



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.09.2021

CORAM

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.607 of 2006

and

M.P. (MD)No.2 of 2006

1.S.Janakiraman (Died)
2.J.Mallika
3.J.Punithavathi
4.J.Singaravelan
5.R.Bhuvaneswari
6.J.Vijayakumar

... Appellants/ Respondents/
Defendants

*(Appellants 2 to 6 are brought on record
as LRs of the deceased sole appellant vide
order dated 12.12.2012 in M.P. (MD)No.1 of
2011 in S.A. (MD)No.607 of 2006 by STJ)*

Vs.

V.Baluchammy

... Respondent/ Appellant/
Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed by the learned III Additional Sub Judge, Madurai, made in A.S.No.103 of 2005, dated 30.11.2005 reversing the judgment and decree passed by the learned District Munsif, Melur made in O.S.No.140 of 2003, dated 28.02.2005.

For Appellants : Mr.R.Paranjothi for A6
No appearance for A3 to A5

For Respondent : Mr.T.Lajapathi Roy

JUDGEMENT

The defendant in O.S.No.140 of 2003 on the file of the District Munsif Court, Melur, filed this second appeal. During the pendency of this second appeal he passed away, his wife and children were brought on record. Later, the second appellant/wife of the original appellant also passed away. The sons and daughters of the original appellant remain on record. The appellants 3 to 5 engaged one counsel, while the sixth appellant engaged another counsel. On the last occasion, there was no representation on behalf of the counsel,



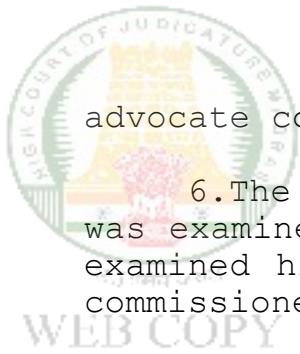
who had entered appearance for the appellants 3 to 5. Therefore, their names were directed to be printed. Today also, there is no representation on behalf of the appellants 3 to 5. The sixth appellant is alone represented through counsel.

2. Order 41 Rule 17 of Civil Procedure Code states that when the appellant does not appear when the appeal is called for hearing, the Court may make an order that the appeal will be dismissed. Explanation to the said provision states that nothing in the Sub Rule shall be construed as empowering the Court to dismiss the appeal on merits. Before me, out of the four appellants, three have not appeared but the remaining appellant is represented through counsel. Now the issue that arises for consideration is as to whether, I can hear the appeal on merits or not. When the respondent herein filed E.P.No.8 of 2015 before the executing Court, it is stated that all the appellants herein namely, appellants 3 to 6 contested the matter through a single counsel. Therefore, I am clearly of the view that the appeal can very well be disposed on merits, because there is no conflict of interest among the appellants and the sixth appellant can very well be taken as representing the entire case of the appellants. Therefore, I propose to dispose of the appeal only on merits.

3. The respondent herein namely, Baluchammy filed O.S.No.140 of 2003 for removal of compound wall and for directing the defendant to hand over the possession of "B" schedule property. Damages were also sought. The case of the plaintiff is that he purchased "A" schedule property vide a registered sale deed dated 14.09.1990. The defendant/Janakiraman purchased adjacent plot vide sale deed dated 01.11.1991. According to the plaintiff, the defendant had encroached on plaintiff's property and put up a compound wall. This happened in the year 1998. The plaintiff lodged a police complaint. He therefore sought recovery of possession from the defendant.

4. The defendant filed written statement controverting the plaintiff's averments. According to him, after purchasing the property under Ex.B13, he constructed a house in March, 1992. According to him, he had not committed any kind of encroachment. He would also state that the plaintiff admits that the septic tank of the defendant is lying within his property. One can assume that the septic tank would have come up contemporaneously, when the house was put up. It is not in dispute that the defendant's house was put up way back in the year 1992. The plaintiff is his neighbour. Therefore, the plaintiff should be taken as having acquiesced in the construction of the septic tank as well as compound wall. Therefore, the present suit is not maintainable. He also contended that the suit was clearly barred by limitation.

5. The trial Court appointed an advocate commissioner. He inspected the spot and measured the disputed sites by taking the assistance of a surveyor. The report and plan submitted by the



advocate commissioner were marked as Exs.C1 to C5.

6.The plaintiff examined himself as P.W.1 and one Gandimathi was examined as P.W.2 and Exs.A1 to A5 were marked. The defendant examined himself as D.W.1. The surveyor, who assisted the advocate commissioner was examined as D.W.2 and Exs.B1 to B18 were marked.

7.After a consideration of the evidence on record, the trial Court by judgment and decree dated 28.02.2005 dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.103 of 2005 before III Additional Sub Court, Madurai. The first appellate Court by the impugned judgment and decree 30.11.2005, set aside the decision of the trial Court and allowed the appeal and decreed the suit as prayed for. Challenging the same, this second appeal came to be filed.

8.The second appeal was admitted on the following substantial question of law:-

"(a) Though a question regarding the limitation as part was raised by the defendant and the learned trial Judge also categorically held that the suit was barred by limitation, whileso, when no issue was framed by the lower appellate Court to that effect and no finding was given on that aspect whether its decree and judgment is sustainable in law? and

(b) Even assuming that there is an encroachment by the defendant, when the plaintiff having acquiesced for a period more than that of the limitation prescribed under the law, is it not the plaintiff estopped from disputing it that also well after the period of limitation?"

