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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.04.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.NO.85 OF 2013

AND

M.P.NO.1 OF 2013

1.K.Narayanan

2.Settu

... Appellants/Defendants

Vs.

1. A.Amsa Ammal

2. Chitra

3. Seenu

4. Ravichandran

5. Durairaj

... Respondents/plaintiffs

PRAYER :

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 08.11.2012 made in A.S.No.54 of 2010 on the file of the Subordinate Judge, Tiruvannamalai reversing the judgment and decree dated 24.09.2010 made in O.S.No.813 of 2004 on the file of the Principal District Munsif, Tiruvannamalai.

For Appellants : Mr.S.Parthasarathy,
Senior Advocate
for M/s.J. Ramakrishnan

For Respondents : R1 to R5 set exparte.
Vide order dated 11.03.2019

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree passed by the Principal Sub-Judge, Tiruvannamalai in A.S.No.54 of 2010 dated 08.11.2012 reversing the judgment and decree passed by the Principal District Munsif, Tiruvannamalai in O.S.No.813 of 2004 dated 24.09.2010.

2. The respondents herein had filed a suit in O.S.No.813 of 2004 on the file of the Principal District Munsif,



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Tiruvannamalai to declare their title over the suit property; to direct the defendants to remove the constructions made by them in the suit property by way of mandatory injunction and to deliver vacant possession of the suit property. The learned Principal District Munsif, Tiruvannamalai by the judgment dated 24.09.2010 had dismissed the said suit without costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.54 of 2010 on the file of the Principal Sub-Judge, Tiruvannamalai. The learned Principal Sub-Judge, Tiruvannamalai by the judgment dated 08.11.2012 had allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit directing the defendants to remove the constructions made by them in the suit property and deliver vacant possession within three months. Feeling aggrieved, the defendants have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the amended plaint are, in brief, as follows:

a) The suit property originally belonged to one Muthuswamy Nainar as per the registered partition deed dated 21.06.1968. The said Muthuswamy Nainar had sold the suit property and also the property lying on the western side of the suit property to one Arumugam Nainar under a registered sale deed dated 27.12.1972 for valuable consideration of Rs.13,500/- and delivered possession to him. The said Arumuga Nainar had been in possession and enjoyment of the said properties from the date of purchase and he died intestate on 11.07.1995 leaving behind the plaintiffs as his legal heirs. The first plaintiff is the wife, the second plaintiff is the daughter and the plaintiffs 3 to 5 are the sons of the said Arumuga Nainar. After the death of the said Arumuga Nainar, the plaintiffs have been in possession and enjoyment of the properties which were purchased by the said Arumuga Nainar under the sale deed dated 27.12.1972 including the suit properties. The said Arumuga Nainar employed in Tamilnadu Explosive Department, Vellore and after his death, the plaintiffs moved to Katpadi as the third plaintiff has been given job on compassionate ground in the said Explosive Department.

b) The property lying to the east of the suit property originally belonged to one Rukmani Ammal who is the mother of the said Muthuswamy Nainar (vendor) of Arumuga Nainar. The said Muthuswamy Nainar, claiming himself to be a legatee under the Will dated 27.01.1993 said to have been executed by his mother Rukmani Ammal, created a fictitious sale deed in favour of the defendants dated 22.10.1998. The defendants without even



ascertaining as to whether any such property is available, had purchased the same and trespassed into the suit property in the month of January, 2004 taking advantage of the absence of the plaintiffs. The plaintiffs came to know about the trespass only on 02.03.2004, when the fourth plaintiff visited the suit property. The fourth plaintiff was shocked to see that the first defendant had trespassed into the suit property and made unauthorised constructions and therefore the fourth plaintiff applied for a registration copy of the sale deed executed in favour of the first defendant and shocked to note that the wrong extent and boundaries recited in the said sale deed. In fact, the western boundary has been wrongly given in the said sale deed and there is no lane as mentioned in the said sale deed.

