

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.02.2019
PRONOUNCED ON : 27.02.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.Nos.869 and 870 of 2006
and
M.P.Nos.2 and 2 of 2006

SA No.869/2006

1. Banumathi
2. Venkateswaran
3. Geetha @ Lakshmi
4. Senthil Kumar ...Appellants in SA.869/2006

Vs.

1. Ambikapathi ...1st respondent in second appeal.869/2006
2. Uma Mahesvari ...2nd respondent in S.A.No.869 of 2006

SA No.870/2006

1. Banumathi
2. Venkateswaran
3. Geetha @ Lakshmi
4. Senthil Kumar ...Appellants in SA.870/2006

Vs.

1. Ambikapathi ...Sole Respondent in SA.870/2006

Cause title accepted vide order of court dated
27.07.2006 made in M.P.Nos.1 and 1 of 2006. 3rd respondent/
2nd respondent in S.A.No.s 869 and 870 of 2006 respectively
transposed as 4th appellant vide order of court
dated 06.06.2007 made in M.P.Nos.1 and 1 of 2007.

Prayer:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree of Principal sub court, Mayiladuthurai, dated 21.11.2005 made in A.S.Nos.79 and 67 of 2005 confirming the judgment and decree of Additional District Munsif Court, Mayiladuthurai dated 15.02.2005 made in O.S.Nos.298 of 2003 and 321 of 2004.

For Appellants in both : Mr.S.Sounthar

For Respondents in both : Mr.G.Saravanan

COMMON JUDGMENT

Second Appeal Nos.869 and 870 of 2006 are directed against the common judgment and decree dated 21.11.2005 passed in A.S.Nos.79 and 67 of 2005 on the file of the Principal Subordinate Court, Mayiladuthurai, confirming the judgment and decree dated 15.02.2005 passed in O.S.Nos.298 of 2003 and 321 of 2004 on the file of the Additional District Munsif Court, Mayiladuthurai.

2. Both the second appeals have been admitted on the following substantial questions of law.

- "a) Whether the first respondent is prevented by doctrine of equitable estoppel and acquiescence from claiming recovery of possession after removal of constructions in view of clear admission by P.W.1 that they failed to object when the appellant put up constructions?
- b) whether the judgments of the courts below are vitiated in its failure to follow the decisions of this Hon'ble court cited before it?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The Parties are referred to as per their rankings assigned to them by the trial court in the common judgment rendered by it.

5. The plaintiff Ambikapathi has laid the suit against the defendant Sambandam for the reliefs of declaration of mandatory injunction and recovery of possession in O.S.No.321 of 2004. The defendant Sambandam has laid the suit against the plaintiff Ambikapathi and another in O.S.No.298 of 2003 for the reliefs of declaration and permanent injunction. The property in dispute between the parties has been described as the 'C' schedule property in O.S.No. 321 of 2004. The plaintiff is the son of Ramasamy Pillai born to his third wife. The defendant is the son of Ramasamy Pillai born to his first wife. The materials placed on record go to show and also not in dispute that as per Ex.A3 partition deed, it is found that of the total extent of 8 cents belonging to Ramasamy Pillai in survey No.83/1, the 'A'

schedule property comprising of an extent of 4 cents was allotted to Ramasamy Pillai and the remaining 4 cents land in the abovesaid survey number on the western side had been allotted to the defendant shown as 'B' schedule and it is the case of the plaintiff that taking advantage of his absence in foreign shores, the defendant had encroached into a portion of the 'A' schedule property while putting up a new construction in his property and thereby encroached into the 'C' schedule property without any authority and accordingly has come forward with the suit seeking for the appropriate reliefs against the defendant. The plaintiff claims title to the 'A' schedule property on the basis of the will dated 10.09.1975 executed by Ramasamy Pillai in his favour and it is also the further case of the plaintiff that subsequent thereto, in the partition effected amongst his mother and the children of Ramasamy Pillai born to his third wife, by way of the partition deed dated 27.07.1995, the plaintiff 'A' schedule property had been allotted to his share.

