

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.09.2019

CORAM

THE HON'BLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

C.M.A.No. 3492 of 2017
and C.M.P.No.22202 of 2017

M/s.Alagar Roadways
by its Partner A. Shankar,
S/O.K. Arumugam,
made construction at
Nos.616 to 619, Krishna Street,
Coimbatore - 641 001.

residing at 13/60D,
Ramalinga Jothi Nagar,
Coimbatore - 641 045. ... Appellant/Respondent/Defendant

Vs.

Pushpa Devi ... Respondent/Appellant/plaintiff

Appeal filed under Order XLIII Rule 1(u) of the Code of Civil Procedure against the Judgment and Decree dated 19.08.2017 made in A.S.No.28 of 2016 on the file of the learned Principal District Judge, Coimbatore, remanding the Judgment and Decree dated 24/11/2015 made in O.S.No.332 of 2006 on the file of the learned I Additional Sub Judge, Coimbatore.

For Appellant : Mr.P. Saravana Sowmiyan

For Respondent : Mr.A. Thiyagarajan

JUDGMENT

This Civil Miscellaneous Appeal is filed by the defendant against the Judgment and Decree dated 19.08.2017 made in A.S.No.28 of 2016 on the file of the learned Principal District Judge, Coimbatore, remanding the Judgment and Decree dated 24.11.2015 made in O.S.No.332 of 2006 on the file of the learned I Additional Sub Judge, Coimbatore.

2.There are three suits in O.S.No.127 of 2008, O.S.No.332 of 2006 and O.S.No.14 of 2007 filed by both the

3.O.S.No.127 of 2008 has been filed by M/s.Alagar Roadways, a registered Partnership Firm represented by its Managing Director against one Pushpa Devi for permanent injunction restraining the defendant, her family members, men and agents from in any manner interfering with the peaceful possession, enjoyment and construction of the suit property within its boundaries, either by making disturbances in the construction work or by any other manner except according to procedure established by law.

4.O.S.No.332 of 2006 has been filed by the plaintiff Pushpa Devi against M/s.Alagar Roadways for mandatory injunction, for removing the offending structures and delivery of possession of the encroached portion and for a preventive permanent injunction restraining the defendant from making any further encroaching constructions or from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and for damages.

5.O.S.No.14 of 2007 has been filed by M/s.Alagar Roadways against Pushpa Devi for removing the offending structures and for delivery of possession of encroached portion of 1'.0 x 61'.0 = 61 sq.ft. and a preventive permanent injunction to restrain the defendant from making further encroachments in the plaintiff's A schedule property and for damages.

6.After hearing both the plaintiff and the respondent, the Lower Court had dismissed all the three suits stating that the plaintiff and the defendant are not entitled for any relief as prayed for. Aggrieved by the same, the plaintiff Pushpa Devi in O.S.No.332 of 2006 had filed an appeal in A.S.No.28 of 2016 before the learned Principal District Judge, Coimbatore for the relief of recovery of possession after removing the encroachment structures made by the defendant and for permanent preventing injunction and also for damages.

7.The case of the appellant/plaintiff therein was that she is the absolute owner of the suit property which was purchased in the year 1997 and 1998 and she is in possession and enjoyment of the same. After purchasing the said property, she had demolished the old buildings and constructed a shopping -cum- residential complex with three upper floors. While constructing the property, the said Pushpa Devi had left some space on both sides for getting light and air. Without any right, the appellant herein in the year 2006 had started to put up constructions in their property encroaching the property of the plaintiff. The encroachment is having the measurement of 9 inches x 60 feet North-South lengthwise.

Hence, she objected to the constructions of the said building and requested them to stop the same. The appellant herein caused damages to the value of Rs.50,000/- and hence, she sent a notice on 12.04.2006 to the appellant herein. Subsequently, the defendant had filed a suit in O.S.No.1066 of 2006 (New No. O.S.No.127 of 2008) before the District Munsif, Coimbatore, for permanent injunction restraining the defendant, her family members, men and agents from in any manner interfering with the peaceful possession, enjoyment and construction of the suit property and interim injunction was also obtained. Further, the defendant did not produce the Approved Plan which is said to have been obtained from the local body. The description of property in the Sale Deed of the defendant is a fraudulent one. Further, the defendant has not constructed the building as per the Plan and exceeding its Western limit and thereby, the defendant encroached the portion of the plaintiff's property.

8.The learned Principal District Judge, Coimbatore allowed the Appeal Suit and the case records were remanded back to the trial Court for appointing Advocate Commissioner for the purpose of taking measurement of the property purchased by the appellant/plaintiff with a direction to the learned trial Judge to decide the issue according to law after getting the report of the Advocate Commissioner along with the Surveyor measurement.

