

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.04.2019

PRONOUNCED ON : 30.04.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1012 of 2005
and
C.M.P. No.13781 of 2005

Mr.G.Krishnamoorthy ...Appellant/Plaintiff

Vs.

1.T.S.Rajadurai (deceased)
2.P.Suseela
3.Peter Charles
4.Eladies Padma ...Respondents/Defendant and (Lrs of Defendant)

Respondents 2 to 4 are impleaded as legal representatives of the deceased sole respondent vide order of court dated 08.11.2006 made in CMP No.9130 of 2006

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.8 of 2004 on the file of the Additional Sub Court, Chengalpattu dated 10.11.2004 confirming the judgment and decree in O.S.No.33 of 1998 on the file of the District Munsif Court, Tambaram dated 27.10.2003.

For Appellant : Mr.V.Lakshminarayanan
for M/s. R.N.Kothandaraman

For Respondents : Mr.R.Vasudevan for R2 to R4

JUDGMENT

Challenge in this Second Appeal is made to the judgment and decree dated 10.11.2004 passed in A.S.No.8 of 2004 on the file of the Additional Subordinate Court, Chengalpattu, confirming the judgment and decree dated 27.10.2003 passed in O.S.No.33 of 1998 on the file of the District Munsif Court, Tambaram.

2. Suit for permanent injunction and mandatory injunction.

3. The case of the plaintiff, in brief, is that he had been allotted the plot No.325 admeasuring 1800 sq. ft (60 feet x 30 feet) in the housing unit promoted by Tiruvalluvar Transport Corporation Housing society and further according to the plaintiff, the defendant was allotted the plot No.326 and the abovesaid two plots lie in a street running north to south and facing towards the street on the western side and it is stated that the boundaries of each plot were fixed measuring the space between the respective septic tanks and according to the plaintiff, he had put up an additional construction i.e a portico of an extent of 250 sq. ft., in the front portion and on the western side of his house within his plot in the year 1996 and also stated that the portico was roofed with RCC and the parapet wall was also constructed over the portico and the cement jades were erected on all the sides and it is stated that the cement jades stretches to a length of 10 feet on the northern side of the plaintiff's plot, adjacent to the defendants property. It is further stated that on the northern end, there is no compound wall or fence dividing the plaintiff's plot and the defendant's plot. Further according to the plaintiff, during May 1997, the defendant put up an additional construction in his plot and in the said process, constructed a wall running east-west in an extent of 20 feet x 1 foot on the northern side of the plaintiff's plot commencing from the eastern end of the plaintiff's portico's northern wall running towards the east and thereby, the defendant has encroached into the plaintiff's plot to an extent of 20 sq. ft. (20 feet x 1 foot) Further, it is stated that the defendant had put up the first floor construction over his building abutting and adjoining to the northern wall of the plaintiff's portico wall and the defendant, without raising any wall from the ground on the northern side and on the other hand, constructed the northern wall over the cement jades put up by the plaintiff on the northern edge and top of the plaintiff's portico without constructing any wall to support his additional construction in the first floor. The defendant had encroached into the plaintiff's portico on the northern side and thereby the northern portico wall of the plaintiff has been damaged and cracks have developed in the same and despite the protests made

by the plaintiff, the defendant did not remove the encroachment committed by him and therefore, the plaintiff issued a legal notice on 25.06.1997 to the defendant to remove the encroachment and in the reply notice dated 28.06.1997, the defendant has admitted the said encroachment over the plaintiff's portico and also putting up of a wall over the plaintiff's plot on the northern side measuring 20 feet x 1 foot east to west. In the communication dated 01.07.1997, the defendant would contend that he had put up the construction within his property and in the communication dated 31.07.1997, he would plead that the plaintiff's had encroached into his property of an extent of 1.5 feet on the southern side. Hence, according to the plaintiff, he has been necessitated to lay the suit against the defendant for appropriate reliefs.