6. It is not in dispute that an old house has been in existence in the plaintiff 'B' schedule property allotted to the defendant by way of the partition deed dated 07.08.1975 and it is seen that as per the case of the defendant, a fence has been put up by Ramasamy Pillai on the eastern side and the said fence had been earmarked as the boundary of the property allotted to the defendant by Ramasamy Pillai and accordingly, the defendant also had been enjoying the property upto the fence on the eastern side put up by Ramasamy Pillai and according to his case, inasmuch as the old building in the abovesaid property got dilapidated, he had put up the new construction in the property including the disputed portion and the plaintiff's mother or his wife never interfered or objected to the same and thus, according to the defendant, to the knowledge of the plaintiff and his relatives, he had put up the construction in the disputed property and accordingly has been in the possession and enjoyment of the disputed property since the date of the partition deed marked as Ex.A3 and as abovesaid, it is the specific case of the defendant that, it is only Ramasamy Pillai, who had put the fence in eastern side earmarking the property allotted to the defendant upto the fence and accordingly contended that inasmuch as the disputed property had been in the possession and enjoyment continuously over a long period of time, it is seen that the defendant has also put forth the claim of title to the disputed portion by way of the adverse possession and accordingly sought for the appropriate reliefs with reference to the same. It is also pleaded by the defendant that in view of the fact that the plaintiff and his relatives had been the silent spectators to the construction put up by him in the disputed portion without raising any protest whatsoever, in such view of the matter, it is his argument that with their approval and consent, he had put up the construction in the

disputed portion and in such view of the matter, according to him, on the basis of the doctrine of acquiescence and the principle of equitable estoppel, the plaintiff is not entitled to seek the reliefs in respect of the disputed portion and if at all the plaintiff could claim any title or interest in the disputed portion, according to the defendant, as per law, he is entitled to recover the compensation with reference to the same and accordingly sought for the appropriate reliefs.

7. Based on the materials placed on record, both oral and documentary, it is found that the courts below have accepted the case of the plaintiff and rejected the defendant's case. Aggrieved over the same, present second appeals have been laid.

8. As abovestated, there is no dispute that as per Ex.A3 partition deed effected between Ramasamy Pillai and the defendant, of the total extent of 8 cents in survey No.83/1, 'A' schedule property had been allotted to Ramasamy Pillai and the 'B' schedule property had been allotted to the defendant. The defendant, being a party to the abovesaid partition deed, it is thus noted that the defendant is very well aware as to the allotment of 4 cents only in survey No.83/1 towards his share and not more than that. However, the defendant would plead that after the abovesaid partition, Ramasamy Pillai had put the fence on the eastern side demarcating his share and the share of Ramasamy Pillai and accordingly it is put forth by the defendant that all along from the date of partition, it is he, who has been in the possession and enjoyment of the disputed portion also along with 4 cents of land to the knowledge of the plaintiff and his relatives and accordingly it is contended that while putting up a new construction in his property to the knowledge of the plaintiff and his relatives, he had put up the construction in the disputed portion and therefore, the plaintiff is not entitled to claim any right, title or interest in respect of the disputed portion and he has lost the same by way of the adverse title of the defendant and as above noted, put forth his case based on the doctrine of acquiescence.

9. With reference to the claim of the defendant that Ramasamy Pillai had put up the fence on the eastern side, as rightly determined by the courts below, there is no material worth acceptance with reference to the same on the side of the defendant and in such view of the matter, the claim of the defendant that he has been in the possession and enjoyment of the property upto the fence on the eastern side alleged to have been put up by his father Ramsamy Pillai, cannot be accepted. In fact, as rightly determined by the courts below, even D.W.3, examined on the side of the defendant, has belied the abovesaid version of the defendant. Furthermore, if really, Ramasamy Pillai had put up the fence on the eastern side including the

disputed portion, while subsequently bequeathing his property allotted to him by way of Ex.A3 partition deed, Ramasamy Pillai would not have bequeathed to the extent of 4 cents in survey No.83/1 to the plaintiff by way of Ex.A2 will. Even the defendant in his suit has admitted that, inasmuch as the children of Ramasamy Pillai born to his third wife had not been allotted any share by way of Ex.A3 partition deed, Ramasamy Pillai had given the property allotted to his share by way of Ex.A3 to the children born to him through his third wife. Now the plaintiff claims title to the abovesaid 4 cents allotted to Ramasamy Pillai by way of Ex.A1 partition deed based on the will executed by Ramasamy Pillai dated 10.09.1975 marked as Ex.A2/A4. The will Ex.A2/A4 is held to have been rightly established by the plaintiff as per law by examining the attesor and the scribe. The fact that Ramasamy Pillai has bequeathed an extent of 4 cents in favour of the plaintiff by way of Ex.A2/A4 will would only go to improbablise the case of the defendant that Ramasamy Pillai had put up the fence on the eastern side inclusive of the disputed portion in survey No.83/1. Furthermore, as per Ex.A1 partition deed, it is found that the 4 cents land in Survey No.83/1 had come to be allotted only to the plaintiff and thus it is seen that, as rightly determined by the court below, the 'A' schedule property belong only to the plaintiff and not to the defendant.

