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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 27.06.2019

DELIVERED ON :25.07.2019

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

S.A.(MD)No.258 of 2009

and

M.P.(MD)No.1 of 2009

Marikannu

.. Appellant/Appellant/Plaintiff

Vs.

R.Raju

.. Respondent/Respondent/Defendant

Prayer :Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree passed in A.S.No.37 of 2008 dated 07.08.2008 on the file of the learned Principal District Judge, Tiruchirappalli confirming the Judgment and decree passed in O.S.No.668 of 1996 dated 07.02.2006 on the file of the learned Additional Sub Judge, Tiruchirappalli.

For Appellant : Mr.M.Ashok Kumar

For Respondent : Mr.S.Krishna Moorthy

JUDGMENT

Heard the learned counsel appearing on both the side.

2.This appeal is filed against the Judgment and Decree passed in A.S.No.37 of 2008 dated 07.08.2008 on the file of the learned Principal District Judge, Tiruchirappalli confirming the Judgment and decree passed in O.S.No.668 of 1996 dated 07.02.2006 on the file of the learned Additional Sub Judge, Tiruchirappalli.

3.The appellant herein is the plaintiff and the respondent herein is the defendant in the suit. The appellant herein has filed a suit in O.S.No.668 of 1996 before the learned Additional Sub Judge, Tiruchirappalli for a prayer of permanent injunction and mandatory injunction against the defendants and the trial Court has dismissed the suit. Against that Judgment and decree, the appellant herein has preferred an appeal in A.S.No.37 of 2008 before the learned Principal District Judge, Tiruchirappalli and



the appeal is also dismissed by confirming the Judgment and decree passed by the trial Court. Against which, the appellant has come forward with this second appeal.

4. The case of the plaintiff is that the suit property was allotted to the share of the plaintiff's father Munnusamy bearing door No.79 and 80 in Nadu Gunjili's street, Trichy. As the legal heir of Munnusamy, the plaintiff acquired the suit property. The northern east west wall absolutely belongs to the plaintiff and the defendant is the owner of the northern side house. There was an open space on the north of the plaintiff's northern wall and southern wall of defendant's house with an extent of 6 ft. The defendant attempted to demolish the wall and put up construction on the northern side of the plaintiff's property. On 01.11.1996, when the plaintiff went to the northern side of her house, she was surprised to see that the cornice in the northern side wall was completely demolished, hook stones removed and a wall abutting northern wall was put up. Without making space between the two walls, the defendant has put up construction and the defendant has to be restrained from putting any further construction. The northern wall of the plaintiff was damaged and there was a loss for the plaintiff to the tune of Rs.1,00,000/- (Rupees One Lakh only). The defendant has to remove the construction made on the northern wall of the plaintiff. Though a police complaint was lodged against the defendant since the defendant was a rich man the Police kept silent and an order of injunction is to be passed against the defendant.

5. The case of the defendant is that the defendant purchased the property from one P.V.M.Ramudu Chettiar by a registered sale deed dated 02.09.1989. P.V.N.Ramudu Chettiar purchased the property from one Sankaran Chettiar through a registered sale deed dated 09.02.1922. Anna Poornathammal is the predecessor in title of Veerasami. From 1922 and even prior to 1922, the northern wall of the plaintiff and the southern wall of the defendant was a common wall. The plaintiff is not the exclusive owner of the suit wall. The allegation that the defendant attempted to demolish and put up a new construction in the plaintiff's property is wrong and that the defendant is having common right over the northern wall of the defendant and northern wall of the plaintiff. The defendant purchased the existing construction of ground floor and first floor from his predecessors in title. There was already constructions in the ground floor and that the wall between the plaintiff and the defendant is common. The ground property was leased out to various tenants even prior to the purchase by the defendant. Even in the first floor, the southern wall of the defendant has wooden pegs and holes for using them as lofts. The defendant's predecessors in title have been enjoying the southern wall on the southern wall of the defendant for more than 74 years. The defendant is having every right to use the southern wall and

he is at liberty to raise construction on the cross wall touching the common wall. The defendant has put up the construction within his limit. Taking advantage of the plaintiff's husband working in the Court utilising his influence with the Police and other high Officials, the plaintiff is threatening the defendant and has filed the suit. The construction was carried out by the defendant in the presence of the plaintiff and his family and the work was carried out only during day time. There is no damage to the wall and there was no hoop stones. There was only wooden pegs and the same was enjoyed only by the defendant and his predecessor in title. The plaintiff has no right to question the same and to pray for removing the wooden pegs. There was no crack in the wall and there was no damage caused to the common wall. The defendant is having all the rights to put up the construction over the southern wall. No details and calculations are arrived at for proving that there was damage to the tune of Rs.1,00,000/- (Rupees One Lakh only). The plaintiff is not entitled for any mandatory injunction. The description of the property is misleading. The plaintiff is not entitled for grant of injunction.

6. On the above said pleadings, the following issues were framed by the trial Court:

(i) வாதி வழக்குரையில் கோரியுள்ளவாறு நிரந்தர உறுத்துக் கட்டளைப் பரிகாரம் பெறத்தகுதியுடையவரா ?

(ii) வாதி செயலுறுத்துக் கட்டளை பரிகாரம் பெற உரிமையுடையவரா ?

(iii) வாதி வழக்குரையில் கோரியுள்ளவாறு நஷ்ட ஈடு பெறத்தகுதியுடையவரா ?

(iv) தாவா சொத்து விபரம் சரியானதா ?

(v) வழக்குரையில் குறிப்பிடப்பட்டுள்ள வழக்கு மூலம் உண்மையானதா ?

