

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.474 of 2015

and

MP.No.1 of 2015

V. Ganesan

... Appellant/Defendant/ Appellant

Vs.

K.P. Arumugam

...Respondent/Plaintiff/ Respondent

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the Judgment and decree dated 21.09.2012 passed in A.S.No.15 of 2012 on the file of Sub Court, Harur, modifying the Judgment and Decree of the learned District Munsif of Harur, dated 30.08.2011 in O.S.No.357 of 2003.

For Appellant : Mr. J. Hariharan
for Mr.V.Nicholas

For Respondent : Mr. T.Panchatsaram

J U D G M E N T

Second Appeal is filed against the Judgment and decree dated 21.09.2012, made in A.S.No.15 of 2012 on the file of Sub Court, Harur, modifying the Judgment and Decree of the learned District Munsif of Harur, dated 30.08.2011 in O.S.No.357 of 2003.

2.The appellant is the defendant and the respondent is plaintiff in O.S.No.357 of 2003. The respondent filed the said suit against the appellant for the relief of declaration of title of the suit property, permanent injunction not to construct the encroached "ABCD" portion and to remove the encroachment shown in the plaint plan.

3. According to respondent, the suit property was allotted to him as per the partition deed dated 05.03.1977. He is in possession and enjoyment of the property by paying taxes to the Government. The appellant's land is situated on the eastern

side of the suit property. The respondent is working as teacher. The appellant approached the respondent to purchase the suit property. The respondent refused to sell the suit property. Hence, there is an enmity between the appellant and the respondent. In the absence of the respondent, the appellant encroached the suit property and put up the basement upto 3 feet. The respondent prevented the appellant from putting up further construction. The appellant proclaimed that he is going to construct the building over the encroached portion. Hence the respondent filed a suit for declaration, Permanent injunction and for mandatory injunction.

4. The appellant filed the written statement and denied all the averments in the plaint. The appellant denied that he approached the respondent to purchase the property and subsequently encroached the property and put up basement. The appellant's father by name Vajravelu was running a saw mill 30 years back and he stopped running business and the building fell down and that no business was carried on. The land of the appellant is 2 feet higher than the land of the respondent. The appellant has put up basement only in his land. The respondent due to enmity with the appellant has filed the suit. The respondent has raised objection after basement level was completed. Till the basement was constructed, the respondent did not object the same. No cause of action has arisen for filing the suit. The respondent ought to have filed a suit for declaration and possession and suit filed by the respondent for declaration, permanent injunction and mandatory injunction is not maintainable and prayed for the dismissal of the suit.

5. Based on the above pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, respondent examined himself as P.W.1 and two other witnesses were examined as P.Ws. 2 and 3 and marked 4 documents as Exs.A1 to A4. The Appellant examined himself as D.W.1 and three others were examined as D.Ws. 2 to 4 and marked 4 documents as Exs.B1 to B4. The Advocate Commissioner's report and plan were marked as Exs. C1 and C2.

6. Considering the pleadings, oral and documentary evidence, the learned Trial Judge decreed the suit and directed the appellant to remove the encroached portion within a period of four weeks at his costs.

7. Against the said Judgment and decree dated 30.08.2011, made in O.S.No.357 of 2003, the appellant filed A.S.No.15 of 2012 on the file of Sub Court, Harur. The learned First Appellate Judge framed necessary points for consideration. The learned I Appellate Judge considering the materials on record, Judgment of the Trial Court and arguments of the counsel for the

parties, dismissed the Appeal and thereby modified the decree declaring the respondent's title over the suit property shown in plaint schedule and granted mandatory injunction to remove the encroachment to an extent of 9 square feet within a period of 3 months, failing which the respondent is entitled to remove the encroachment through Court of Law and also granted permanent injunction in respect of encroached portion shown in the surveyor's sketch. 8. Against the Judgment and Decree dated 21.09.2012 made in A.S No.15 of 2012, the present Second Appeal is filed.

9. At the time of admission, the following substantial questions of law were framed.

"a. When the Plaintiff has admitted that his land and the land of the defendant has been divided by 300 feet ridge and that the land of the defendant is on the eastern side of the said ridge and the alleged encroachment is on the east of the said ridge?

b. When there is a total variation of the alleged encroachment by the Plaintiff and the Advocate Commissioner whether the Courts below are correct in granting the decree for the removal of such encroachment which is not consistent with the rough sketch of the Plaintiff and the Commissioner's plan?"