10. Though some reliance is placed by the defendant upon the patta said to have been granted to him inclusive of the disputed portion marked as Ex.B28, when the abovesaid patta document cannot be construed as a document of title and when the abovesaid patta has not been established to have been issued in favour of the defendant to the knowledge of the plaintiff as per law, as rightly determined by the court below, on the basis of Ex.B28 patta, the defendant cannot be allowed to putforth the contention that he has acquired the title to the disputed portion.

11. Insofar as in the suit laid by the defendant claiming the reliefs of declaration and injunction, the defendant has not come out with a clear picture as to on what basis he seeks the relief of declaration to the disputed portion. A reading of his plaint would only go to show that he claims title to the disputed portion based on his long and continuous possession and enjoyment of the same and on the strength of the alleged fence put up on the eastern side by his father Ramasamy Pillai. However, on a perusal of the written statement filed by him in the suit laid by the plaintiff, it is found that the defendant is endeavouring to obtain the claim of title to the disputed portion only by way of the adverse possession. Thus it is found that the defendant seeks adverse title to the disputed portion on the strength of his long and continuous possession and

enjoyment of the same right from Ex.A3 partition deed based on the alleged fence put up by his father Ramasamy Pillai. However, as above pointed out, on the basis of the materials placed on record, the defendant has failed to establish that his father had put up the fence on eastern side and therefore, the abovesaid case of the defendant that he has been in the possession and enjoyment of the disputed portion right from the date of Ex.A3 partition deed, cannot be accepted as such and rightly disbelieved by the courts below. As could be seen from the materials placed on record, in the year 2000-2001, the defendant had demolished the old house in the property allotted to him and put up a new construction thereon. No doubt, while putting up the new construction, it is found that the defendant had also raised the construction in the disputed portion also and according to the plaintiff, inasmuch as his mother and wife are not aware of the actual extent of the property allotted to the defendant under Ex.A3 partition deed, they had not raised any objection to the same and only later, on coming to know of the encroachment made by the defendant in the disputed portion, as abovestated by the plaintiff, he had objected to the same by lodging a complaint against the defendant and accordingly it is found that immediately on coming to know of the trespass committed by the defendant in the disputed portion and the construction put up by him thereon, seeking the appropriate reliefs with reference to the same, the plaintiff has laid the suit against the defendant in O.S.No.321 of 2004. It is thus found that immediately on gaining knowledge about the encroachment made by the defendant in the disputed portion, It is evident that the plaintiff has initiated necessary action pertaining to the same and in such view of the matter, considering the time gap between the construction put up by the defendant in the disputed portion and the resistance offered to the same by the plaintiff not being on the higher side, accordingly it is seen that when the offending construction had been put up in the disputed portion by the defendant only during the year 2000 and when the same had been questioned / challenged by the plaintiff in the year 2003 itself, in such view of the matter, it is found that unless the defendant establishes his claim of title to the disputed portion as per law, he would not be entitled to obtain the reliefs claimed by him.

12. As regards the plea of adverse title set out by the defendant in respect of the disputed portion, when admittedly he has been allotted only 4 cents of land in survey No.83/1 and when there is no material placed on record to show that prior to 2000 i.e., before the new construction put up by him in the disputed portion, he has been in the possession and enjoyment of the same, in such view of the matter, the claim of the defendant that the disputed portion has been enjoyed by him right from the

date of Ex.A3 partition deed, as such, cannot be believed and accepted. Even assuming for the sake of arguments that the disputed portion had been in the possession and enjoyment of the defendant based on the fence alleged to have been put up by Ramasamy Pillai on the eastern side, as rightly put forth by the plaintiff's counsel, mere possession of the same, howsoever long, that alone would not be the basis for enabling the defendant to claim the adverse title. Unless the defendant place acceptable and reliable materials evidencing the factum of the possession and enjoyment of the suit property openly, continuously and uninterruptedly to the knowledge of the plaintiff by exhibiting the animus possidendi beyond the statutory period and when with reference to the same, there is no acceptable materials on the part of the defendant, it is seen that the claim of adverse title to the said portion by the defendant, as such, had been rightly negatived by the courts below.

