

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.09.2019
PRONOUNCED ON : 18.09.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.30 Of 2000

1. V.R.Vellingiri (died)
2. P.A.Sundaravathani
3. V.Kasturi
4. V.Kanthimathi
5. V.Kalaivani
6. V.Karthikeyan

(Appellants 2 to 6 brought on record as LR's of the deceased sole appellant viz V.R.Vellingiri vide court Order dated 27.06.2019 made in CMP.Nos.888 to 890 of 2007 in S.A.No.30 of 2000) ...Appellants/Defendant

Vs.

1. A.S.Natarajan
2. A.R.Alagappan

... Respondent/Plaintiffs

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 18.02.1998 and made in A.S.No.26 of 1997 on the file of the Second Additional District Judge, Coimbatore confirming the judgment and decree dated 27.09.1996 and made in O.S.No.2458 of 1990 on the file of the Third Additional District Munsif, Coimbatore.

For Appellants : Mr.Ishhaq Ahamed

For Respondents : Set exparte

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree passed in A.S.No.26 of 1997 on the file of the Second Additional District Judge, Coimbatore dated 18.02.1998 confirming the judgment and decree passed by the Third Additional District Munsif, Coimbatore in O.S.No.2458 of 1990 dated 27.09.1996.

2. The respondents herein had filed a suit in O.S.No.2458 of 1990 on the file of the Third Additional District Munsif, Coimbatore for the relief of mandatory injunction, directing the defendant to remove the roofs, tiles and eaves that are projecting beyond the western border line of the property of the defendant and into the property of the plaintiff. The learned Third Additional District Munsif, Coimbatore by the Judgment dated 27.09.1996 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.26 of 1997 on the file of the Second Additional District Judge, Coimbatore. The learned Second Additional District Judge, Coimbatore by the judgment dated 18.02.1998 had dismissed the said appeal with costs and thereby confirmed the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendant had filed the present second appeal.

3. During pendency of the second appeal, the sole appellant/defendant died and his legal representatives have been impleaded as appellant Nos.2 to 6.

4. For the sake of convenience, the parties are referred to as described before the Trial Court.

5. The averments made in the plaint are in brief as follows:

The suit property is situated in Site No.12, Block No.250/1 and 251, measuring 33 feet east west and 40 feet north south. This is a house site, acquired by the first plaintiff in the year 1962 and since then he has been in possession and enjoyment of the same. The defendant is the owner of the property situated on the eastern side of the suit property. He had put up a tiled house in his property. However, the roofs and eaves are projecting beyond the north-south boundary of the property of the defendant and protrudes into the site of the first plaintiff. For the purpose of putting up construction, the first plaintiff had also put up solid foundation and raised the construction to the basement level. Taking advantage of the position, of the construction of the plaintiff, the defendant purposely extended his roof and eaves further west of his property and the same are actually protruding into the property of the first plaintiff. The defendant had absolutely no right whatsoever for extending the roof and eaves of the property of the defendant beyond the western boundary line and into the property of the first plaintiff. The eaves, tiles etc of the property of the defendant sloped down and extended more than 1 ½ feet in to the property of the first plaintiff. On many occasions, the first plaintiff demanded and called upon the defendant to cut and remove all the extensions of roof and

eaves, but, the defendant was totally indifferent and giving evasive replies. Therefore, on 29.05.1990, the first plaintiff issued a lawyer's notice, calling upon the defendant to remove all the portions of the roof and eaves and other superstructures and such projections that are actually projecting in to the property of the first plaintiff. But, instead of complying with the said demand, the defendant on 15.06.1990, issued a reply notice with false averments. Hence, the first plaintiff was constrained to file the above suit for the relief of mandatory injunction directing the defendant to remove all the projecting roof and the materials beyond the western boundary line of his property.

6. During pendency of the suit, the first plaintiff sold the suit property to the second plaintiff and hence, the second plaintiff has been impleaded as a party.

7. The averments made in the written statement filed by the defendant are in brief as follows:

The first plaintiff is a litigant by nature and he could not complete his construction for the error committed by him while digging the foundation. The first plaintiff has encroached on the northern side of the defendant's property. Therefore, he prayed to dismiss the suit.

