

Reserved on :25.03.2019

Pronounced on:1.04.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.671 of 2011 &
M.P.No.1 of 2011

N.Shanmugam

... Appellant/Plaintiff

Vs

1. Padma

2. Varalakshmi Respondents/Defendants 2 & 3

Prayer :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree passed in A.S.No.10 of 2006 dated 24.01.2011 on the file of the Additional District Court, FTC-2, Ranipet reversing the judgment passed in O.S.No.2 of 1992 dated 21.04.2004 on the file of the District Munsif Court, Sholingur.

For Appellant : Mr.K.Venkatesan
for Mr.M.P.Jayaprakash

For Respondents: Mr.S.Rajesh for
Mr.S.Sivanandan

JUDGMENT

Aggrieved over the finding of the first appellate Court in decreeing the suit filed for declaration, mandatory injunction and delivery of possession, this Second Appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The plaintiff property is shown as ABCD in the plaint plan. The suit property originally belonged to one Dharani Ammal. The plaintiff's father has purchased the same. After the death of his father, the portion shown as ABCD is allotted to the plaintiff in a family arrangement. The portion shown as EHBA was purchased by one Sanjeevi and from him, the first defendant has purchased the same. The remaining portion on the

western side mentioned as FHBG was sold to one Doraiswami, from the said Doraisamy the second and third defendants are claiming right. The defendants have right on the northern side of ABCD portion. They have no right on the southern side. On 10.12.1991, the defendants had encroached upon ABKJ portion in the plaint plan and put up a compound wall. The above portion has been shown as 'B' schedule property. Hence, the suit for declaration, mandatory injunction and for recovery of possession and also for permanent injunction.

4. The first defendant filed written statement denying the contention of the plaintiff and they never encroached over the suit property. Originally in Survey No.672/2, east to west 16 ft., north to south 60 ft was owned by one Dharaniammal and she has sold the same to one Tamilselvi on 31.03.1983. From the said Tamilselvi, the first defendant has purchased the above property. After the purchase, she has constructed a house, bathroom and latrine within the boundaries. The eastern portion of the property measuring 44ft east to west and 60 ft. north to south sold to one Sanjeevi Chetty and his wife Vijayammal and they in turn have sold the above property to one Doraisamy Mudaliar. Doraiswamyi Mudaliar had put up terraced shops and put up a compound wall. The defendants 2 and 3 are legal heirs of the said Doraisamy Mudaliar. The suit property was originally purchased by the purchaser in title and thereafter, the defendants have purchased the above property.

5. In the additional written statement, the first defendant has contended that he has put up construction after obtaining permission from the Town Panchayat. The defendants never encroached upon the portion of the suit property. Hence, the plaintiff is not entitled for recovery of possession or mandatory injunction.

6. In the reply statement, it is contended that the drainage was put up by Sholingur Town Panchayat and the said drainage lies in the site of the plaintiff's shop.

7. The trial Court framed the following issues for determination in the suit :

1. Whether the suit property belong to the plaintiff?
2. Whether it is true that the defendants have encroached upon the suit property?

3. Whether the plaintiff is entitled for mandatory injunction as prayed for?

4. Whether it is true that the defendants have put up construction in their property?

5. To what relief the plaintiff is entitled?

8. On the side of the plaintiff, P.W.1 has been examined and Ex.A.1 has been marked. On the side of the Defendants D.W.1 to D.W.3 have been examined and Ex.B.1 to Ex.B.10 marked. C.W.1 has been examined and Ex.X.1 and Ex.X.2 has been marked.

9. During the trial, the relief as against the first defendant has been given up by the plaintiff. The suit has been decreed as against the second and third defendants. The trial Court has held that the defendants 2 and 3 have encroached upon the property of the plaintiff and decreed the suit. As against which, an appeal has been filed by the second and third defendants before the first appellate Court. The first appellate Court allowed the appeal and directed the defendants 2 and 3 to pay a compensation of Rs.50,000/- for 165 sq.ft. mentioned as BGCK as encroached portion and held that the plaintiff is guilty of acquiescence. Therefore, he is entitled only to compensation and ordered the defendants to pay a compensation of Rs.50,000/- with interest at the rate of 12% per annum from March 2001 to 2011. As against which the present second appeal has been filed.

