



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.10.2022

JUSTICE N.SESHASAYEE
S.A(MD).No.657 of 2009

Devaraj

... Appellant/Appellant/Defendant

Vs.

Thankappan

... Respondent/Respondent/Plaintiff

Prayer : Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 21.04.2009 in A.S.No.78 of 2007 on the file of the first Additional Subordinate Judge's Court, at Nagarkoil at Padmanabhapuram confirming the judgment and decree dated 09.06.2007, made in O.S.No.314 of 2003 on the file of the Court of the Additional District Munsif, at Padmanabhapuram.

For Appellant : Mr.Gomathi Sankar
For Respondent : Mr.A.Prasanna Rajadurai

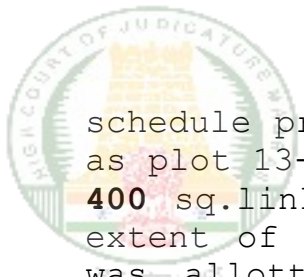
J U D G M E N T

The defendant in O.S.No.314 of 2003 is the appellant herein. The suit was initially laid for prohibitory injunction seeking to restrain the defendant not to interfere with the plaintiff's possession of the suit property.

2. A commission came to be appointed by the trial court and the Commissioner's report has indicated that the defendant is in possession of 247 sq links in excess of his entitlement. This apart, the defendant has also put up a shopping complex in his plot. In these circumstances, the plaintiff amended the plaint to include the relief of mandatory injunction to remove the construction so put up by encroaching into his property and also for recovery of possession.

3. The facts fall within a narrow compass and it does not require large discussion or deliberation in view of the conclusion to be indicated later in this judgment. For narrative convenience, the parties would be referred to as per their rank before the trial court.

4. A certain Chellaiah Nadar owned 11.600 cents in S.No.259/13 of Veeyannoor Village. He died in 1992 and his 4 sons namely, the plaintiff, the defendant, one Paulraj and another Sundararaj succeeded to this property. Under Ext.A.1 partition deed dated 02.12.1998, the 4 brothers divided this property into 4 different plots. Under the partition deed, the plaintiff was allotted 'C'



schedule property and the plot allotted to him has been referred to as plot 13-C. This plot is said to have an extent of 2 cents and (*) 400 sq.links. This substantially matches the description as to the extent of the suit property as given in the plaint. The defendant was allotted 'A' schedule property in Ext.A.1 and his plot is referred to as 13-E and he is given 2 cents and (*) 900 sq.links. When the plaintiff apprehended that his brother, the defendant herein, might have encroached his property, he laid the suit.

5. As earlier stated, a Commission came to be appointed and the Commissioner in his report has indicated that the defendant is in occupation of an extent of 247 sq links in excess of his own entitlement, which he obtained under Ext.A.1 partition deed. The Commissioner has also indicated to the extent that there is shortage of area available for the plaintiff. Based on this, the suit came to be decreed and the same was confirmed by the First Appellate Court. Hence, this Second Appeal.

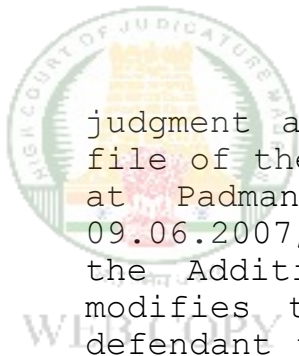
6. This Second Appeal is admitted for considering the following substantial questions of law:

- i) Whether he plaintiff was not entitled to the grant of permanent injunction and mandatory injunction under Sections 38,39 and 41 of the Specific Relief Act?*
- ii) Whether the Court below following the Ruling in AIR 1981 Mad. ought to have refused the discretionary relief of mandatory injunction since the acquiescence of the plaintiff in the construction of the defendant's first and second floors?*
- iii) Whether by his conduct in encroaching on the defendant's property the courts allowing the cross claim of the defendant the plaintiff was not entitled to the equitable relief of injunction?*

7. Heard the learned counsel for the appellant and the learned counsel for the respondent.

8. It is now indisputable fact that the defendant has put up a shopping complex in his property. But, demolition of building at this point of time would cause grave inconvenience besides financial loss to the defendant. Therefore, in fitness of things, it is only appropriate to direct the defendant to pay compensation to the extent of value of the property that he had encroached. Indeed, there is also another difficulty in granting a decree for recovery of possession since the Commissioner has not indicated where exactly in the plot allotted to the plaintiff the encroachment by the defendant had taken place.

9. Accordingly, this Court allows this appeal by setting aside the



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judgment and decree dated 21.04.2009 in A.S.No.78 of 2009 on the file of the first Additional Subordinate Judge's Court, at Nagarkoil at Padmanabhapuram confirming the judgment and decree dated 09.06.2007, made in O.S.No.314 of 2003 on the file of the Court of the Additional District Munsif, at Padmanabhapuram. This Court modifies the decree to one for payment of compensation by the defendant to the plaintiff and remands the matter back to the trial court, which shall grant an opportunity to both sides to determine the current market value for computing the compensation amount. The parties are directed to appear before the trial court on **03.11.2022**. No costs.

Sd/-

Assistant Registrar(CS-III)

(*)Corrected as per the order of this court dated 01.11.2022 made in SA(MD).No. 657 of 2009

Sd/-

Assistant Registrar()

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01/11/2022

Sub Assistant Registrar(CS)

CM

(*) To be substituted the order already despathced on 20.10.2022

To

1.The 1st Additional Subordinate Judge, Nagarkoil at Padmanabhapuram

2.The Additional District Munsif, at Padmanabhapuram.

3.The Section Officer,

VR Section,

Madurai Bench of Madras High Court,

Madurai.

+1 CC to M/s.M.V.KRISHNAN, Advocate (**SR-52315[F]** dated **01/11/2022**)

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