13. In conclusion, it is found that to the knowledge of the plaintiff, it could be gathered that the defendant had encroached into the disputed portion in the year 2000 while putting up a new construction in the property, on coming to know of the same, immediately challenging the same, as abovenoted, in the year 2003 itself, the plaintiff had preferred the suit against the defendant. No doubt, the evidence had been let in on the part of the defendant that the plaintiff's mother and wife were the silent spectators to the construction put up by the defendant in the disputed portion also, but, as rightly determined by the courts below, inasmuch as the family members of the plaintiff are illiterate ladies and unaware of the extent of land allotted to the defendant by way of Ex.A3 partition deed, they had not put any resistance while the defendant put up the construction in the disputed portion and only on the plaintiff gaining the knowledge as regards the same, it is found that the plaintiff had moved and taken necessary action against the defendant by way of the police complaint and following the same, has come forward with the civil action for appropriate reliefs.

14. It is however contended by the defendant that, inasmuch as for more than two years the defendant was allowed to put up the construction in the disputed portion without any protest on the part of the plaintiff, according to the defendant, on the basis of the doctrine of acquiescence, the plaintiff has lost the remedy to recover the possession of the disputed portion and at the most, the plaintiff would be entitled to seek only the compensation with reference to the same. However, the courts below had rejected the abovesaid case projected by the defendant for claiming the title to the disputed portion on the basis of doctrine of acquiescence. In this connection, strong reliance

is placed upon the decision reported in 1981 1 MLJ 258 (R.S.Muthuswami Gounder Vs. A.Annamalai and others) by the defendant's counsel. The abovesaid decision had also been projected by the defendant before the courts below. Considering the abovesaid decision in toto, as rightly determined by the courts below, insofar as this case is concerned, it is seen that the doctrine of acquiescence cannot be made applicable for enabling the defendant to claim the title to the disputed portion and for claiming the relief under the abovesaid doctrine of acquiescence, the defendant must satisfy five ingredients for claiming the right to the disputed portion on the basis of the abovesaid doctrine and the same could be gathered from the abovesaid decision, which has been discussed in the following manner.

"8. Mr.N.Sivamani invited my attention to certain passages occurring at pages 1050, 1051, 1053 and 1054 of Volume II of 'Sarkar on Evidence', Eleventh Edition. At page 1050 the observations of Lord Campbell in Cairncross Vs. Lorimer, are extracted, and they are:

"Generally speaking if a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license".

At page 1051 the observation of Cottenham, L.C. In Duke of Leeds Vs.Azherst, is extracted and it is this:

"If a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence".

The following passages also are found at page 1051:

"In order to constitute acquiescence not only (1) full knowledge of one's right is required, but (2) there must be some lying by him to the detriment of the other side.

For it is elementary that there can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement Acquiescence implies that a person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the bonafide belief that he was acting within his rights. The absence of either of those elements makes the doctrine inapplicable. Acquiescence does not simply mean standing by. It does not mean quiescence only. It means assent after the party has come to know of his right There is a distinction between acquiescence occurring while the act is in progress, and acquiescence taking place after the act has been completed. In the former case the acquiescence is acquiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case when the act is completed without any knowledge or without any assent of the person whose right is infringed, the matter is to be considered on very different legal considerations."

At page 1053 we find the following passage:

"It is of the essence of acquiescence that the party acquiescing should be aware of any by words and conduct should represent that he assents to what is violation of his rights and that the person to whom such representation is made should be ignorant of the other party's right and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party".

We also find the following passage at page 1053:

"The laws as to equitable estoppel by acquiescence has been very clearly stated by Fry, J., in Wilmott Vs. Barber:

"It has been said that the acquiescence which will deprive a man of his legal

rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights what, then, are the elements or requisites necessary to constitute fraud of that description?

In the first place, the plaintiff (i.e. the party pleading acquiescence) must have made a mistake as to his legal rights;

Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the mistaken belief;

Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is found upon conduct with knowledge of your legal rights;

Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights;

Lastly, the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but in my judgment nothing short of this will do."

The learned commentator has added at page 1053 that in order that the rule may apply all the above conditions must exist.

9. Mr.N.Sivamani invited my attention to the following passage occurring at page 1054:

"Mere non-interference is not enough. Acquiescence with full notice in act prejudicial to one's self so as to induce reasonable belief of his consent, followed by consequent alteration of other's position is necessary Where knowledge on the part of the person to be estopped is not proved, the doctrine of acquiescence does not apply....."