c) The suit property and the remaining extent lying to the west of the suit property together shown as Item No.2 purchased by Arumuga Nainar under the registered sale deed dated 27.12.1972 and the same has been sub- divided as S.No.62/2 immediately after his purchase and it stands muted in the name of Arumuga Nainar. There is no well or common passage as mentioned in the sale deed dated 22.10.1998. The fourth plaintiff appraising the first defendant of the above facts requested him to deliver the possession of the suit property after removing the constructions for which the first defendant gave an evasive reply. Hence the fourth plaintiff for himself and on behalf of the other plaintiffs caused a notice to the first defendant on 12.04.2004 calling upon him to surrender possession of the suit property. Though the first defendant had received the said notice, he neither sent any reply nor complied with the demands made in the notice. Hence, the plaintiffs were constrained to file the above suit for declaration of their title, for mandatory injunction to remove the constructions made by the first defendant and for delivery of the suit property. Subsequently, the second defendant was impleaded as a party.

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

a) The allegations that the suit property originally belonged to Muthuswamy Nainar and he sold the same to Arumugam Nainar under a registered sale deed dated 27.12.1972, are all false. The property comprised in T.S.No.62 in Chellanary street, Tiruvannamalai, measuring East-West 42 ft and North-South 36ft totally 1512 sq.ft (a vacant site) absolutely belonged to one Rukmani Ammal. The said Rukmani Ammal bequeathed the said property under a registered Will dated 27.01.1993 in favour of her son Muthuswamy Nainar. After the death of the said Rukmani Ammal, her son Muthuswamy Nainar succeeded to the said property and sold a vacant site measuring East-West 22 ft and North-South 36 ft to one Settu under a registered sale deed dated



14.10.1998. The said portion has been marked as 'BCIH' in the rough sketch filed along with the written statement. Subsequently, the said Muthuswamy Nainar sold the adjacent property by a registered sale deed dated 22.10.1998 situated on the western side of Settu's property measuring East-West 20 ft North-South 35 ft which is described as 'ABGH' in the sketch enclosed with the written statement. Subsequently, after purchase, there was some difficulty in enjoying the said properties and hence the said Settu and the first defendant had exchanged their properties under the registered exchange dated 13.08.1999 and in the said exchange, the first defendant got 'BCEF' portion and the said Settu got 'DEGH' portion as shown in the rough sketch enclosed in the written statement.

b) After the exchange, the first defendant entitled to 'ACDF' portion while Settu entitled to 'DFGI' portion as mentioned in the said rough sketch. The municipal authorities, sub-divided the properties and the first defendant property comes in T.S.No.62/1A2 measuring East-West 42ft and North-South 18 ft totalling 752 sq.ft. Therefore, the allegations that the first defendant created the sale deed on 22.10.1998 with the false recitals that there is no property in existence answering the description of property and based on the said documents, the first defendant trespassed into the suit property in January, 2004 by taking advantage of the absence of the plaintiffs, are all false. On the contrary, the plaintiffs conveniently suppressed the registered deed of exchange dated 13.08.1999. Under the sale deed dated 27.12.1972, Arumuga Nainar purchased the property comprised in T.S.No.83 measuring East-West 82 ft and North-South 23 ft and the said property has nothing to do with the properties which were purchased by the first defendant and his cousin brother Settu. They are situated in different T.S.Numbers. In such circumstances, it is futile to contend that boundary recitals in the sale deed of the first defendant are all false. On the contrary, the boundary recitals in the plaintiffs' predecessor's sale deed should have been false and misleading in any event. The plaintiffs would pretend that they do not know how Settu is involved. In fact, Settu has constructed a building in his property and the first defendant is keeping his property vacant. The defendant did not issue any reply to the lawyer's notice issued by the fourth defendant, since it does not deserve any reply. Having purchased a property in T.S.No.83, the plaintiffs cannot set up any claim over T.S.62. Therefore, the first defendant prayed to dismiss the suit.