8. The averments made in the additional written statement filed by the defendant are in brief as follows:

The first plaintiff and the father of the defendant were close friends and the plaintiff was treasurer and the defendant's father was the president of Vadavalli Weavers' Association. The first plaintiff had laid up foundation in the year 1978 by encroaching the defendant's land on the western side. The defendant's house is a tiled roof and lies within the defendant's boundaries and the eaves are projecting within the specific boundaries of the defendant. Irrespective of the measurements on the southern side, the first plaintiff had wantonly and deliberately put up a construction (basement) in the defendant's property. On measurement, it was found that the first plaintiff had encroached about one feet land of the defendant. The allegation that the defendant had put up construction by extending roof 1½ feet in the first plaintiff's property is false. The first plaintiff is a litigant and a court bird. The first plaintiff has enough space available at the western side of his basement within his limit. The suit is barred by limitation and therefore, the defendant prayed to dismiss the suit.

9. Based on the aforesaid pleadings, the learned third Additional District Munsif, Coimbatore, had framed necessary issues and tried the suit. During Trial, on the side of the

plaintiffs, the first plaintiff was examined as P.W.1 and one Muthu Ramalingam was examined as P.W.2. The plaintiffs had marked Exs.A1 to A4 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and examined one more witness as D.W.2. He had marked Exs.B1 to B8 as exhibits. The Advocate Commissioner was examined as C.W.1. The report and the Rough sketches filed by the Advocate Commissioner were marked as Exs.C1 to C3 respectively. A copy of the sale deed dated 03.05.1995 executed by the first plaintiff in favour of the second plaintiff was marked as Ex.C.4.

10. The learned third Additional District Munsif, Coimbatore, after considering the materials placed before her found that the defendant had protruded the eaves of the roof into the plaintiff's property and he is bound to remove the protruded portions of eaves. Accordingly, she decreed the suit as prayed for with costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.26 of 1997 on the file of the Second Additional District Judge, Coimbatore. The learned Second Additional District Judge, Coimbatore, by the judgment dated 18.02.1998 had dismissed the said appeal confirming the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendant had filed the present second appeal. Since the defendant died during pendency of the second appeal, his legal representatives have been impleaded as appellants 2 to 7.

11. This Court at the time of admitting the second appeal had formulated the following substantial questions of law:

" (1) Whether the Courts below had not erred in law in decreeing the suit that is filed for mandatory injunction when admittedly in the sale deed dated 3.5.1995 executed by first plaintiff in favour of second plaintiff it had been categorically stated that the suit property is sold free of all encumbrances and he had relinquished all his right and interest in the property and the same is sold free of all encumbrances?

(2) When the cause of action ceases to exist when subsequent to filing of suit the first plaintiff sold the suit property on 3.5.1995 to the second plaintiff, whether the courts below had not erred in law in decreeing the suit?"

12. Eventhough, notice to the respondents 1 and 2 was served by substituted service and their names also printed in the cause-list, they neither appeared in person nor through counsel. Hence, they were called absent and set-exparte. Hence, after hearing the arguments of the learned counsel for the appellants and perusing the records, judgment is being passed in this second appeal.