10. The following substantial questions of law have been formulated in this Second Appeal :

1. Whether the compensation awarded by the first appellate Court on the ground of acquiescence is correct in the absence of any pleading and evidence about acquiescence?

2. Whether the plaintiff is not entitled to the relief of mandatory injunction as incidental claim of declaration and possession?

11. The learned counsel appearing for the appellant submitted that the defendants have taken a stand that they never encroached upon the suit property and the Commissioner's Report clearly prove that the suit property has been encroached by the defendants 2 and 3. The first defendant has already handed over the encroached portion to the plaintiff. Whereas, the defendant 2 and 3 have encroached the property and put up compound wall

which has been clearly established before the trial Court. The Courts below having found that the defendants 2 and 3 have encroached a portion of the suit property, the first appellate Court is wrong in applying the principle of acquiescence in the absence of any evidence. It is the specific contention of the plaintiff that the suit property has been encroached on 10.12.1991 and the suit has been filed in the year 1992, immediately after such encroachment. Therefore, the question of acquiescence does not arise at all. Hence, submitted that the judgment of the first appellate Court awarding compensation of Rs.50,000/- is not according to law.

12. Whereas, it is the contention of the learned counsel for the respondents that the defendants 2 and 3's father Doraisamy Mudaliar purchased the property in the year 1987. After the purchase, he had constructed terrace shops on the north and also annexed the remaining portion by raising compound wall within the limits of his property and enjoying the same till his death. Therefore, the defendants 2 and 3 did not trespass upon the suit property as contended by the plaintiff. The cause of action alleged is false. Further, it is the contention of the learned counsel that the husband of the second defendant namely Doraisamy Mudaliar has put up construction in his property from the year 1990 onwards. The plaintiff is having acquiesced at the time of raising the compound wall and he has not raised any objection. The suit has been filed after three years of constructing the compound wall. Further, it is the contention of the learned counsel that the evidence of D.W.1 clearly indicate that the compound wall was constructed with the knowledge of plaintiff and his father and they never objected at any point of time. When they have not objected when the third defendant's father put up construction, now they cannot ask for recovery of possession or mandatory injunction. He is entitled to compensation only. The first appellate Court is right in applying the principle of acquiescence and granted compensation. In support of his contentions, he had relied upon the judgment in R.S.Muthuswami Gounder Vs. A.Annamalai and others reported in 1981 (1) MLJ 258.

13. The suit has been laid for declaration of 'B' schedule property and also for delivery of possession of the property, for mandatory injunction directing the defendants to remove the super structure raised in the suit property. It is the contention of the plaintiff that the father of the plaintiff has purchased the suit property in the year 1983 and he was in possession of the same. His father has died few years ago leaving behind the plaintiff and his brother as his legal heirs and in a family arrangement, the property shown as ABCD was

allotted to the plaintiff. According to the plaintiff, portion shown as EFGA in the plan was sold to one Sanjeevi and the said Sanjeevi in turn sold the same to the first defendant and the remaining portion shown as FHBG was sold to one Doraisamy Mudaliar from whom the defendants 2 and 3 claim right over the said portion of the site. According to the plaintiff, the defendants have no right in the south of the AB line. On 10.12.1991, the defendants high handedly trespassed into a portion of the plaintiff's site shown as ABKJ and laid foundation upto the basement level, thereby clubbing the said ABKJ portion which is shown as 'B' schedule property in the plaint.