4. The defendant resisted the plaintiff's suit contending that his plot on the western side measures north to south 41 feet and on the eastern side 40 feet and on both northern and southern sides, his plot measures 60 feet and according to the defendant, his plot admeasures 2430 sq. ft., and further according to him, he had put up the first floor construction by resting the same on two pillars within his property and not put up the same by resting on the northern compound wall of the plaintiff's portico and on the other hand, according to the defendant, the plaintiff's portico wall had been put up encroaching into the defendant's property and further according to the defendant, the plaintiff had, without demarcating the boundaries of the two plots, had put up the portico portion by extending the same in the defendant's plot without any entitlement and also denied the alleged encroachment of 20 feet x 1 foot in the plaintiff's plot by putting up the wall and accordingly, it is stated that it is only the plaintiff who had committed the trespass and not the defendant and therefore, prayed for the dismissal of the plaintiff's suit.

5. In support of the plaintiff's case P.Ws.1 and 2 were examined and Exs.A1 to A15 were marked. On the side of the defendant D.Ws.1 and 2 were examined and Exs.B1 to B5 were marked. Exs.C1 and C2 were also marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the courts below were pleased to dismiss the plaintiff's suit. Impugning the same, the present second appeal has been laid.

7. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration.

"Is not the defendant in the suit, on the principle of law of estoppel, prevented from contending that he has not encroached?

8. As could be seen from the materials placed on record, it is found that the plaintiff and the defendant were allotted the plots, to which they claim title, by the Tiruvalluvar Transport Corporation Housing society. Accordingly, it is found that the plaintiff was allotted the plot No.325 and the defendant was allotted the plot No.326. As could be seen from the lie of the abovesaid two plots, it is found that the abovesaid two plots lie in the street portion running north to south and they are facing the street on the west. It is the case of the plaintiff that he had been allotted the plot No.325 admeasuring 1800 sq. ft. The plaintiff has admitted that the plot No. 325 allotted to him measures 60 feet x 30 feet on both sides. It is thus found that on both sides, the plaintiff's plot measures 30 feet north to south and 60 feet east to west. The plaintiff has admitted that Plot No.326 has been allotted to the defendants. In addition to that, in the legal notice dated 25.06.1997, the plaintiff has further admitted that the plot No. 326 allotted to the defendant admeasures 2430 sq. ft. The same could also be gathered from the allotment order marked as Ex.A1, whereunder, it is mentioned that the plot No.325 measures 1800 sq. ft and the plot No.326 allotted to the defendant measures 2430 sq. ft. According to the defendant, on the western side, his plot measures 41 feet north to south and on the eastern side his plot measures 40 feet. However, despite the abovesaid factors, the plaintiff would plead in the plaint that the defendant's plot measures only 40 feet north to south on the western side and 40 feet north to south on the eastern side. It is not in dispute that both the plots allotted to the plaintiff and the defendant measures east to west 60 feet on both sides. When from Ex.A1 as well as Ex.A7, legal notice, it is evident that the defendant plot admeasures 2430 sq. ft., and it is found that only if the defendant's plot measures 41 feet north to south on the western side, the abovesaid total extent would be possible. Be that as it may, as far as the plot No.325 is concerned allotted to the plaintiff, it is seen that he had been allotted only the plot measuring 30 feet x 60 feet, in toto, 1800 sq. ft.

9. The trouble had started between the parties only when the parties had endeavoured to put up the additional construction in the plots belonging to them. Now according to the plaintiff, he had put up the portico in the front and in the western portion of his plot and accordingly, it is stated that the portico put up by him was roofed with RCC and the parapet wall had also been constructed over the same and also stated that cement jades were erected on all the sides. It is stated that the cement jades

extend upto the length of 10 feet on the northern side i.e. nearly abutting the defendant's plot. According to the plaintiff, the defendant had also put up the additional construction in his plot and it is stated that the defendant, while putting up the first floor construction, without raising any wall or pillar to rest the same in his plot, according to the plaintiff, the defendant had encroached into the plot of the plaintiff and without raising any wall or pillar to support the first floor construction, had erected the first floor wall resting the same on the northern wall of the plaintiff's portico i.e. over the cement jades put up by the plaintiff on the northern edge of the portico and resultantly, it is stated that his portico had been damaged and thereby, according to the plaintiff, the defendant is liable to remove the abovesaid encroachment. Further according to the plaintiff, while putting up the additional construction, the defendant had put up a wall east to west encroaching 1 foot into the plaintiff's plot to about 20 feet east west and accordingly, it is stated that while putting up the construction by the defendant, he had encroached into the plaintiff's plot to an extent of 20 feet x 1 foot and the same is also liable to be removed by the defendant.

