



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 16.03.2022

JUDGMENT PRONOUNDED ON : 01.04.2022

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CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A. (MD) .No.479 of 2021
and CMP(MD) .No.6418 of 2021

Muthulalitha

...Appellant/Appellant/
Plaintiff

Vs

Sundaravadivu

...Respondent/Respondent/
Defendant

PRAYER : Second Appeal is filed under Section 100 of C.P.C, to allow the second appeal by setting aside the judgment and decree made in A.S.No.29 of 2018 dated 08.02.2021 on the file of the Additional District and Sessions Court, Srivilliputhur, confirming the judgment and decree made in O.S.No.52 of 2010 dated 02.01.2018 on the file of the Subordinate Court, Srivilliputhur.

For Appellant : Mr.M.Thirunavukkarasu

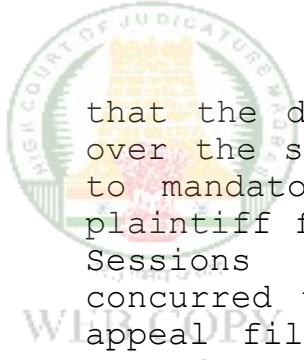
For Respondent : Mr.S.Ramesh
For Mr.V.Raghavachari

JUDGMENT

The plaintiff is the appellant.

2.The plaintiff filed O.S.No.52 of 2010 before the Subordinate Court, Srivilliputhur for declaration that she is the absolute owner of the plaint second schedule property which is a wall and sought for consequential permanent injunction from in any way encroaching or doing any other construction in the plaint second schedule property. The plaintiff further prayed for a mandatory injunction to remove the encroachment over the second schedule wall as shown in the plaint fourth schedule property.

3.The trial Court partly allowed the suit granting declaration of title over the first and second schedule properties and consequential injunction for the said properties. The trial Court also granted permanent injunction in favour of the plaintiff



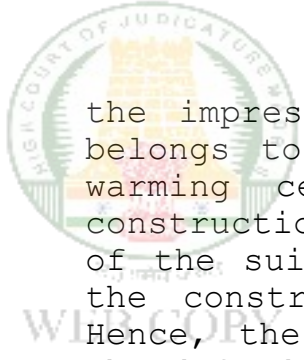
that the defendant should not put up any construction or encroach over the second schedule property. However, the prayer with regard to mandatory injunction was rejected. As against the same, the plaintiff filed A.S.No.29 of 2018 before the Additional District and Sessions Court, Srivilliputhur. The learned Appellate Judge concurred with the findings of the trial Court and dismissed the appeal filed by the plaintiff. As against the same, the present second appeal has been filed by the plaintiff.

4.The plaintiff had contended that she is the owner of plaintiff first and second schedule properties. The defendant who is the adjacent owner had encroached upon the second schedule property which is a wall belonging to the plaintiff and she has inserted ½ feet of her property at the height of 25 feet in the suit second schedule wall and she has also put up 'RCC' tank in the said encroachment. Hence, the plaintiff prayed for declaration and permanent injunction for the second schedule property and for mandatory injunction for removal of the encroachment (mentioned in the fourth schedule property) over the second schedule property.

5.The trial Court agreed with the contention of the plaintiff that the suit second schedule property is the exclusive wall belonging to the plaintiff and proceeded to grant a decree for declaration of title and permanent injunction in favour of the plaintiff over the second schedule property. The trial Court further found that since the second schedule wall is the exclusive wall of the plaintiff, the defendant is not entitled to put up any construction over the second schedule wall. Hence, the trial Court granted a decree for permanent injunction restraining the defendant from in any manner put up any further construction or encroachment over the second schedule wall. However, the prayer for mandatory injunction for removal of construction that have already been was rejected by the trial Court.

6.The trial Court relied upon the Advocate Commissioner's report to arrive at a finding that the width of the second schedule wall upto the first floor is 1 ½ feet and above the first floor, it is one feet. The Court arrived at a finding that between the two walls of the plaintiff and the defendant, there is no gap. The trial Court also arrived at a finding that upon the exclusive wall of the plaintiff, the defendant has encroached upon to an extent of ½ feet and put up construction in the first floor. The trial Court also found that if the said wall is directed to be demolished, the building of the plaintiff would also get damaged. When the defendant has put up this encroached construction, the plaintiff was available in the town. During the construction, the plaintiff has not raised any objection. The parties were in talking terms and there is no enmity between the parties.

