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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.1658 of 2002

Suseela Ammal

.. Appellant/Plaintiff

/Vs/

Kalia Gounder

.. Respondent /Defendant

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment in A.S.No.191 of 2001 dated 19.07.2002 on the file of the Principal District Judge, Villupuram, upholding the decree and judgment in O.S.No.263 of 1986 dated 21.08.2001 on the file of the I Additional District Munsif Court, Thirukoilur.

For Appellant : Ms.V.Srimathi

For Respondent : Mr.T.R.Rajaraman

JUDGMENT

The plaintiff in O.S.No. 263 of 1986 on the file of the first Additional District Munsif, Thirukovilur is the appellant herein. He filed a suit in O.S.No. 263 of 1986 for a declaration of his title to the B schedule Property and also for a mandatory injunction to remove the wall put up by the defendant in the B schedule property. However, the suit was dismissed with regard to the prayer of mandatory injunction with a direction to the plaintiff to file a separate suit to claim compensation from the defendant in respect of the encroached portion.

2. Aggrieved over the decree and judgment of the trial court, the plaintiff filed an appeal in A.S.No.191 of 2001 before the Principal District Judge, Villupuram. After analysing the evidence on record, the learned Principal District Judge upheld the decree and judgment passed by the I Additional District Munsif, Thirukovilur.

3. Now, the present appeal is filed by the plaintiff on the following substantial questions of law.



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i) Whether the Courts below are right in extending the principles of equity to a trespasser?

ii) Whether the Courts below ought not to have directed the removal of superstructure, when the defendant had pleaded title over the B schedule mentioned property and failed to establish his right over the same?

iii) Whether the Courts below are right in transgressing beyond the order of remand in A.S.No.8/95 and dated 13.10.1997 on the file of Additional District Judge, Villupuram and should it not have known that no new case could be pleaded or proved than what is contained in the order of the appellate court?

iv) When acquiescence and estoppel are rule of evidence, whether the courts below are right in dismissing the suit accepting the case of the defendant even in the absence of pleading and proof?

4. At the outset, it may be observed that both the courts below have concurrently held that the plaintiff is entitled to the B schedule property. However, both the courts below have also held that though there is an encroachment in the B schedule property, the plaintiff should file a separate suit seeking compensation from the defendant.

5. Mrs.Srimathi, learned counsel appearing for appellant contended that when both the courts below have concurrently held that the defendant had encroached upon the plaintiff's property and the suit also been filed within a period of 12 years, the plaintiff should have been granted mandatory injunction and the findings of both the courts below that the plaintiff has to file a separate suit seeking compensation from the defendant is totally perverse. Reliance was also placed on the decision in Nagaraj and Lingammal Vs. C.P.Munikrishnappa and others reported in S.A.No.652 of 1999 dated 14.10.2003 passed by a Single Judge of this court, wherein, it has been held thus.

"In another Judgment reported in MANU/TN/0472/1978 (Duraismi Mudaliar Vs Ramasami Chettiar) the learned Single Judge of this Court has held regarding the removal of superstructure put up by the defendant during pendency of the suit or after decree competence of executing Court to order removal or demolition has been decided in the following manner:

"where a Court directs by a decree or order that vacant possession of land should be given, that decree could be made effective by directing its own officer to remove the superstructure on it, and to deliver vacant



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possession of the property to the decree-holder. It might not be necessary to have any specific power in that behalf, and such a power was exercised in every case in which vacant possession was ordered. The power to remove the superstructures on the land was an incidental power necessary and ancillary to the power to deliver possession of the property. Should there be any obstruction within the meaning of Order 21 Rule 97 of the Code of Civil Procedure, that has got to be dealt with specifically under the said provisions.

There will not be any difficulty with reference to a case where the superstructure came to be put up by the defendant either during the pendency of the suit or after the decree. In such a case, in execution of the decree for possession, the executing Court could order the removal or demolition of the construction made during the pendency of the suit or after the decree".

6. An advocate Commissioner was appointed by the trial court and he inspected the suit property and filed his report, which are marked as Ex.C1 to Ex.C7. In fact, the properties of the plaintiff and the defendant were measured with the help of the surveyor. A reading of the Advocate Commissioner's report would go to show that the defendant had constructed his house which extends to 17 feet, when actually he is entitled to 15 feet as per the sale deeds Ex.B1 to Ex.B3. Therefore, it is clear that the defendant had encroached upon the plaintiff's property on the western side by two feet East to West. Though the first appellate court had extracted the decision in Chidambaram Vs. Gomathi Ammal and others reported in 1996 (2) MLJ 59, wherein, it has been held that "It is by now well settled that recovery of possession can be granted by courts on declaring title of the plaintiffs and such recovery of possession can be enforced even after removing the superstructure, if any, put up without any separate decree in the form of mandatory injunction in that regard.", the Principal District Judge, Villupuram has given findings that the plaintiff should initiate separate action to claim compensation from the defendant for the encroached portion of two feet. The findings given by both the courts below on this aspect is perverse and the defendant should hand over the possession of the B schedule property to the plaintiff. Therefore, the appeal is liable to be allowed and the decree and judgment passed by both the courts below are set aside, with regard to the mandatory injunction.

7. In the result,

(i) The second appeal is allowed. No costs.

(ii) The decree and judgment passed in A.S.No.191 of 2001 on the file of the Principal District Judge, Villupuram is set



aside.

(iii) The suit in O.S.No.263 of 1986 on the file of the I Additional District Munsif, Thirukovilur is decreed with costs.

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Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

mst

To

1. The Principal District Judge,
Villupuram.
2. The I Additional District Munsif,
Tirukovilur.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No. 65306

S.A.No.1658 of 2002

GJ II(CO)
GN(02/05/2019)