9.The learned Advocate Commissioner has also measured the "A" Schedule property and submitted his report along with the Surveyor Plan. In the Report, the boundaries are mentioned as East West on Southern side - 18 feet, East West on Northern side - 18 feet, North South on Western side - 81 feet, North South on Eastern side - 56 feet and further, East West - 2 feet and North - South -25 feet. It cannot be said that the said A schedule property had encroached by the same. Since the measurements are same and identical to Ex.A.7, they come to the conclusion that the same has not been encroached upon. They have also submitted that if they are really agreed they should also take out a Commission to prove that they are in possession of the said extent in which they have purchased. But, the defendant did not do so and they prayed that the same should not be accepted and the "B" schedule of property also to be measured along with "A" schedule of property.

10.The Lower Appellate Court has decided all the issues regarding encroachment and stated that the measurement in Plaint "A" Schedule property and Ex.C.1 - Report and Ex.C.2 - Plan are identical and therefore, the Lower Court has come to the conclusion that it cannot be said that the defendant has encroached the property of the plaintiff. The Appellate Court, while dealing with the findings of the Lower Court, has

come to the conclusion that even after attempting the encroachment by the other side, the plaintiff in the suit has not taken any steps to measure the property. Hence, the Appellate Court has given a finding that in order to have a better adjudication, it is necessary to identify the correct measurement of the property which is purchased by both the parties and to come to the conclusion, the Commissioner's Report and the Surveyor Plan is necessary and therefore, the Appellate Court has allowed the appeal and set aside the Judgment and Decree of the Lower Court and the case records were remanded back to the trial Court for appointing Advocate Commissioner for the purpose of taking measurement of the property purchased by the plaintiff. Aggrieved by the said Judgment and Decree, M/s. Alagar Roadways has filed the present Civil Miscellaneous Appeal.

11. Raising various grounds stating that the appeal is barred by res judicata since the respondent has filed an appeal only against the suit filed by her and failed to file appeals against the two suits filed by the appellant herein. Since the Common Judgment has been rendered in all the suits they have filed a separate appeal against all the suits. The Advocate Commissioner was appointed on the application filed by the appellant when the matter was taken up before the trial Court and the Advocate Commissioner has submitted his report as well as the surveyor plan in Ex.C.1 to Ex.C.3 and the trial Court has come to the conclusion that both the parties have not encroached the property.

12. The omission on the side of the respondent for not filing an application for appointment of an Advocate Commissioner is deliberate and now the appeal has been remanded for appointment of Advocate Commissioner is illegal. The learned District Judge has failed to see that in order to cover up the laches and the omissions, the appeal has been remanded which would result in serious miscarriage of Justice. Further, the learned District Judge erred in appointing the Advocate Commissioner suo moto which is illegal and unsustainable.

13. The dispute is regarding the encroachment of 1 ½ feet width throughout the length towards the plaintiff's property and 9 inches x 60 feet North South lengthwise, while constructing the building by the defendant. Both the parties have purchased the properties adjacently and the defendant had demolished her old buildings and constructed new four storeyed buildings to her entire extent of lands. Both the parties have put up constructions and the allegations levelled against each other and both of them have encroached upon the other persons property. This is the reason for permanent problem to the parties and it will be appropriate, according to the

Judgments of the Lower Court and the Appellate Court, to appoint another Advocate Commissioner with the help of the Surveyor to measure the properties of the parties as per the Sale Deeds and to find out who has encroached upon the lands.

14.Hence, both the parties are directed to provide all the revenue records regarding their properties on hand and also Planning Permission granted by the Local body. The Lower Court is also directed to adjudicate the matter based on the Advocate Commissioner's Report as well as the Revenue records produced by both the parties within a period of six months. The second report of the Advocate Commissioner has to be taken into account and the issues to be decided accordingly. Both the parties are directed to co-operate with the proceedings. The respondent herein shall bear the Fee of the Advocate Commissioner.

This Civil Miscellaneous Appeal is disposed of accordingly. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

mps

To

1.The Principal District Judge, Coimbatore.

2.The I Additional Sub Judge, Coimbatore.

+1cc to Mr.P. Saravana Sowmiyan, Advocate SR.No.81813

+1cc to Mr.A. Thiyagarajan, Advocate SR.No.81526

C.M.A.No. 3492 of 2017

and

C.M.P.No.22202 of 2019

SPD (CO)
GMY (16/06/2020)