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

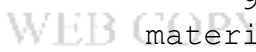


It is false to allege that while drafting the plaint, in the schedule property, while mentioning the southern boundary, instead of mentioning the S.Nos.84/1 and 91, by mistake, the plaintiffs have mentioned it as S.Nos.89/1 and 95, that the mistake had crept in due to inadvertence and the same deserves to be rectified by way of amending the plaint. The petitioners cannot introduce a new case by way of amending the plaint which is not warranted under law. Therefore, the first defendant prayed to dismiss the suit.

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

It is false to state that the suit property and the property situated on the west of the suit property originally belonged to Muthuswamy Nainar and the said Muthuswamy Nainar had sold the said properties to Arumuga Nainar on 27.12.1972. Originally, the property comprised in T.S.No.62 in Chellanari street, Tirvannamalai, measuring East-West 42 ft and North-South 36 ft totalling 1512 sq.ft absolutely belonged to Rukmani Ammal. The said Rukmani Ammal under a registered Will dated 27.01.1993 bequeathed the said property in favour of her son Muthuswamy Nainar and after her death, the Will came into force and that the said Muthuswamy Nainar succeeded to the property. The said Muthuswamy Nainar sold East-West 26ft and North-South 36 ft under a registered sale deed dated 14.10.1998 in favour of the second defendant and subsequently, the said Muthuswamy Nainar sold the adjoining property on the western side measuring East-West 20 ft and North-South 36 ft under a registered sale deed dated 22.10.1998 to the first defendant. Thereafter, the exchange deed dated 13.08.1999 has been executed between the defendants and the properties were exchanged as mentioned in the rough sketch filed along with the written statement. As per the sub- division, the second defendant's property comes under T.S.No.62/1A3 measuring East-West 42 ft and North-South 18 ft totaling 756 sq.ft. The patta also stands in his name. The allegation that the sale deed dated 22.10.1998 was brought forth with the false recitals and there is no property in existence answering the description of property in the sale deed dated 22.10.1998 are all false. In fact, the said Arumuga Nainar purchased the property in T.S.No.83 whereas the defendants purchased the property in T.S.No.62. Therefore, the second defendant prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial on the side of the plaintiffs, the fifth plaintiff was examined as PW1 and two more witnesses were examined as P.Ws.2 and 3 and they had marked Exs.A1 to A7 as exhibits. On the side of the defendants, the defendants 1 and 2 examined themselves as

[illegible]

4. When there is ambiguity in respect of extent in the title deeds whether the judgment and decree of the learned Appellate Judge is sustainable since it has failed to apply the principles namely "boundary will prevail over



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extent?

5. When the boundary description in the suit schedule as framed is not clear and vague, whether in law the judgment and decree of the learned Appellate Judge in decreeing the suit is sustainable for want of substantial compliance of Order 7 Rule 3 of CPC?

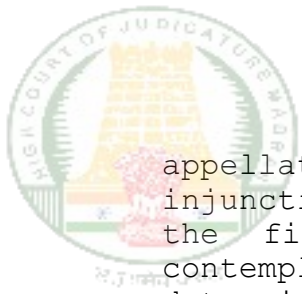
6. When the material evidence of Exs.B1 to Ex.B9 and Ex.C4 and Ex.C5 including the oral evidence of D.W.3 are ignored and also misconstrued by the learned Appellate Judge, whether in law the judgment and decree of the learned Appellate Court is not perverse?

7. Having regard to the facts and circumstances of the present case whether in law the reliefs sought for by the plaintiffs more particularly the prayer for mandatory injunction is not barred by limitation and as such the judgment and decree of the learned Appellate Judge is sustainable?"

11. When the second appeal was posted for arguments, the learned counsel for the respondents reported no instructions and hence the respondents/plaintiffs were called absent and set exparte. Hence, after hearing the arguments of the learned counsel for the appellants/defendants and perusing the records, the judgment is being passed in the second appeal.