10. Complaining the same, it is found that the plaintiff has issued the legal notice on 25.06.1997 calling upon the defendant to remove the offending construction. The abovesaid legal notice has been marked as Ex.A7. To Ex.A7, the defendant sent a reply on 28.06.1997, which has been marked As Ex.A8. Even though the plaintiff would claim that the defendant has admitted his encroachment into the plaintiff's plot in the abovesaid reply notice marked as Ex.A8, on a perusal of Ex.A8, it has not been clearly admitted by the defendant that he had encroached into the plaintiff's plot and rested his first floor construction over the portico wall of the plaintiff or put up the wall encroaching into the plaintiff's property as such. On the other hand, the tenor of the reply notice Ex.A8 would only go to show that the defendant had complained of only about the encroachment on the part of the plaintiff while putting up the additional construction in his plot and alleged that it is only the plaintiff who had encroached into the defendant's property and put up the additional construction. No doubt, the defendant has clarified the abovesaid reply notice by sending the communication dated 01.07.1997, which has been marked as Ex.A9. In the communication dated 31.07.1997, the defendant has reiterated the encroachment committed by the plaintiff into his plot while putting up the additional construction and called upon the plaintiff to remove the same.

11. In the light of the abovesaid factual matrix, it is seen that both the parties had been complaining against each other that they had intruded into the other man's property and put up

the construction/ wall aforesaid. Therefore, it has to be seen foremost whether the construction put up by the plaintiff falls within his property or whether the same had been put up intruding into the defendant's property as alleged by the defendant and whether the defendant had encroached and put up the construction by encroaching into the plaintiff's property as alleged in the plaint.

12. In this matter, the commissioner had been appointed to inspect the properties belonging to the parties and he has filed his report and plan marked as Exs. C1 and C2. On a perusal of Exs. C1 and C2, in toto, it is found that the commissioner had measured the plots allotted to the plaintiff and the defendant and found the construction put up by the plaintiff in his plot and in particular, the portico portion put up by him, in all, it is stated that the plaintiff's plot / construction runs to an extent of 30 feet 9 inches on the western side. Further it is stated that the defendant's plot / the construction put up by the defendant measures 40 feet 3 inches.

13. On the basis of the commissioner's report and plan, it is evident that the plaintiff has put up the construction beyond his limits and when according to the plaintiff, he has been allotted only the plot measuring 30 feet x 60 feet and when further according to the plaintiff, his plot measures both on the western side and on the eastern side only 30 feet north to south, it does not stand to reason as to how could the construction put up by the plaintiff extend to a length of 30 feet 9 inches as depicted in the commissioner's report and plan. Obviously, it is found that beyond the limits allotted to him, the plaintiff has put up the construction to an extent of 9 inches. Further, when it is seen that the defendant has been allotted the plot measuring 41 feet north to south on the western side and when as per the commissioner's report and plan, it is found that the defendant's plot measures only 40 feet 3 inches on the western side and when the same is considered, both the plaintiff's plot and the defendant's plot together measures north to south on the western side 71 feet. In such view of the matter, when the plaintiff is entitled to only 30 feet north to south on the western side and on the other hand when he is found to have put up the construction to an extent of 30 feet 9 inches and in particular, the portico portion put up by him has been raised beyond his limits extending into the plot of the defendant, as rightly determined by the courts below, it is found that it is only the plaintiff who had committed the encroachment into the defendant's plot and put up the additional construction, namely, the portico and in such view of the matter, the plaintiff cannot be allowed to complain that the

defendant had rested his first floor construction upon the portico wall and also on the cement jades erected on the portico and thereby the defendant is liable to remove the same, and the abovesaid case cannot, at all, be countenanced and the same is found to have been rightly disbelieved and rejected by the courts below.