14. The main contention of the plaintiff is that the defendants have put up construction on 10.12.1991 to annex ABKJ portion by raising a compound wall. The trial Court and the first appellate Court found that the compound wall put up by the defendants is to an extent of 165 sq.ft. The trial Court and the first appellate Court has found that the above portion lies within the site purchased by the plaintiff's father. The above finding has been arrived by the trial Court and the first appellate Court based on the evidence and Commissioner's Report. In view of the factual evidence of the Courts below and as there is no challenge over such encroachment by the respondents herein, this Court need not dwell upon the above facts.

15. The first appellate Court, having found that an extent of 165 sq.ft. lies within the site of the plaintiff, has come to the conclusion that the plaintiff is acquiesced the construction and has not made any objection at the time of construction and the construction has been put up more than 2 ½ years earlier to the filing of the suit and awarded compensation at the rate of Rs.300/- per sq.ft., though the market value is Rs.250/- per sq.ft. and awarded compensation of Rs.50,000/-. Now the contention of the learned counsel for the appellant is that the first appellate Court had inferred acquiescence without any pleadings and evidence with regard to acquiescence.

16. In the plaint, it is the specific contention of the plaintiff that the defendants have put construction on 10.12.1991 by trespassing into the property. Though, the relief is sought against all the defendants, the relief as against the first defendant was given up in the trial Court itself. Whereas, the defendants 2 to 3 have denied their encroachment. According to them, their predecessors in title have put up construction and they have not made encroachment and particularly defendants 2 and 3 claim title through Doraisami,

husband of the second defendant and father of the third defendant. According to them, the said Doraisamy Mudaliar has raised a compound wall within his boundary long back, prior to the suit. Further, he has also filed additional written statement that construction was completed two years back in the year 1990 itself. The plaintiff has acquiesced construction and they never made any objection at the relevant point of time. They were silent spectators without raising any objection for the construction. Further, both the properties are adjacent properties is not in dispute.

17. In the light of the specific pleadings of the parties, now it is to be analysed whether the defendants have put up construction only on 10.12.1991 as alleged by the plaintiff. Ex.B.4 and Ex.B.5 plan shows that the defendants purchasers in title, namely Doraisamy Mudaliar has obtained permission to construct the shop and has constructed shop as per the plan and the plan is dated 25.09.1989. Ex.B.6 to Ex.B.9 relates to the year 1990. The above documents probabilize the defendants case that the building was constructed in the year 1989 and they were paying taxes. The dispute is with regard to the construction of the compound wall.

18. It is to be noted that it is the case of the plaintiff that the defendants have put up foundation and annexed ABKJ portion. The above pleadings itself clearly probabilize the case of the defendant that the compound wall and the foundation was put up at the time of construction as per Ex.B.4 and Ex.B.5. This fact is further fortified by the own admission of the plaintiff in his evidence. P.W.1 evidence in entirety read the same clearly indicate that he has shown ignorance as to when the compound wall was constructed by Doraisamy Mudaliar. He has categorically admitted in the cross examination that the compound wall was put up only by the said Doraisamy Mudaliar, husband of the second defendant and father of the third defendant. Similarly he has also stated that he did not know that the said Doraisamy Mudaliar has put up shops and collecting rents. Further he has also admitted that while putting up compound wall, his father was very much present, he did not know whether taxes were paid by Doraisamy Mudaliar. He has further admitted that he and his father never objected for such construction. His evidence further goes to show that at the time of construction of the compound wall he was residing in some other village, 3 km away from the suit property. The above admitted facts makes it very clear that his father was also very much present at the time of construction of the compound wall and the plaintiff has not made any objection. Further, his entire evidence also shows that he does not know when Doraisamy

Mudaliar has put up construction. All these facts clearly probabalize the defence theory that the construction of compound wall was over when the said Dorasamy Mudaliar constructed the house property and shops.