12. Substantial questions of law 1 to 7:

The learned senior counsel for the appellants has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that the first appellate court failed to see that the plaintiffs failed to prove that the original owner Muthuswamy Nainar had got right over the entire properties which were sold under Ex.A2 dated 27.12.1972. He further submitted that the first appellate court failed to see that the properties purchased by Arumuga Nainar under Ex.A2 sale deed and the properties purchased by the defendants are totally different properties. He further submitted that the plaintiffs have not given correct description of property with a view to identify their property as contemplated under Order 7 Rule 3 CPC. He further submitted that the first appellate court failed to apply the principle that "boundary will prevail over extent". He further submitted that the first appellate court failed to appreciate the evidence in a proper perspective. He further submitted that the first



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appellate court failed to see that the suit for mandatory injunction is barred by limitation. He further submitted that the first appellate court did not follow the procedures contemplated under Order 41 Rule 31 CPC r/w Section 96 CPC to determine the entire point for consideration arising in the present case. He further submitted that the first appellate court completely lost sight of the vital fact that DW3 categorically deposed that though he was allotted a larger extent, it was not actually available. He further submitted that the first appellate court failed to see that under Ex.A1 partition deed, after allotting the share to Rukmani Ammal, only the remaining property was allotted to Muthuswamy Nainar (DW3) and hence he can sold only the property which was allotted to him. He further submitted that the first appellate court failed to consider the Advocate Commissioner's report and plan and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

13. In support of the aforesaid contentions, the learned senior counsel relied upon the decision in Roohnisha Beevi and 15 others Vs. A.M.M.Mahudu Mohamed and 29 others 1998-1- LW. 244.

14. It is an admitted fact that the first plaintiff is the wife and the plaintiffs 2 to 5 are the daughters and sons of one Arumuga Nainar. According to the plaintiffs, the suit property and the property which is lying just west to the suit property were purchased by the said Arumuga Nainar under a registered sale deed dated 27.12.1972 from one Muthuswamy Nainar. Their further case is that the said Muthuswamy Nainar got the said properties under a registered partition deed dated 21.06.1968(Ex.A1).

15. The case of the defendants is that they also purchased their properties from the same Muthuswamy Nainar. Their further case is that under the aforesaid partition deed dated 21.06.1968, the property comprised in T.S.No.62 measuring East-West 42 ft and North-South 36 ft totally 1512 sq.ft was allotted to Muthuswamy Nainar's, mother Rukmani Ammal. Their further case is that the said Rukmani Ammal bequeathed the said property through a Will dated 27.01.1993 to her son Muthuswamy Nainar and after her death, the said Muthuswamy Nainar succeeded to the said property and sold the said properties to the defendants under two different sale deeds dated 14.10.1998 and 22.10.1998 respectively. Their further case is that the said Muthuswamy Nainar while examining himself as DW3 has categorically deposed that even though a larger extent was mentioned in Ex.A1 partition deed, towards his share in



T.S.No.62/2, actually no such an extent is available. Their further case is that under Ex.A1, Rukmani Ammal's share was allotted first, the said Muthuswamy Nainar had taken only the remaining land and hence only a lesser extent was available with him.

16. So, it is clear that the plaintiffs and the defendants claimed their right only through Muthuswamy Nainar. A perusal of Ex.A1 would show that in T.S.No.62, out of total extent of 9553 sq.ft, Rukmani Ammal was allotted 'A' schedule property i.e. in T.S.No.62 measuring East-West 42 ft and North-South 32 ft totally of 1512 sq.ft with specific boundaries. Muthuswamy Nainar was allotted 'C' schedule property. In 'C' schedule, two items were mentioned; One is in T.S.No.83 out of 3769 sq.ft, 1886 sq.ft was allotted; another item is in T.S.No.62, out of 9553 sq.ft, East-West 89 $\frac{3}{4}$ ft and North-South 21 ft totally 1884 $\frac{1}{2}$ sq.ft. The said Muthuswamy Nainar sold both the items to Arumuga Nainar under Ex.A2 sale deed dated 27.12.1972. Subsequently, the mother of the said Muthuswamy Nainar viz., Rukmani Ammal under a registered Will dated 27.01.1993 (Ex.B1) bequeathed the property which was got by her under Ex.A1 partition deed, in favour of the said Muthuswamy Nainar and thereafter, she died. It is to be pointed out that under Ex.A2, in T.S.No.62, the said Muthuswamy Nainar had sold 1884 $\frac{1}{2}$ sq.ft to Arumuga Nainar on 27.12.1972 itself and therefore, it has to be presumed that on that date itself, the said Muthuswamy Nainar had handed over the possession of the extent of 1884 $\frac{1}{2}$ sq.ft in T.S.No.62/. Only thereafter in the year 1993, the said Rukmani Ammal had executed Ex.B1 Will in favour of Muthuswamy Nainar. In such a case, only the remaining property if any available alone could have been bequeathed by the said Rukmani Ammal in favour of Muthuswamy Nainar.