14. Similarly, the case projected by the plaintiff that the defendant had put up the wall intruding into his property to an extent of 1 foot from the eastern edge of the portico to an extent of 20 feet east to west also cannot be accepted when it is found that the north-south measurement of the plaintiff's plot, on ground, measures 30 feet 9 inches on the western side and 30 feet north to south on the eastern side. As rightly found by the courts below, if the abovesaid case of the plaintiff is to be accepted, it is found that the plaintiff's plot would be measuring only 29 feet north to south both on the eastern side and on the western side. On the other hand, it is seen that the plaintiff's plot measures 30 feet north to south on the eastern side and 30 feet 9 inches north to south on the western side. Therefore, it is seen that the alleged encroachment pleaded by the plaintiff, as regards the raising of the wall, on the part of the defendant to an extent of 1 foot into his property has no basis and accordingly, it is found that the plaintiff is unable to place any acceptable material pointing to the same.

15. As rightly found and determined by the courts below, the commissioner's report and plan marked in the proceedings clearly belies the plaintiff's case and when the plaintiff is found to be the troubleshooter and found to have erected the construction exceeding his limits by intruding into the defendant's property one way or the other, the plaintiff cannot be allowed to complain that it is only the defendant who had encroached into his property as put forth by him. Accordingly, it is found that all along the defendant had been repudiating the case of the plaintiff by contending that it is only the plaintiff who had encroached into his property while putting up the additional construction and in such view of the matter, the case projected by the plaintiff that the defendant has admitted his encroachment in the reply notice marked as Ex.A8, as such, cannot be readily accepted.

16. Considering the encroachment made by the plaintiff into the defendant's property, while raising the additional construction, namely, the portico portion, it is found that the defendant has been inhibited in putting up the additional construction in his property and accordingly it is found that

the first floor construction had been put up by the defendant in such a manner as resting upon the portico wall put up by the plaintiff. When the portico wall put up by the plaintiff is, itself, found to be raised by intruding into the defendant's property, the plaintiff cannot complain that it is only the defendant who had trespassed into his property and put up the first floor construction.

17. The relief of injunction is an equitable remedy. The person who seeks the relief of injunction, being an equitable remedy, such person must come before the court with clean hands. He must show equity and he must show his entitlement under the equity to the relief he has sought. Fairness and good faith are the two important things required for obtaining the equitable relief. If the person who seeks the same by his conduct qua the person against whom the relief is sought has acted in an unfair or inequitable manner, he would not be entitled to the injunction. Applying the abovesaid position of law to the present case, when it is seen that the plaintiff has not put up the construction raised by him within his plot and on the other hand, the plaintiff is found to have encroached into the defendant's plot by putting up the additional construction i.e., the portico and the plaintiff has miserably failed to establish that the defendant has put up the wall by encroaching into his portion of an extent of 20 feet and 1 foot as claimed in the plaint and as on ground, the plaintiff's plot measures 30 feet north to south on the eastern side and 30 feet and 9 inches north to south on the western side, if the abovesaid encroachment of 20 feet x 1 feet has any semblance of truth as found by the courts below, the plaintiff's plot would be measuring only 29 feet north to south on both the sides, in such view of the matter, the abovesaid plea also is found to be a false one. In all, it is only the plaintiff, who is the offending party and not the defendant and the plaintiff is found to have suppressed the intrusion made by him into the defendant's plot and come forward with the present suit falsely alleging that it is the defendant who had encroached into his property. On the other hand, on ground, as could be seen from the commissioner's report and plan, it is only the plaintiff who is the encroacher and not the defendant. In such view of the matter, the courts below are fully justified in not extending the equitable relief of permanent and mandatory injunction prayed for by the plaintiff against the defendant.

18. The courts below having determined the issues involved between the parties abovesaid by appreciating the materials available on record and the same centers on factual matrix and

not involving any question of law as such and when the courts below are found to have determined the abovesaid issues by analyzing the materials placed on record by giving the cogent reasonings and conclusions and when the reasonings and the conclusions of the courts below are not shown to be suffering from perversity or not shown to be illogical or irrational in any manner, in all, the courts below had rightly refused the grant of the reliefs prayed for by the plaintiff and in such view of the matter, no interference is warranted with reference to the same in any manner.