He also invited my attention to the following passage occurring at page 4984 of Field's 'Law of Evidence', 10th Edition, 1972:

"Acquiescence does not simply mean standing by. It does not mean acquiescence only. It means assent, after the party has come to know of his right".

The learned counsel argued that knowledge on the part of the person to be estopped is necessary and that he should have come to know about the encroachment by way of construction while the construction was in progress for the principle of acquiescence being applied against him, and that there would be no acquiescence if he came to know of the construction after the completion of the construction."

15. In the light of the principles set out, as above stated, for claiming the benefit under the doctrine of acquiescence by way of equitable estoppel, at the foremost, the defendant has to establish that he was in the possession and enjoyment of the disputed portion on the mistaken belief that the same forms part of the property allotted to him under Ex.A3 partition deed and on that premise, had put up the construction thereon during 2000 and the plaintiff also have acquiesced to the abovesaid claim of interest or right of the defendant in the disputed portion and accordingly not put forth any resistance to the same and in particular, not asserted his right in respect of the disputed portion in any manner and on the other hand had been the silent spectator to the construction put up by the defendant in the disputed portion and however insofar as the case at hand, when it

is seen that it is the specific case of the defendant himself that he had been allotted only 4 cents of land in survey No.83/1 and the remaining 4 cents had been allotted to his father Ramasamy Pillai, in such view of the matter, the claim of the defendant that on a mistaken impression he had been in the possession and enjoyment of the disputed portion since the date of Ex.A3 partition deed on the strength of the fence put up by his father Ramasamy Pillai on the eastern side, as such, cannot be believed and accepted. When as above discussed, the defendant has failed to establish that the fence had been put up by his father and on the other hand, his father asserting his right over the 4 cents of land allotted to him by way of Ex.A3 partition deed, had subsequently bequeathed the same in favour of the plaintiff and the plaintiff and his family members had asserted their right over the same in the partition deed marked as Ex.A1, in such view of the matter, it is found that the essential ingredients for claiming the doctrine of acquiescence, as above pointed out, having not been pleaded and satisfied by the defendant in any manner and when though the plaintiff's female relatives could held to be not offering resistance to the alleged construction put up by the defendant in the disputed portion at the first instance, however, on coming to know of the same when it is seen that he had initiated appropriate case against the defendant as per law and the time gap is found to be not on the higher side, in all, it is seen that as determined by the courts below, the doctrine of acquiescence cannot be made applicable to the facts and circumstances of the case at hand and on that footing, the defendant cannot be allowed to claim the reliefs sought for by him as regards the disputed portion. When as regards the disputed portion, the defendant is found to have claimed title to the same only on the plea of adverse possession and when with reference to the same, the pleas putforth by the defendant are not clear as to when from his possession of the disputed portion has become adverse to the plaintiff, the defendant having also failed to establish the adverse title by placing acceptable and reliable materials to hold that he has been in the possession and enjoyment of the disputed portion right from Ex.A3 partition deed, in such view of the matter, the courts below are fully justified in negating the plea of acquiescence relied upon by the plaintiff for claiming the reliefs prayed for qua the disputed portion.

16. In the light of the above discussions, the argument putforth by the defendant's counsel that the doctrine of equitable estoppel and acquiescence would prevent the plaintiff from claiming the recovery of possession of the disputed portion cannot be made applicable to the present case when there are no clear pleas set out by the defendant with reference to the same either in the plaint or in the written statement filed by him in the litigation involved in the matter and as above noted, when

the essential ingredients for constituting or invoking the doctrine of acquiescence had not been made out by the defendant, the courts below are found to be justified in negating the abovesaid plea putforth by the defendant for claiming the reliefs. The courts below are found to have assessed and analysed the various case laws on the subject putforth by the defendant in the right perspective and rightly upheld that the principles enunciated therein are not established by the defendant to be applicable to the case at hand, particularly, sans any plea or proof on the part of the defendant in connection with the same, in such view of the matter, the substantial questions of law formulated in the second appeals, are accordingly answered against the defendant and in favour of the plaintiff.

17. In conclusion, both the second appeals are accordingly dismissed with costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

bga

To

1. The Principal Sub Court, Mayiladuthurai
2. The Additional District Munsif Court, Mayiladuthurai
3. The Section Officer, V.R.Section,
High Court, Madras. (2 copies)

+2 ccs to Mr.S.Sounthar, Advocate, S.R.No.18772

S.A.Nos.869 and 870 of 2006
and
M.P.Nos.2 and 2 of 2006

MG(CO)
SSM(14/06/2019)

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