19. In this regard it is relevant to refer to the judgment of the Honourable Division Bench in Associated Cement Companies Ltd. Vs. Ramakrishna Gounder reported in ILR 1965 (1) Madras 237 wherein the Honourable Division Bench has held that when the plaintiff had permitted the defendant to complete his construction it was evidential that they are acquiescence in the act of the defendant and held that instead of delivery of possession, the defendants would be compensated in money. Following the above judgment, this Court in a judgment in R.S.Muthuswami Gounder Vs. A.Annamalai and others reported in 1981 (1) MLJ 258 has held as follows :

"16... It will be clear from what we have stated above, that although an owner of property will have undoubted right to recover possession of it from a trespasser albeit that the latter had put up a construction upon it, an exception does exist to such a rule when the owner is precluded by any conduct on his part from claiming possession. That is not really denying the owner his right to recover possession from the trespasser; but a rule of estoppel which prevents the owner from claiming the property to be his so far as the other side is concerned.

In the case which came up for consideration before me, the respondent-plaintiff had not done anything when the appellant-defendant was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property and it was found that the appellant-defendant could not have done those things in a hurry and they must have taken several months for the appellant to complete the things which he had done on the property. The plaintiff-respondent had not disclosed those things in the plaint and had not prayed for a mandatory injunction for the removal of the structures put up by the defendant on the trespassed portion of the property. In those circumstances I held that the Court would be justified in inferring acquiescence on the part of the respondent and considered that it was not a case for directing delivery of possession of the trespassed portion but it was a case where the respondent-

plaintiff had to be compensated in money for the value of the trespassed portion, and I called for a finding from the lower appellate Court as regards the market value of the trespassed portion. I am bound by the decision of the Division Bench of this Court rendered in the aforesaid *The Associated Cement Companies. Limited v. L. S. Ramakrishna Gowder.* and following that decision and my own view expressed in *S. Palanivelu v. K. Veradammal.* I hold that the plaintiff, who resides about a mile away from the suit property, would have come to know about the defendant putting up constructions on a major portion of the suit property if he had cared to find out and since he has not done so and kept quiet until the first defendant had completed his constructions which have been valued by the Commissioner at Rs. 15,000 and had sent the notice only about 7 or 8 months later after January, 1972, asserting his right to the suit property, I am of the opinion that the principle of acquiescence has to be made applicable to the facts of the present case and that the plaintiff has to be given only a decree for compensation in respect of the property, namely the market value of the suit property in lieu of the relief of recovery of vacant possession of the property. For want of evidence, a finding has to be called for from the lower appellate Court regarding the market value of the suit property as on the date of the suit. The lower appellate Court will submit its finding within two months from the date of receipt of the records. The parties are at liberty to adduce fresh evidence regarding the market value of the suit property. They will have two weeks' time to file their objections after the finding is received in this Court."

20. Considering the above judgment and particularly the conduct of the plaintiff in not objecting the construction at the earlier point of time while the compound wall was annexed with the property of Doraisamy Mudaliar and further he has failed to establish the alleged encroachment on the date pleaded in the plaint, his conduct is nothing but acquiescing act of Doraisamy Mudaliar raising the compound wall. Accordingly, the substantial questions of law are answered against the appellant.

21. The first appellate Court has fixed the market rate at the rate of Rs.300/- per sq.ft. and fixed compensation with interest at the rate of 12% per annum. This Court, considering the escalation of price, is of the view that the defendants have

some how or other have annexed 165 sq.ft. of land belonging to the plaintiff and the plaintiff has to be compensated properly.

22. Accordingly, in the interest of justice, the Second Appeal is partly allowed and the judgment of the first appellate Court modified and this Court enhances the compensation from 50,000/- to Rs.1,00,000/-, considering the escalation of price in land value direct the respondents to pay the above amount with interest at the rate of 9% per annum from 01.03.2011 till the date of payment. The respondent shall pay such amount within a period of three months. In event of the appellant refusing to receive the amount, such amount shall be deposited with interest to the credit of the suit before the trial Court. Failure to pay the amount within such time, the judgment of the trial Court will be restored. No cost.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Judge,
FTC-2, Ranipet.
2. The District Munsif,
Sholingur.

+1cc to Mr.M.P.Jayaprakash, Advocate Sr.32051

Second Appeal No.671 of 2011

gj II[col]
srg 29/05/2019