19. The plaintiff's counsel during the course of arguments, would also put forth the plea that the defendant should be directed to remove the construction put by him on the principles of acquiescence and estoppel. However, I fail to understand as to how the abovesaid ground could be raised by the plaintiff during the course of arguments, particularly, all along, the plaintiff has been pleading that it is only the defendant who is the intruder and the plaintiff had put up the construction within his limits. However, on factual matrix when it is seen that the position is otherwise i.e the plaintiff is found to be the intruder and had put up the additional construction beyond his limit and in the defendant's area and thereby hindered the defendant in putting up his construction and when no plea of acquiescence and estoppel had been raised by the plaintiff in the plaint, also sans any evidence pointing to the same, in such view of the matter, the abovesaid argument projected, as such, cannot be accepted.

20. The argument has also been put forth that the measurement of the plots of the parties should be determined by measuring the space between the respective septic tank available in the plots. However, when there is no material placed on record to hold that the measurement should be determined from the septic tanks available in each plot and on the other hand, on ground, it is seen that taking advantage of the absence of the compound wall between the two plots, the plaintiff had put up the additional construction extending the same into the defendant's plot, thereafter, had come forward with the present suit as if it is only the defendant who had encroached into his plot and put up the construction, etc., the position being otherwise, as abovenoted, it is found that the relief of injunction prayed for by the plaintiff cannot be granted.

21. For the reasons aforestated, the substantial question of law formulated in this second appeal is accordingly answered against the plaintiff and in favour of the defendant.

22. In conclusion, the second appeal fails and is accordingly dismissed with costs. Connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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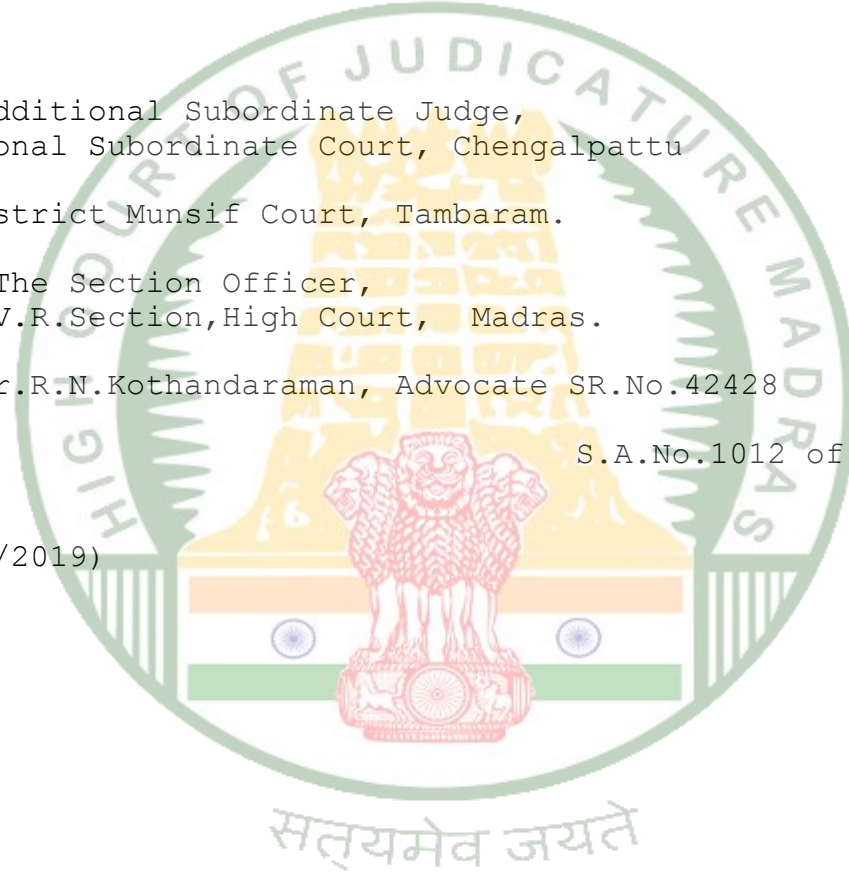
1. The Additional Subordinate Judge,
Additional Subordinate Court, Chengalpattu
2. The District Munsif Court, Tambaram.

Copy To :The Section Officer,
V.R.Section,High Court, Madras.

+1cc to Mr.R.N.Kothandaraman, Advocate SR.No.42428

S.A.No.1012 of 2005

GJ(CO)
GMY(18/10/2019)



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