



S.A(MD).No.237 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 27.06.2022

CORAM: JUSTICE N.SESHASAYEE

S.A(MD).No.237 of 2011
and M.P(MD).No.1 of 2011

1.Baseeria Beevi
Moosa Mydeen(Died)
2.Mohamed Sultan
3.Rishvana Begam
4.(Minor) Imran Khan

...Appellants/Appellants 1 to 3
to 5/Defendants

Vs

Nagoor Beevi(Died)
1.Umar Ayisha
2.Liaqath Ali
3.Badhusha
4.Zahir Hussain
5.Ayub Khan
6.Umar Aptheen

....Respondents/ Respondents
2 to 7/Plaintiff

Prayer:Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree passed in A.S.No.31 of 2009 dated 12.04.2010 on the file of the Subordinate Court, Kovilpatti modifying the judgment and decree passed in O.S.No.39 of 2004 dated 21.04.2008 on the file of the District Munsif, Kovilpatti.

For Appellants : Mr.K.Sekar

For Respondents : Mr.M.Thirunavukkarasu



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JUDGMENT

The defendants, in O.S.No.39 of 2004 on the file of the District Munsiff Court, Kovilpatti, laid by certain Nagoor Beevi for declaration of her title and also for mandatory injunction to remove certain encroachment, are the appellants herein. The trial Court decreed the suit in *toto* and in a first appeal preferred by the defendants in A.S.No.31 of 2009, the first appellate Court modified the said decree, and held that inasmuch as the defendants have encroached for a width of 8½” in 2nd item of property they only need to pay compensation to the plaintiff. This is now under challenge. For the narrative convenience, the parties are hereby referred to as per their rank before the trial Court.

2. The case of the plaintiff is that she has purchased Schedule I property from a certain Dhanalakshmiammal under Ext.A.1, dated 10.03.1970, and that her vendor obtained the property under Ext.A.2-settlement deed. According to her, on to her immediate eastern wall there lies a vacant space measuring 2.125 feet wide, and this is left for discharging the eaves water of her roof. The defendants are the next adjacent owners on further east. She alleges that the defendants had put up a construction encroaching into this



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stretch measuring 2.125 ft., and seeks declaration of her right over this portion. Indeed, in the plaint it is described as item No.2 property. She also prays for mandatory injunction for removal of encroachment.

3. In the written statement, the defendants contended that they had put up a new construction some four years prior to the institution of the suit, and that the defendants had acquiesced in the construction. They denied that 2nd item of property ever belonged to the plaintiff, and even if there is any encroachment it is lost to her by adverse possession.

4.1 The dispute went to trial, and before the trial Court the plaintiff examined herself as P.W.1, and also examined an independent witness as P.W.2. She produced Ext.A1 to Ext.A6, of which the relevant title documents have already been referred to. For the defendants, the second defendant examined himself as D.W.1, but have not produced any document whatsoever. The trial Court has also appointed a Commission and whose reports are also marked as Ext.C.1 and Ext.C.2.

4.2 On appreciating the evidence, the trial Court decreed the suit, and in particular found that the defendants, though had pleaded that they had title



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document to their property, and that they have also obtained necessary approval from the planning authorities for the construction of their property, they had not produced any document to establish that their construction is well within their property.

5. Challenging the above decree, the defendants preferred the first appeal in A.S.No.31 of 2009. The First Appellate Court however modified the decree of the trial Court, and directed that the compensation alone need be paid by the defendants only to the extent they have encroached the property. For arriving at this conclusion, the Court has considered the Commissioner's report where he has reported that in arriving at the extent of encroachment at 8.5 inches, he had excluded the western wall of the plaintiff's house, which implied that the alleged encroachment might be less than 8.5 inches than what the Commissioner has indicated. For this purpose, he directed the parties to have this extent of encroachment re-done through the Commissioner now with the assistance of a Surveyor. This decree is now challenged by the defendants in this appeal.

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



“i) Whether both Courts are correct by ignoring the issue No.3 regarding acquiescence and laches on the part of respondents when the suit is for mandatory injunction?

ii) Whether both Courts are correct in ignoring Section 41(g) of Specific Relief Act when the respondents have acquiesced the construction of the building by the appellants which is more than 8 years old as admitted by them as well as by the report of the advocate commissioner?

iii) Whether both Courts are correct by shifting the burden of proof regarding the encroachment on the appellants herein? and

iv) Whether the lower Appellate Court is correct in law by directing the appellants to measure the alleged encroachment by a Surveyor when there was no encroachment as alleged by the respondents herein?”

7. Opening the argument the learned counsel for the defendants took this Court extensively through the pleading of the defendants, more particularly, his plea of acquiescence of adverse possession, and also took this Court specifically to the cross-examination of P.W.1, where the plaintiff has



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conceded that the defendants had put up the construction some 7 or 8 years ago. He would argue that the alleged encroachment involves a wall which is the mother wall of the defendants' house, and if it is demolished, it will cause huge inconvenience.

8. The learned counsel for the plaintiff argued that the First Appellate Court has been fair in its approach when it directed payment of damages, and it is impermissible for the defendants not even to pay the damages when they found to have been encroached into the property of the plaintiff.

9. On principle, this Court agrees with the approach of the first appellate Court. The Commissioner has visited the property and he had found that there is an encroachment for a width of 8.5 inches and for a length of 12 feet. In other words, the encroached area is 102 sq.inche This Court finds that the decree directing payment of compensation is fair in law. But the second part is critical. Should the property of both sides be measured yet again?

10. Here, the only contention of the defendants is that the Commissioner has clearly indicated that they have left the western wall of the plaintiff and he

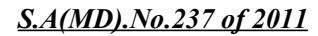


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measured the property. Normally, the wall thickness would be around 4 inches and even if this is accepted, still there would be an encroachment anywhere between 6.5 inches to 4.5 inches, depending upon whether the entire width of the western wall of the plaintiff is measured or only half the width of the said wall is reckoned. This is far too trivial an issue for this Court to engage, and therefore, this Court does not want to disturb the finding on 8.5 inches.

11. Now is the question of fixing the value for the compensation. After hearing both sides, and also after ascertaining the fact that the property is located even today in a Panchayat area, and also taking into account the time when the encroachment was made, this Court holds that a sum of Rs.25,000/- would be a fair and reasonable compensation and directs the defendants to pay a sum of Rs.25,000/- (Rupees Twenty Five Thousand only) as compensation for the encroachment made.

12. Now, this appeal is partly allowed and sets aside only that portion of the first appellate court's decree that required a remeasuring the extent of encroachment made by the defendant through a surveyor, and fixes Rs.25,000/- as compensation and directs the defendant to pay the same to



closed.

before **21.08.2022.**



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14. Post the matter on **27.08.2022** under the caption 'for reporting settlement'.

27.06.2022

Index : Yes/No

Internet: Yes/No

Abr/rmk

To:

1.The Subordinate Judge, Kovilpatti.

2.The District Munsif, Kovilpatti.

3.The Section Officer,

VR Section, Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.

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