17. Even assuming that at the time of executing Ex.A2 sale deed, the said Muthuswamy Nainar had title only to the lesser extent than what has been mentioned in Exs.A1 and A2, since subsequently he got the property under Ex.B1 Will from her mother, by virtue of Section 43 of the Transfer of Property Act, the purchaser under Ex.A2 sale deed viz., Arumuga Nainar is entitled to get title over the property which was purchased under Ex.A2 sale deed.

18. In this context, it would be relevant to refer to recent decision of the Hon'ble Supreme Court in : Tanu Ram Bora Vs. Promod Ch. Das (D) through L.Rs. and Ors.: MANU/SC/0164/2019 (C.A.No.1575 of 2019) (arising from SLP (C) 1135 of 2016 dated 08.02.2019 wherein the Hon'ble Supreme Court in paragraph Nos.7.3, 7.4, 7.5 has observed as follows:



"7.3 Section 43 of the Act reads as under:

43. Transfer by unauthorised person who subsequently acquires interest in property transferred—where a person [fraudulently or] erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

7.4 Section 43 of the T.P. Act provides that where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Thus, if at the time of transfer, the vendor/transferor might have a defective title or have no title and/or no right or interest, however subsequently the transferor acquires the right, title or interest and the contract of transfer subsists, in that case at the option of the transferee, such a transfer is valid. In such a situation, the transferor cannot be permitted to challenge the transfer and/or the transferor has no option to raise the dispute in making the transfer.

7.5 The intention and objects behind Section 43 of the T.P. Act seems to be based on the principle of estoppel as well as the equity. The intention and objects seems to be that after procuring the money (sale consideration) and transferring the land, thereafter the transferor is estopped from saying that though he has sold/transferred the property/land on payment of sale consideration, still the transfer is not binding to him. That is why Section 43 of the T.P. Act gives an option to the transferee and not the transferor. The intention of Section 43 of the Act seems to be that nobody can be permitted to take the benefits of his own wrong. In the facts and circumstances of the case, Section



43 of the Act would come into play and protect the rights of the original Plaintiff."

From the aforesaid decision, it is clear that as per Section 43 of the Transfer of Property Act, where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. It is also clear that if at the time of transfer, the vendor/transferor might have a defective title or have no title and/or no right or interest, however subsequently the transferor acquires the right, title or interest and the contract of transfer subsists, in that case at the option of the transferee, such a transfer is valid. In such a situation, the transferor cannot be permitted to challenge the transfer and/or the transferor has no option to raise the dispute in making the transfer. The intention and objects behind Section 43 of the T.P. Act seems to be based on the principle of estoppel as well as the equity. The aforesaid decision will squarely apply to the facts of this case. DW3 is estopped from taking a plea that the plaintiffs have no right or interest over the property purchased under Ex.A2 sale deed.

19. As already pointed out even assuming that at the time of executing the Ex.A2, sale deed the said Muthuswamy Nainar (DW3) got title over the lesser extent, as soon as he got the right under Ex.B1 Will, the purchasers under Ex.A2 sale deed would get title over the property which has been mentioned in the said sale deed. In such circumstances, only after deducting the property which was sold under Ex.A2 sale deed, the said Muthuswamy Nainar can sell the remaining land to the defendants 1 and 2. The defendants 1 and 2 being the subsequent purchasers, should have purchased the property after verifying the fact that what is the extent available with the said Muthuswamy Nainar. There is no evidence that they have measured the properties before purchasing from the said Muthuswamy Nainar and therefore, neither the said Muthuswamy Nainar nor the defendants can take a plea that the plaintiffs are entitled to only a lesser extent.

