



S.A.No.900 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.12.2023

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 900 of 2023
&
C.M.P.No. 28817 of 2023

1.Jeeva

2.Sumathi

...Appellants

Vs.

John Samuel

...Respondent

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree in A.S.No. 06 of 2020 dated 19.10.2022 on the file of the Subordinate Court, Coonoor, confirming the Decree and Judgement in O.S.No. 80 of 2008 dated 25.06.2020 on the file of the District Munsif Court, Coonoor, Nilgiris.



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S.A.No.900 of 2023

For Appellant : Mr. R.Suresh Kumar
for Mr. K.M. Vijayan Associates.

JUDGMENT

The defendants in a suit for permanent and mandatory injunction are the appellants before this Court. The facts which have culminated in the filing of the above Second Appeal is herein below set out and the parties are referred to as the plaintiff and defendants.

2. The plaintiff had filed a suit O.S.No.82 of 2008 on the file of the District Munsif, Coonoor stating that he was the absolute owner of the suit schedule property and is in possession and enjoyment of the same, he having purchased it under a registered sale deed dated 30.07.2003. The plaintiff would submit that the property tax is assessed in his name and he is paying taxes to Coonoor municipality regularly. From the date of his purchase, he has been in absolute possession and enjoyment of the suit property.



S.A.No.900 of 2023

WEB COPY

3. The defendants who are the owners of the properties situate on the west of the suit property, on 05.08.2008, tried to encroach the property aerially to an extent of 3 feet breadth and 18.5 feet length on the western side of the suit property by extending the sun shade of their building. The plaintiff had managed to stop the attempt with great difficulty and had issued a legal notice dated 06.08.2008, addressed to the 1st defendant. The matter was also informed to the Coonoor Town Police, who informed the plaintiff to approach the Civil Court for redressal. However, after the police intervention, the defendants stopped their work for few days. Again on 20.09.2008, the defendants attempted to aerially encroach the extent of 3 feet breadth and 1.1 meter length of the suit property by extending the sun shade.

4. The plaintiff would contend that the defendants have encroached an extent of 5.5 sq. feet on north west side of the suit



property and had aerially encroached 2 feet breadth and 5.6 meter length by extending sun shade. Therefore, the plaintiff has come forward with the suit in question.

5. The 1st defendant had filed a written statement which was adopted by the 2nd defendant contending that the 1st defendant has not put up a sun shade outside his property. The complaint of the plaintiff to the municipal authorities and the police had not been entertained, since the allegations found to be false. The defendants would submit that the very schedule of the suit property would show that the plaintiff was attempting to claim a portion of the defendant's property. They would contend that there was no cause of action for filing the suit. Hence, they sought for the dismissal of the suit.

6. An additional written statement came to be filed by defendants. This additional written statement came to be filed after the amendment have been carried out in the plaint. The 1st defendant



would submit that the plaintiff was attempting to put up a new case on the basis of the report of the commissioner, which the defendants were not admitting and submitted that the original claim and the subsequent case is totally different with reference to the prayer for mandatory injunction. In the original suit only one schedule was included, however in the amended plaint there are two schedules. They would further submit that the relief is barred by limitation.

7. On considering the pleadings the Trial Court had framed the following issues:

“1. Whether the plaintiff is entitled to permanent injunction as prayed?

2. Whether the plaintiff is entitled to mandatory injunction as prayed ?

3. To what other relief?

Additional Issues:

1. Whether the plaintiff is in possession and



S.A.No.900 of 2023

enjoyment of the suit property?

2. Whether the defendant has encroached into the suit property?

8. The plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.7. The defendants had examined the 1st defendant as D.W.1 and marked Ex.B.1. The Commissioner's report has been marked as Ex.C.1 and Ex.C.2.

9. The Trial Court after considering the commissioner's report and the evidence that has been filed came to the conclusion that the plaintiff is in exclusive possession of the suit schedule property. Since the plaintiff's possession has been proved, the Trial Court had proceeded to grant injunction. The plaintiff has sought for mandatory injunction calling upon the defendants to remove aerielly encroachments that have been put up by the defendants and the Trial



Court had considered as to whether the defendant has encroached into the plaintiff's property, which has been described for the relief of mandatory injunction.

10. The commissioner in Ex.C.1 has stated as follows:

“The Defendant/Respondent had encroached 1.1 meter from the 5.6 metre length at the back side of plaintiffs property and there is an encroachment of 5.6 metre length aerial encroachment in the said property more fully described and delineated in "BLUE" in survey sketch attached herewith”.

11. The learned Judge has taken note of the photographs marked as Ex.A.7, which has been filed along with commissioner's report and plan and come to the conclusion that there has been an aerial



S.A.No.900 of 2023

encroachment in the form of projection. In the cross examination of D.W.1, he has accepted the fact that he is not objected to the commissioner's report, which has reported that the sun shade from the defendant's property extends over the plaintiff's property.

12. The learned Judge observed that the owner of the property is entitled to free the access right upto the sky and therefore, the defendants had no right to encroach to the extent of 2 feet in breadth and 5.6 meters in length and also encroaching into compound wall measuring an extent of 5.5 sq.ft., as seen in Ex.C.1 and Ex.C.2 and Ex.A.7. Ultimately, the suit was decreed.

13. Challenging the same, the defendants had filed A.S.No.6 of 2020 on the file of the Sub Court, Coonoor. The learned Judge has also confirmed the Judgement and Decree of the Trial Court and



S.A.No.900 of 2023

dismissed the appeal, against which the present Second Appeal is filed.

14. The matter is posted today under the caption “For Admission”.

15. Heard the learned counsel and perused the records.

16. The Advocate Commissioner who has appointed to inspect the property of the plaintiff and note down the encroachments thereon has submitted a report.

17. The defendants had raised a plea of limitation stating that the relief is barred by limitation. The Courts below have taken note of the fact that the amendment application which is filed and ordered has not been challenged by defendants. However, the relief for mandatory



S.A.No.900 of 2023

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injunction would date back to the filing of the suit. Therefore, the relief of mandatory injunction is not barred by limitation. Further, the report of the commissioner clearly indicates the encroachment made by the defendants into the plaintiffs' property. Admittedly, the defendants have encroached into the plaintiff's property aerially to an extent of 2 feet breadth and 5.6 meter in length. That apart, 5.5 sq.ft., of land has been encroached on the north eastern side of the suit property, which is an encroachment into the plaintiff's property. Therefore, the Courts below on considering the evidence and records have decreed the suit. The defendant has not been able to make out any case that the suit is barred by limitation or that there is no encroachment by him.

18. Both the Courts below have extensively considered the oral as well as documentary evidence to decree the suit. The defendants have not made out any question of law much less a substantial question of law warranting interference of this Court. Accordingly,



S.A.No.900 of 2023

the Second Appeal is dismissed. Consequently, the connected Civil
Miscellaneous Petition is closed. No costs.

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21.12.2023

Index : Yes/No
Internet : Yes/No
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To

1.The Subordinate Court,
Coonoor.

2.The District Munsif Court,
Coonoor,
Nilgiris.

P.T. ASHA, J,

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S.A.No.900 of 2023

S.A.No. 900 of 2023

21.12.2023