(vi) வேறு என்ன பரிகாரம் ?

7. One witness was examined as P.W.1 and 9 documents were marked as Exs.A1 to A9 on the side of the plaintiff and the defendant himself was examined as D.W.1 and 8 documents were marked as Exs.B1 to B8 and Exs.C1 to C5 were marked as Court documents. After considering the pleadings and evidence, the trial Court dismissed the suit. Against which, the respondents herein have preferred an appeal. The first Appellate Court has framed the following issues:

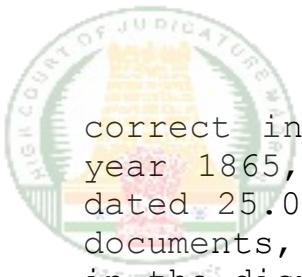
(a) Whether the disputed wall is the exclusive wall of the plaintiff ?

(b) Whether plaintiff is having 6' space on the north of his northern wall ?

(c) Whether plaintiff is entitled to the relief of permanent injunction as prayed for ?

(d) Whether plaintiff is entitled to the relief of mandatory injunction as prayed for ?

(e) Whether plaintiff is entitled to get damages from the



correct in considering the old documents, Ex.B7 which is of the year 1865, Ex.B5 dated 09.02.1922, Ex.B4 dated 29.10.1945, Ex.B3 dated 25.01.1961 and Ex.B6 dated 17.08.1965 and in all the above documents, it is described that the defendant is having half right in the disputed wall.

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12.It is seen that in the Commissioner reports, Exs.C1 to C5, it is stated that the thickness of the old wall is 1 $\frac{1}{4}$ ft and the defendant constructed a new wall with a thickness of $\frac{3}{4}$ ft adjoining or annexing the old wall. The trial Court has dismissed the suit but has given a findings that the old wall is the individual property of the plaintiff and it is not a common wall.

13.On the side of the respondent, it is stated that the trial Court has given a findings as to title when no such prayer is sought for. In support of this contention, a Judgment passed by the Hon'ble Supreme Court in the case of **Jharkhand State Housing Board v. Anirudh Kumar Sahu and Ors.** in **Civil Appeal No.8242 of 2009** is cited, where it is stated as follows:

"The trial Court has given several findings with regards to the title and observed that plaintiff has got right and title to the property. Even the 1st appellate Court has also made specific observation with regard to title and gave a clear finding that plaintiff has asked for declaration. High Court mechanically confirmed the judgment and decree of the Courts below without appreciating both the legal and factual aspects.

The learned counsel has also submitted that the relief sought is only for injunction. The copy of the plaint filed before us also strengthens the same."

14.The plaintiff/appellant is claiming 6 feet beyond the disputed wall but he has failed to seek for a prayer of declaration of title. Even in Ex.A6 there is no such wordings regarding the availability of 6 feet beyond the disputed wall. As the trial Court has given a finding that the wall is the individual property of the appellant, the averment that the lower Courts fail to consider more than 40 years old document cannot be raised. Hence, it is decided that this issue raised by the appellant is not maintainable.

Issue No.2 :

15.On the side of the appellant, it is stated that the lower Court has failed to consider the Commissioner reports and held that the issue of damage was merely on assumption. It is stated that the Commissioner has clearly pointed out that there is a crack in the appellant's wall due to the construction work done by the plaintiff but the trial Court ignoring the Commissioner report and gave a observation that the wall constructed by the



defendant will strengthen the wall of the plaintiff.

16. On the side of the respondent, it is stated that the respondent did not make any construction on the common wall. The respondent constructed pillars in his own land and constructed the building. The pillars not on the common wall and the trial Court has clearly made a finding that the wall constructed by the defendant is of $\frac{3}{4}$ ft and the common wall is of $1\frac{1}{4}$ ft and now the breadth of the common wall is $2\frac{1}{4}$ ft and the wall becomes stronger and there is no damages caused to the common wall.

17. A perusal of the Commissioner report reveals that there was a crack in the wall of the plaintiff. For causing a crack, the defendant is liable to pay compensation. Since the other portions of the wall is not damaged, the findings of the trial Court that the wall might have been damaged due to the age of the wall is not correct. There is no specific objections regarding the value of the damages. Hence, it is decided that the appellant/plaintiff is entitled for claiming damages to the tune of Rs.1,00,000/- (Rupees One Lakh only) from the respondent.

Issue No.3:

18. The question of law raised by the appellant is not a question of law. This question is only question of fact which cannot be decided by the second appellate Court.

19. In issue no.2, it is decided that the appellant is entitled for claiming damages. Issues nos.1 and 3 are decided against the appellant. The judgment and decree passed by the first appellate Court and the trial Court is modified. The respondent is directed to pay a sum of Rs.1,00,000/- (Rupees One Lakh only) to the appellant within a period of three months from the date of receipt of copy of this order.

20. Accordingly, this second appeal is disposed of. No Costs. Consequently, M.P.(MD)No.1 of 2009 is closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

To

1. The Principal District Judge,

<https://hcservices.gov.in/>

2.The Additional Subordinate Judge, Tiruchirappalli.

Copy to:

The Section Officer,

The V.R.Section,

Madurai Bench of Madras High Court,

Madurai. (2 copies)

+1 CC to M/s.S.KARISHNAMOORTHY, Advocate (SR-77771[F] dated 26/07/2019)

+1 CC to M/s.M.ASHOKKUMAR, Advocate (SR-78024[F] dated 26/07/2019)

S.A. (MD) No.258 of 2009
25.07.2019

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