13. Substantial Questions of Law 1 and 2:

The learned counsel for the appellants has submitted that the Courts below failed to note that pending suit, that too after giving evidence by the first plaintiff, he sold the property to the second plaintiff. Since the first plaintiff had sold the property during pendency of the suit, the first plaintiff had lost his right to continue the suit and in such a case, the second plaintiff should have examined himself as witness, but the second plaintiff did not enter in to the witness box and subjecting himself for cross-examination and therefore, adverse inference has to be drawn against him. He further submitted that the Courts below granted decree based on the Advocate Commissioner's Report. But, the Courts below failed to consider the objections filed by the defendant with regard to the commissioner's report and plans. He further submitted that the Advocate Commissioner has not measured the properties properly by fixing ' G ' Line and also survey stones. He further submitted that since the plaintiffs had filed suit for mandatory injunction, the burden is upon them to establish that the defendant had encroached the property of the plaintiffs. But, on the contrary, the Courts below erroneously held that the defendant did not prove his case. He further submitted that the defendant had put up his construction in the year 1974 itself and at that time the plaintiffs did not raise any objection and after sixteen years, the first plaintiff had filed the suit complaining that the defendant had put up a construction by protruding the roofs' eaves into the suit property. He further submitted that since the first plaintiff did not raise objections at the time of construction made by the defendant, his act would amount to a acquiescence and hence he is estopped from complaining that the defendant had encroached the suit property. He further submitted that the Trial Court without considering the aforesaid facts had decreed the suit and the First Appellate Court had also mechanically confirmed the same and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the Courts below and dismiss the suit.

14. It is seen from Ex.A.3, the patta has been granted in favour of the first plaintiff on 28.05.1962 assigning the suit property. The defendant has not disputed the said fact. The defendant is the adjacent owner and his property is situated on the east of the suit property. After the first plaintiff was examined as P.W.1, he sold the suit property in favour of the second plaintiff under the original of Ex.C4 dated 03.05.1995. Since the defendant has not disputed the title of the first plaintiff over the suit property, he cannot question the sale made by the first plaintiff in favour of the second plaintiff. As per Section 52 of the Transfer of Property Act, there is no

bar for transferring the property during the pendency of the suit. The purchaser can step into the shoes of the original owner and conduct the case. The result whatever comes in favour of or against the original owner shall bind upon the purchaser.

15. In this case, the original plaintiff namely, the first plaintiff gave evidence alleging that the defendant put up a construction by protruding roofs' eaves into his property. After giving the evidence, he sold the property to the second plaintiff under the original of Ex.C4. The right whatever got by the first plaintiff transferred to the second plaintiff. As already pointed out that the defendant has not disputed the ownership of the suit property and as such he cannot question the sale made by the first plaintiff in favour of the second plaintiff. In this case, the original owner deposed before the Court in respect of the averments made in the plaint. Further, the second plaintiff has produced a copy of the sale deed executed by the first plaintiff and marked as Ex.C.4. Under the said circumstances, merely because, the second plaintiff has not examined himself as witness, no adverse inference can be drawn against him.

16. Oral evidence of the Advocate Commissioner, his report (Ex.C.1) and the plans filed by him (Exs.C2 and C3) would clearly establish that the properties of both the parties were measured with the help of a qualified surveyor and with reference to the documents and found that the eaves protruded to the length of 1'3'' inches in the suit property from the defendant's house. Though the defendant had filed objections to the Commissioner's Report stating that the measurements are not properly taken, he has not filed any application requesting to reissue the Commissioner's warrant to measure the properties once again. So, it appears that the said objections were made only for record purpose.

17. Though the defendant has deposed in his evidence that in the year 1978 itself, the first plaintiff made encroachment on his land, he has not immediately lodged any complaint before the police nor filed any suit before the Court. On the contrary, he lodged a complaint only on 23.04.1992 i.e., during pendency of the suit. Further, though the defendant has pleaded that he has purchased the property in the year 1973 and constructed a house in the year 1974 itself, in order to prove the same, he has not produced the sale deed or any other documents. Under the circumstances, the contention of the defendant that the first plaintiff estopped by acquiescence cannot be accepted.

18. The Trial Court after taking into consideration of the aforesaid facts had rightly decreed the suit as prayed for

and the same has been confirmed by the first appellate Court. In the said factual concurrent findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants.

19. In the result, the second appeal is dismissed confirming the judgments and decrees passed by the Courts below. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

Vv
To

1. The Second Additional District Judge,
Coimbatore.
 2. The Third Additional District Munsif,
Coimbatore.
 3. The Section Officer, VR Section,
High Court, Madras.
- +1 CC to Mr.Ishhaq Ahamed, Advocate sr 80052.

S.A.No.30 of 2000

GP(CO)
SP(09/11/2020)

सत्यमेव जयते

WEB COPY