9.The learned counsel appearing for the sixth appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree and restore the decision of the trial Court. The core contention of the learned counsel appearing for the sixth appellant is that the advocate commissioner did not measure the property correctly. He should have measured the property with reference to the sale deeds of the respective parties. In any event, the advocate commissioner had no authority or jurisdiction to render a finding regarding encroachment. He also would point out that the suit was hopelessly barred by limitation. The plaintiff is not a stranger. He is very much a neighbour. The defendant had put the construction way back in the year 1992. The septic tank in question was also put up at the same time. Obviously, a residential house cannot be put up without septic tank. When the septic tank was put up way back in the year 1992 and the plaintiff had acquiesced in its construction, he now cannot be heard to ask for its removal. The



learned counsel submitted that the trial Court had correctly appreciated the issues on hand and dismissed the suit. He called for restoration of the trial Court's decision.

10.Per contra, the learned counsel appearing for the respondent/plaintiff submitted that the impugned judgment and decree do not warrant any interference.

11.There is no dispute that the plaintiff purchased the suit property under Ex.A4 dated 14.09.1990 and the defendant purchased the plot under Ex.B13 dated 01.11.1991. The measurements set out in Ex.A4 are as follows:-

*"East-West on the Northern side 78.04 links
East-West on the Southern side 78.02 links
South-North on the Western side 42.42 links
South-North on the Eastern side 42.42 links"*

There is no dispute that 42.42 links is equivalent to 28 feet.

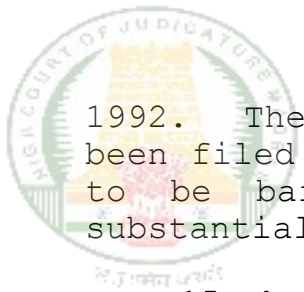
12.The measurements set out in Ex.B13 are as follows:-

*"East-West on the Northern side 78.02 links
East-West on the Southern side 78.02 links
South-North on the Western side 37.88 links
South-North on the Eastern side 37.88 links"*

There is no dispute that 37.88 links is equivalent to 25 feet.

13.Therefore, the suit schedule property that belongs to the plaintiff must measure 28 feet on the Eastern side South-North, while the defendant's property (Plot No.71) should measure 25 feet on the Eastern side South-North. Now, we have to see from the advocate commissioner's sketch as to whether, the defendant's property measures 25 feet or more. The advocate commissioner had measured the suit property by taking the assistance of a surveyor (D.W.2). The surveyor was examined on the side of the defendant. The defendant had not filed any objection to the advocate commissioner's report. A bare perusal of the advocate commissioner's plan would show that the defendant has occupied 29 feet on the Eastern side North-South. According to his sale deed (Ex.B13), it could measure only 25 feet. Of course, advocate commissioner ought not have rendered any finding as regards encroachment. That was clearly beyond the terms of warrant. Be that as it may, that the defendant is occupying four feet further on the Eastern side North-South is evident from the advocate commissioner's report and plan.

14.Having come to the conclusion that encroachment has been committed by the defendant, the question is whether the present suit for recovery of possession can be dismissed on the ground of limitation. The substantial questions of law framed in this second appeal turn on the question of limitation and acquiescence. Even according to the defendant, the constructions were put up only in



1992. The suit was filed on 06.08.2003. In other words, it has been filed within 12 years. Therefore, the suit cannot not be said to be barred by limitation. I therefore answer the first substantial question of law against the appellants.

15. The next question that arises for consideration is as to whether the plaintiff can be denied relief on the ground of acquiescence. The plaintiff admittedly kept quiet, when the septic tank was put up way back in the year 1992. 11 years after the septic tank was put up by the defendant, the suit came to be instituted. Therefore, the plaintiff has to be necessarily denied relief in this regard. But the plaintiff obviously did not keep quiet, when the compound wall was put up. The construction of the compound wall commenced only in the year 1998. Immediately, the plaintiff lodged his objection. A police complaint was also laid. The defendant and his entire family were prosecuted in C.C.No.872 of 2000 on the file of the Judicial Magistrate No.II, Madurai. The case ended in acquittal. From this one can safely conclude that the construction of the compound wall was not consented to by the plaintiff. Therefore, the doctrine of acquiescence cannot be invoked in the case of the compound wall. Therefore, I answer the second substantial question of law in favour of the appellants only as regards the construction of the septic tank and not as regards the construction of compound wall. The judgment and decree passed by the first appellate Court are accordingly modified. The second appeal is partly allowed in the following terms:-

"(i) The suit is decreed to the extent of removal of the offending compound wall.

(ii) The septic tank can as well remain in the same spot. The appellants can continue to utilise the said septic tank and the plaintiff will not come in the way of same.

(iii) Considering the facts and circumstances, the plaintiff will not be entitled to any damage. No costs. Consequently, connected miscellaneous petition is closed."

Sd/-

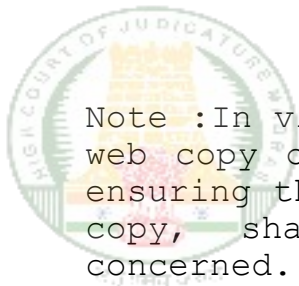
Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

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To:

1.The III Additional Sub Judge,
Madurai.

2.The District Munsif,
Melur.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.T.LAJAPATHI ROY, Advocate (SR-30743[F] dated
30/09/2021)

S.A. (MD) No.607 of 2006
29.09.2021

RD(08.02.2022) 6P 6C