20. In Roohnisha Beevi and 15 others Vs. A.M.Mahudu Mohamed and 29 others (cited supra), this court has held that the evidence supplied by boundaries, extent, survey numbers and lekhoms forms the determining factors when the identity of the property is put in issue. Further, it was held that when some of them are in conflict with the rest as when the extent and survey numbers do not agree with the boundaries usually the boundaries



predominate, and the rest is regarded as erroneous or inaccurate descriptions". There is no quarrel with regard to the aforesaid proposition of law.

21. In this case, the defendants being the subsequent purchasers, they should have measured the property before purchase and ascertain whether actually the extent mentioned in Ex.B1 Will is available with DW3. In this case, as already pointed out that there is no evidence that they have measured the properties before purchase. Therefore, the aforesaid decision will not help the defendants.

22. In this case, admittedly the second defendant had constructed a building in the suit property. So the question will arise as to whether the relief of mandatory injunction can be granted. At this juncture, it would be relevant to refer to the decision in M.Ramalingam Vs. N.Thangavelu, 1997-2-LW-35 wherein this court in paragraph Nos.18 to 21 has observed as follows:

"18. Before putting up construction, he did not make any attempt to measure the same. He was under the belief that it is his property. Naturally, there cannot be any question of acting on the representation of the plaintiff and the same has caused detriment to him.

19. What was the encouragement given by the plaintiff is not stated. The defendant did not have any mistake about his legal rights, nor has he a case that on the basis of the mistake on his part, he has spent money. The defendant has no case that before putting up the construction, plaintiff was also made known about his legal right, and about the limits of his property. In what way the plaintiff encouraged the putting up of the construction is also not explained. Mere silence by itself will not amount to representation unless a duty is cast on the plaintiff to speak about the limits. If so, plaintiff must also be made aware of the limits of the property. The case put forward by the defendant himself is that pursuant to the partition decree, plaintiff has not taken possession and, therefore, plaintiff is not entitled to recover the property. That means the limits of the property were not clear and made known to the plaintiff. It is only on the basis of the title, plaintiff claims his right. When the defendant comes forward before court with a case that the plaintiff should not exercise his legal right, it is for him to explain why he should be



denied that right.

20. Further, the suit is not for mandatory injunction alone. The suit is one for declaration of title and recovery of possession. In that case, it is not discretionary relief that is granted. There is a great difference between a suit for mandatory injunction and a suit for declaration of title and recovery of possession, with a consequential relief of mandatory injunction. In the decision reported in Bodi Reddy v. Appu Gounden as he then was, has considered this question in minute detail. In that decision, the learned Judge said that in a suit for declaration of title and recovery of possession, relief of mandatory injunction is only for the benefit of the defendant, and if the defendant is not availing that benefit, what the plaintiff could get from Court is only recovery of possession. In that case, it was held thus:

Whenever the plaintiff comes to the court and prays for possession of his property in the occupation of a trespasser, with the incidental relief of mandatory injunction directing the trespasser to demolish the construction put up by him, there is no question of the court exercising any discretion as to whether the, mandatory injunction should be granted or award of damages alone would be sufficient and once the plaintiff has established his right to a decree for possession, that decree must follow irrespective of any consideration of laches, acquiescence, want of hardship or inconvenience to the plaintiff and any question of hardship to the defendant. The discretion is available only in suits where the plaintiff asks for an injunction against the defendant, not in respect of any trespasser for encroachment committed by the defendant on the plaintiff's property itself, but in respect of any action done by the defendant on his own land or on a common property or on a public property interfering with the enjoyment of the plaintiff of his own property. In a suit in which the plaintiff asks for relief on the basis of his title to the property, the only circumstance in which the plaintiff may be denied the relief is when the principle of equitable estoppel will apply and even then it is not as if the court declares the title of the plaintiff and denies the relief of possession to him in the exercise of the discretion, but prevents the



plaintiff from asserting his title to the property itself on the basis that by his own conduct he had estopped himself from asserting any such right.

