower appellate court have power to mould the relief in favour of the plaintiff/appellant. Without doing so the lower court as well as the lower appellate court hastily arrived at a

conclusion, the plaintiff has not proved his title before the lower court as well as the lower appellate court. In the absence of title, no mandatory injunction can be granted in favour of the plaintiff. The said observation is perverse even then the court can mould the relief by appropriating the relief by awarding the compensation after the collection of court fees.

10. The learned counsel appearing for the second respondent would submit that the lower court as well as the lower appellate court arrived at a fair conclusion after framing proper issues. Since, the plaintiff did not produce any documents to establish his title, the claim for mandatory injunction does not arise. In the absence of title, mandatory injunction cannot be granted in favour of the appellant/plaintiff. Apart from the above, the lower court appointed a Commissioner to measure the property. Accordingly, the Advocate Commissioner measured the property and filed a report which was marked as Exs.C1 to C3. After perusal of the Commissioner's report, the lower court as well as the lower appellate court arrived at a conclusion that the defendants possess the property after acquiring the adverse portion.

11. On perusal of the judgment of the lower appellate court. The lower appellate court has framed the following questions of law:-

1. Whether the contention of the Plaintiff that the defendants have encroached to an extent of 3.6 cents is acceptable?
2. Whether the contention of the defendants that they have put up constructions even prior to 1974 is acceptable?
3. Whether the findings of the lower court that the plaintiff is guilty of acquiescence and hence not entitled for the relief of mandatory injunction is acceptable?
4. Whether the plaintiff is entitled to claim for damages?
5. Whether the defendants have established their title to the alleged area of encroachment by adverse possession?
6. Whether the judgment of the lower court is sustainable?

12. There are six issues framed by the lower appellate court. Mainly the lower appellate court discussed the issue, whether the contention of the plaintiff that the defendant had encroached the extent of 3.6 cents and the defendants have put up a constructions prior to 1974 or not, and the defendants have established the title to the alleged area of encroachment by way

of adverse portion.

13. After elaborate consideration and after perusing the plan furnished by the Surveyor to the Commissioner and Commissioner's report, the lower court arrived at a conclusion that the defendants are in possession of 3.6 cents in Survey No.735/4 and the plaintiff's claim of encroachment against the defendants was rejected, in view of the existence of the building, septic tank and other permanent construction in the said extent of 3.6 cents, which was established by the Commissioner who was examined as P.W.1.

14. The appellant/plaintiff had not established the alleged encroachment as against the defendants. Accordingly, the prayer of mandatory injunction is also rejected. Since, the appellant/plaintiff did not establish his title before the lower court as well as the lower appellate court and the plaintiff had not established his possession within 12 years prior to the suit, the lower appellate court arrived at a conclusion in favour of the respondent/defendant and against the appellant/plaintiff.

15. With regard to the alternative prayer for damages, which was also discussed by the lower appellate court elaborately, though the lower court has not recorded any findings as to why the plaintiff is not entitled to claim for the damages, the lower appellate court recorded its findings that the plaintiff had not produced any evidence on the question of damages and not let in any evidence to guide the court on this aspect. In the absence of above, the lower appellate court has not granted the relief of damages.

16. On perusal of the judgment of the courts below, I do not find any error to interfere with the order passed by the lower court as well as the lower appellate court and the substantial questions of law are answered against the appellant. Accordingly, the second appeal is dismissed. No Costs.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

msvm

To

1.The I Additional District Judge, Coimbatore.

2.The I Additional District Munsif, Coimbatore.

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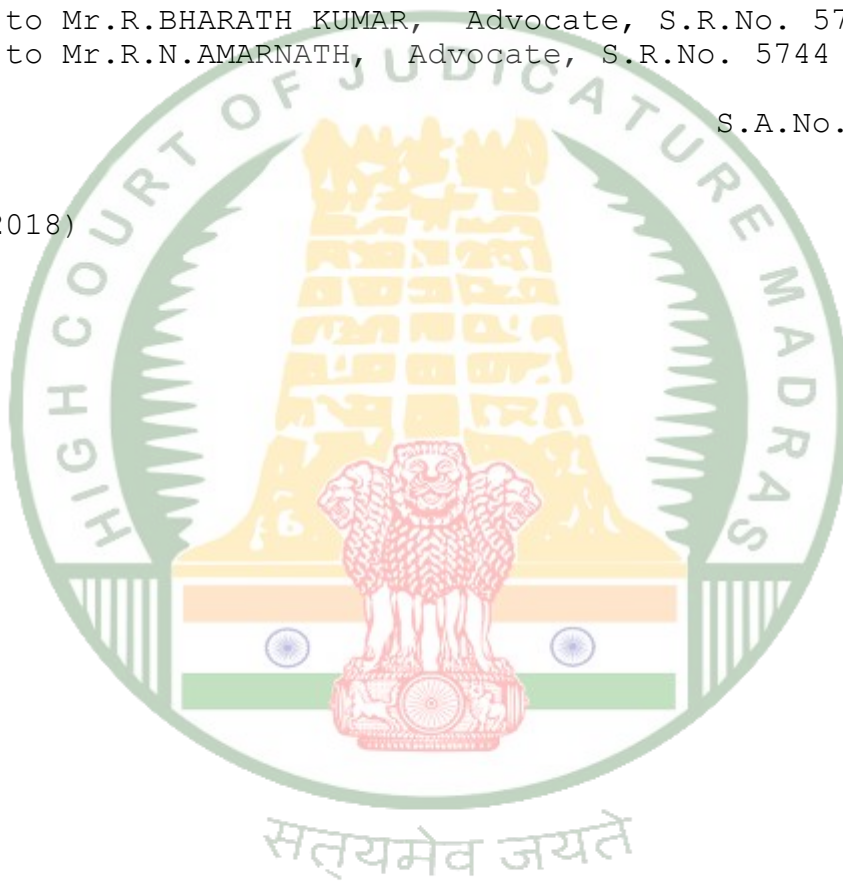
The Section Officer,
V.R. Section, High Court, Madras.(2 copies)

+1cc to Mr.R.BHARATH KUMAR, Advocate, S.R.No. 5705

+1cc to Mr.R.N.AMARNATH, Advocate, S.R.No. 5744

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MG(CO)
TR(16/02/2018)



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