10. The Learned Counsel for the appellant contented that the respondent failed to give the measurement of the encroachment by the appellant. The measurement of encroachment given by the respondent in the rough sketch differs from the sketch filed by the Advocate Commissioner. The respondent has stated that the pointed portion is on the northern side and the horizontal portion is the southern side, whereas the Advocate Commissioner has stated that pointed portion is on the southern side and the horizontal portion is on the northern side. The Courts below having found that the respondent has not given measurement of encroached portion, ought to have dismissed the suit and allowed the appeal. The first Appellate Court erred in dismissing the appeal based on the Advocate Commissioner's report. The surveyor or Advocate Commissioner cannot give finding with regard to encroachment. They can only give the measurement of the property.

11. The learned counsel appearing for the respondent contended that the respondent has proved his title by marking partition deed dated 05.03.1977, by letting in oral evidence

and by examining two other witnesses as P.W.2 and P.W.3. The contention of the learned counsel for the appellant that the respondent did not furnish measurement of encroachment and suit ought to have been dismissed is contrary to the Advocate Commissioner's report. The respondent has filed only rough sketch along with the plaint. The Advocate Commissioner appointed by the Court inspected the suit property along with surveyor and measured encroachment by appellant and given a report with a sketch. The appellant has not taken any steps to set aside the report and sketch of the Advocate commissioner. The evidence of the respondent as P.W.1 that encroachment is on the eastern side of the ridge, cannot be a ground of for dismissing the suit. The respondent has proved that the appellant encroached the respondent's property. The Judgments and Decrees of lower courts are valid and legal. The learned counsel for the respondent further contended that respondent has filed R.E.P. No. 12 of 2013 and as per the order of the court, encroachment was removed and appellant handed over the possession to the respondent and nothing survives in the second appeal.

12. Heard the learned counsel for the appellant as well as the respondent and perused the materials on record.

13. From the materials on record, it is seen that respondent has proved his title to the suit property by letting in oral and documentary evidence. The title of the respondent is not an issue in the Second Appeal. As per the substantial questions of law, the issue to be decided by this court is whether the appellant encroached the property of the respondent and constructed basement or not.

14. The Learned counsel for the appellant vehemently argued that there is a ridge between the property of the appellant and the respondent. The appellant property is on eastern side of the ridge. The appellant has put up construction in his property on the eastern side of the ridge and the respondent as P.W.1 has admitted this fact. The Courts below have taken note of the fact that the respondent has not proved the measurement of encroachment alleged to have been made by the appellant.

15. These contentions are unacceptable. There are materials on record to show that appellant has encroached the respondent's land and started putting up construction in the basement upto 3 feet height. The respondent has given rough sketch showing the encroachment by appellant. The respondent cannot measure the encroachment and cannot give exact measurement of the encroachment. The approximate extent can be furnished by the aggrieved party. The respondent has taken steps for appointment

of Advocate Commissioner to measure the property and Advocate Commissioner after inspecting and measuring the property along with the surveyor has filed a report with regard to the encroachment. From the materials on record it is seen that Advocate Commissioner measured the property with the help of surveyor and has given a report and sketch. The appellant has filed objections to the Advocate Commissioner's report. Apart from that the appellant has not taken any steps to reissue warrant of commission to prove that his report is wrong. The Courts below have considered this fact and has accepted Advocate Commissioner's report and granted mandatory injunction for removal of encroached portion as per the report of the Advocate commissioner. The Advocate commissioner is appointed to assist the court. It is for the court to accept or reject the commissioner's report. In the facts and circumstances of the present case, the report of the Advocate Commissioner has been accepted by the lower court by giving reasons for the same. There is no error in the said conclusions. Further the learned counsel for respondent stated that the construction has been removed and possession has been taken by the respondent as per the orders passed in REP No. 12 of 2013 filed by the respondent. The learned counsel for the appellant took time to verify this fact and at the time of hearing, the learned counsel for the appellant disputed the said context of the learned counsel for the respondent. Considering the materials on record and for reasons stated above, the substantial questions of law are answered against the appellant.

16. In the result, the second appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1. The Subordinate Judge, Harur.

2. The District Munsif, Harur.

Copy to:

The Section Officer,

VR Section, High Court Chennai-104

+lcc to Mr.V.Nicholas, Advocate, S.R.No.52173

S.A.No.474 of 2015

and

MP.No.1 of 2015

PVS (CO)

GSP(12/11/2018)