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In a suit for recovery of possession, the prayer for mandatory injunction is only for the benefit of the defendant and if the defendant has any objection to the same, a mandatory injunction should not be granted, but the plaintiff is entitled to a decree for possession, liberty being given to the defendant to remove the construction within a specified period and-in the event of his failure to do so, the plaintiff being authorised to remove the same at the expense of the defendant.

Held, when the owner of a land files a suit for recovery of possession of his land from a trespasser who had built upon the land, with incidental prayer for mandatory injunction directing the defendant to demolish the building put up by him, the plaintiff (owner) is entitled to succeed once he has established his title and the fact that he has been in possession of the property within 12 years from the date of the suit and he is not prevented by the principle of equitable estoppel from asserting his title to the suit property. Simply because the plaintiff has prayed for a mandatory injunction as incidental to the relief of recovery of possession, there is no discretion vested in the Court to deny delivery of possession, to the plaintiff and instead, toward compensation to him. Once the suit is within time, the doctrine of laches or acquiescence has no place to defeat the right of the plaintiff to obtain the relief in the suit. Unless acquiescence amounting to equitable estoppel is established, the plaintiff cannot be denied the relief of possession, which he has asked for.

21. Learned Counsel for the appellant relied on the decision reported in R.S. Muthuswami Gounder v. A. Annamalai and Ors. it is seen that the Maddanappa v. Chandramma was not cited before the learned Judge. The facts therein are entirely different. That was a case where the plaintiff was aware of the limits of his property, and on facts, their Lordships said that the silence prompted the defendant to put up the construction. Here, the contention of the defendant is otherwise. In this connection, the decision reported in Chhaganlal v. Narandas may be of some relevance. In that case,



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their Lordships said that a person claiming the benefit of estoppel must show that he was not aware of the true state of affairs, and, if he was aware of the real state of affairs or had means of knowledge, there cannot be estoppel. In this case, before construction, a duty was cast on the defendant to know the limit of his property. He had the means of knowledge, but the same was not availed. Their Lordships in that case held thus:

Estoppel deals with questions of facts and not of right. A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute. To bring the case within the scope of estoppel as defined in Section 115 : (1) there must be a representation by a person or his authorised agent to another in any form, a declaration, act or omission, (2) the representation must have been of the existence of a fact and not of promise de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration act or omission, must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only to the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee.

The conditions enunciated in that case are also not satisfied in this case."

23. In this case also, there is no evidence that before putting up construction, the second defendant made any attempt to measure the properties. Further, there is no pleading in the written statement that in what way the plaintiff encouraged the



putting up of the construction. Further in this case, apart from mandatory injunction, recovery of possession also asked. So in view of the aforesaid decision, when the owner of the land filed a suit for recovery of possession of his land from a trespasser who had built upon the land, with incidental prayer for mandatory injunction directing the defendant to demolish the building put up by him, the plaintiff (owner) is entitled to succeed once he has established his title and the fact that he has been in possession of the property within 12 years from the date of the suit and he is not prevented by the principle of equitable estoppel from asserting his title to the suit property. Therefore, this court does not find any infirmity in the findings of the first appellate court. Accordingly, the substantial questions of law are answered against the appellants/defendants.

24. In the result, the second appeal is dismissed. Consequently, connected miscellaneous petition is closed. The judgment and decree passed by the first appellate court are confirmed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Subordinate Judge,
Tiruvannamalai.
2. The Principal District Munsif,
Tiruvannamalai.

Copy To

The Section Officer,
V.R. Section,
High Court, Madras.

S.A.No.85 of 2013
and
M.P.No.1 of 2013

PA (CO)
CS/20/11/2019