7.The trial Court also found that the defendant has recently
<https://hcservicesportal.gov.in/hcservices> it schedule property and she might have been under

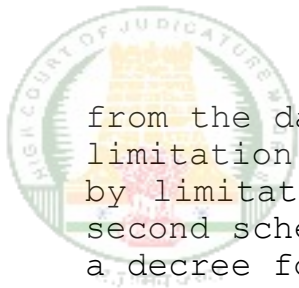


the impression that the said $\frac{1}{2}$ feet in the second schedule wall belongs to her. The plaintiff has also participated in the house warming ceremony of her neighbour namely the defendant. The construction has been completed around two years back before filing of the suit and the plaintiff has not raised any objection during the construction or at the time of completion of construction. Hence, the plaintiff has acquiesced with the construction made by the defendant. Based upon the said finding, the trial Court rejected the prayer for mandatory injunction.

8.The First Appellate Court elaborately discussed about the depositions of PW1 and DW1 and arrived at a finding that there is no encroachment made by the defendant at the ground floor level and the encroachment of $\frac{1}{2}$ feet has been done only at the first floor level. The First Appellant Court found that if any decree for mandatory injunction is granted, it is very difficult to be executed because the plaintiff's property will also get damaged and the whole of the first floor will get opened up. The First Appellate Court further found that the description of measurement of the encroachment mentioned as item No.4 is also erroneous. The First Appellate Court further found that the plaintiff has not approached the Court with clean hands and suit is affected by laches and acquiescence. Though the plaintiff had knowledge about the construction in the second schedule property, she has not chosen to object to the same till the completion of construction and thereafter, filed a suit for mandatory injunction for removal of the construction. In case, a decree for mandatory injunction is granted and the same is executed, the plaintiff will get benefit of $\frac{1}{2}$ feet between her wall and the wall of the defendant. The First Appellate Court also found that now the plaintiff's wall and the defendant's wall have been joined together and it will be difficult to cut them in between and remove $\frac{1}{2}$ feet from them. Hence, the First Appellate Court found that even if a mandatory injunction is granted, the same cannot be enforced. Based upon the said finding, the First Appellate Court dismissed the appeal filed by the plaintiff. As against the same, the plaintiff has filed the above second appeal.

9.The scope of the second appeal is restricted to the consideration of the fact whether the plaintiff is entitled to get a decree for mandatory injunction to remove the encroachment made by the defendant in the second schedule property.

10.The learned counsel for the appellant had contended that the Courts below have arrived at a concurrent finding that the second schedule property exclusively belongs to the plaintiff. When the second schedule property exclusively belongs to the plaintiff, the encroachment made by the defendant have to be removed in the second schedule wall. The Courts below have also concurrently found that the defendant has encroached upon the second schedule wall. According to the learned counsel for the appellant, the prayer for



from the date of construction and hence, the prayer is not barred by limitation. He further contended that when the prayer is not barred by limitation and the plaintiff has established her right over the second schedule property, the Court below have erred in not granting a decree for mandatory injunction.

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11.The learned counsel for the appellant further contended that the executability of the decree cannot be considered at the stage of granting a decree for mandatory injunction. He further contended that $\frac{1}{2}$ feet encroachment made by the defendant from the first floor level will cause great hardship to her in a manner that it will prevent the entry of light and air into her property. He further contended that the findings of the Courts below that the plaintiff has acquiesced with the construction of the defendant is not factually correct. The question of acquiescence will arise only in a case where the plaintiff has actively encouraged the defendant in putting up the construction or kept silent after having knowledge about the encroachment. In the present case, it cannot be attributed to the plaintiff that despite having knowledge about the encroachment, she kept quiet or she actively helped the defendant to put up construction. Hence, the Courts below were not right in arriving at a finding that the plaintiff has acquiesced to the construction made by the defendant.

