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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.02.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1331 of 2008

and

M.P.No.1 of 2008

Janarthanan
S/o, K.Rajamani,
Post Master,
Pudhuchatram Post Office,
Namakkal Taluk,
Namakkal District.

... Appellant / Defendant

Vs.

Dr.A.Azhagammal,
W/o, P.Natarajan,
No.89-E, Thiruchi Main Road,
Namakkal.

... Respondent / Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 31.01.2003 passed in A.S.No.61 of 2001 by the Subordinate Judge at Namakkal, reversing the judgment and decree dated 25.08.2000 passed in O.S.No.220 of 1999 by the Additional District Munsif at Namakkal.

For Appellant : Mr.R.Agilesh

For Respondent : No appearance
Set exparte

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 31.01.2003 passed in A.S.No.61 of 2001 on the file of the Subordinate Court, Namakkal, reversing the judgment and decree dated 25.08.2000 passed in O.S.No.220 of 1999 on the



file of the Additional District Munsif Court, Namakkal.

2. The defendant in O.S.No.220 of 1999 is the appellant in the second appeal.

3. In this matter, though notice of motion had been ordered to the respondent, despite the service of notice, the respondent had not endeavored to appear either in person or through counsel, when the matter is taken up for hearing, accordingly, the respondent being called, remaining absent, set exparte.

4. The suit has been laid by the plaintiff for the relief of mandatory injunction and permanent injunction. According to the plaintiff, the suit property described in the plaint schedule belongs to her by way of a sale deed dated 12.11.1979 and the defendant while putting up a terraced building on the western side which is adjacent to the plaintiff's property, inserted his construction to a length of about 10 ft on his eastern side from north to south and thereby inserted into the plaintiff's western wall and thereby tarnished the western wall of the plaintiff and the glasses fixed on the same and the plaintiff demanded the defendant to remove the illegal stains on her wall and glasses caused by the cement mixture and also to remove the illegal insertion of the wall into the plaintiff's wall and the defendant had assured to comply with the same and on the other hand, failed to comply with the promise qua the removal of the unauthorized construction put up him as above stated and hence according to the plaintiff, she has been necessitated to institute the suit for appropriate reliefs.

5. The defendant resisted the plaintiff's suit contending that the alleged encroachments projected by the plaintiff on the western side of her property ie. On the western wall of the plaintiff by putting up the insertions is false and also the claim of the plaintiff that the defendant had assured to remove the stains as putforth in the plaint is also false and according to the defendant, he has put up the construction only in the property belonging to him and it is only the plaintiff who had endeavored to encroach into the defendant's property and therefore considering the lie of the property belonging to the parties, the defendant has only put up the construction within the limits of his property without making any encroachment and



therefore according to the defendant, the plaintiff has no cause of action to lay the suit and the suit is also liable to be dismissed.

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6. In support of the plaintiff's case, P.W.1 was examined. No document has been marked. On the side of the defendant, D.W.1 was examined,. No document has been marked. Exs.C1 and C2 were marked.

7. The trial court on an appreciation of the available materials placed on record and the submissions putforth by the respective parties, decreed the suit laid by the plaintiff in part ie., by granting the relief of mandatory injunction in favour of the plaintiff directing the defendant to remove the stains and rubbish within the period of one month and dismissed the plaintiff's suit in other aspects. Aggrieved over the judgment and decree of the trial court, the plaintiff preferred the first appeal and the first appellate court, on an appreciation of the evidence adduced by the respective parties, noted that though the defendant would plead that it is only the plaintiff who had encroached into his property, however further noted that the defendant had not initiated any legal action against the plaintiff with reference to the so called alleged encroachment put up by the plaintiff and accordingly considering the Commissioner's report and plan, further noted that the defendant has not preferred any objection to the Commissioner's report and plan and when the Commissioner, in his report and plan has clearly depicted that the defendant while putting up the portico portion shown as "D" had put and constructed the same adjoining the plaintiff's window portion shown as "B" and thereby the plaintiff's windows developed cracks and further the defendant while putting up the windows shown as W1, W2 and W3 in the Commissioner's plan and the sunshade put up by him over the same had also constructed the same by inserting into the plaintiff's wall, accordingly held that the defendant had inserted into the plaintiff's portion while constructing his house with the length of 2 inches and on the other hand, the plaintiff would claim that the defendant had encroached into his portion with the length of 3 inches and as rightly concluded by the first appellate court, when admittedly it is noted as per the Commissioner's report and plan, the defendant has encroached into the portion belonging to the plaintiff, particularly, on the western side of the plaintiff's property, it is for the defendant



to establish that he has the entitlement to the property encroached by him and accordingly on factual matrix, proceeded to hold that it is only the defendant who had encroached into the plaintiff's property and thereby proceeded to hold that the plaintiff is entitled to seek the reliefs as prayed for in the plaint and accordingly dispose of the appeal preferred by the plaintiff.

8. During the course of arguments, the defendant's counsel would contend that the relief sought for by the plaintiff simplicitor for mandatory injunction is not maintainable without seeking the relief of declaration of his title to the property belonging to him. In this connection, he relied upon the decision reported in A.I.R. 2008 Supreme Court 901 [Gurunath Manohar Pavaskar & Others Vs. Nagesh Siddappa Navalgund & Others]. However on a perusal of the materials placed on record, it is seen that no such specific defence plea is taken by the defendant in the written statement and no issue/point as to that contention has also been formulated by the Courts below. That apart, the defendant has also not raised the said point in the grounds set up in the second appeal and also not formulated or mooted any substantial question of law on the abovesaid aspects. As above pointed out, considering the nature of the reliefs claimed by the plaintiff and when the relief has been substantiated by the Commissioner's report and plan without any pale of doubt, as determined by the Courts below and when the Courts below had not accepted the plaintiff's case based on any revenue records as such as sought to be projected by the defendant's counsel and when both the parties had endeavored to proceed with the case without placing any documents as such pointing to their claim of title to their respective properties and would rest to invite the Courts below to adjudicate the case only based on the Commissioner's report and plan filed in the Courts below, in such view of the matter, I am of the considered opinion, the abovesaid decision relied upon by the defendant's counsel would not be applicable to the facts and circumstances of the case at hand.

9. The reasonings and conclusions of the first appellate court in upholding the plaintiff's case are based on the proper appreciation of the materials available on record, particularly the evidence of the plaintiff and the defendant as well as the Commissioner's report and plan projected in the matter and though



both the parties have not filed any document of title to show their claim of title to the suit property, however, when the available materials disclose that it is only the defendant who had encroached into the plaintiff's property as claimed by the plaintiff and the same had come to be decided by the appellate court on factual matrix involved in the matter, no substantial question of law is found to be involved in the determination of the same, in such view of the matter, I hold that the second appeal is not entitled for acceptance as no substantial question of law is involved in the same.

10. In the light of the abovesaid position, the judgment and decree dated 31.01.2003 passed in A.S.No.61 of 2001 by the Subordinate Court, Namakkal, reversing the judgment and decree dated 25.08.2000 passed in O.S.No.220 of 1999 on the file of the Additional District Munsif Court, Namakkal are confirmed. Resultantly, the second appeal is dismissed. No costs. Connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge,
Sub Court, Namakkal.
2. The Additional District Munsif,
Additional District Munsif Court,
Namakkal.

Copy To

The Section Officer,
VR Section, High Court.

S.A.No.1331 of 2008
and
M.P.No.1 of 2008

SSI(CO)
SB(29/09/2021)