12.Per contra, the learned counsel for the respondent had contended that all the houses in the said area are having a common wall without any gap in between them. He further contended that the wall of the plaintiff and the defendant have now got merged together and there is no gap between the wall of the plaintiff and the defendant. If a decree in mandatory injunction is granted, it is very difficult to carve out $\frac{1}{2}$ feet in the first floor, in order to execute the decree. Not only the defendant's building, the plaintiff's building will also get completely damaged, if such an exercise is carried out in the execution proceedings. He further contended that the plaintiff is the neighbour and the construction was being made right in front of the plaintiff and there was no objection from the plaintiff at any point of time. The construction was made two years prior to the filing of the suit.

13.Now at this length of time, if any decree for mandatory injunction is granted, the defendant would be put to great prejudice. He further contended that the Court may consider awarding of damages in lieu of decree for mandatory injunction.

14.I have carefully considered the submissions made on either side.

15.Section 40 of Specific Relief Act reads as follows:

"40. Damages in lieu of, or in addition to, injunction.—



(1) The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

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(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint:

Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach."

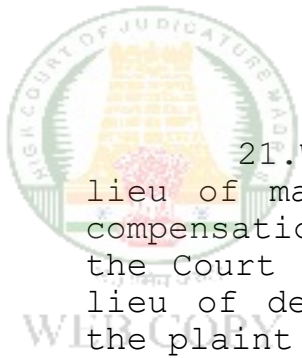
16. In the present case, I find that there is some force in the argument on the side of the respondent. Even assuming, if any decree for mandatory injunction is granted, the same cannot be executed by carving out $\frac{1}{2}$ feet of wall over the second schedule property said to have been put up by the defendant. Now, there is no gap in between the wall of the plaintiff and the defendant. If any attempt to carve out $\frac{1}{2}$ feet, would literally damage both the plaintiff's building and the defendant's building. That apart, the plaintiff was very much available in the suit property, during the construction made by the defendant. She had belatedly approached the Court for mandatory injunction that too after a period of two years from the date of construction.

17. The trial Court as well as the First Appellate Court have concurrently found that the defendant has made encroachment over the second schedule property. The defendant has not filed any second appeal challenging the said decree.

18. In the light of the above said facts, I deem it appropriate that the plaintiff would be adequately compensated in lieu of decree for mandatory injunction. However, as per Section 40 (2) of Specific Relief Act, damages cannot be awarded by this Court unless the same has been claimed in the plaint.

19. In the present case, the learned counsel for the appellant/plaintiff has filed a memo on 15.03.2022 contending that the party would be satisfied with the award of damages of Rs.1,00,000/- in lieu of mandatory injunction.

20. The learned counsel for the respondent/defendant has also filed a memo valuing the damages at Rs.50,000/- without prejudice to the contention in the second appeal.



21. When the plaintiff has agreed to receive compensation in lieu of mandatory injunction and the defendant has agreed to pay compensation to avoid a decree for mandatory injunction, I find that the Court will have jurisdiction to grant a decree for damages in lieu of decree for mandatory injunction even without amendment of the plaint based upon the memo filed by both the parties.

22. In view of the above said discussion, I find that the damages to a tune of Rs.60,000/- would be appropriate in lieu of decree for mandatory injunction.

23. In view of the above said discussion, the following decree is passed.

(1) The judgment and decree of the Courts below rejecting the decree for mandatory injunction stands confirmed.

(2) The defendant/respondent is directed to pay a sum of Rs. 60,000/- in lieu of decree for mandatory injunction in favour of the appellant/plaintiff within a period of three months from the date of the decree.

(3) In other respects, the judgment and decree of the Courts below are confirmed.

24. With the above directions, the second appeal is partly allowed. No costs, consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

msa

To

1. The Additional District and Sessions Judge, Srivilliputhur,

2. The Subordinate Judge, Srivilliputhur.

3. The Section Officer

V.R. Section

Madurai Bench of Madras High Court

Madurai

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



+1 CC to M/s.M.THIRUNAVUKKARASU, Advocate (SR-16004[F] dated
01/04/2022)

+1 CC to M/s.V.RAGHAVACHARI, Advocate (SR-16189[F] dated
01/04/2022)

S.A. (MD) .No.479 of 2021
and CMP (MD) .No.6418 of 2021
01.04.2022

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