

(2007) 08 KL CK 0040

In the High Court Of Kerala

Case No : Regular Second Appeal No. 1112 of 2006

P.S. Rama Bhat, P.G. Subramanyan and S.K. Radha

APPELLANT

Vs

K.A. Aboobacker, Zuhara and S.V. Keshavan

RESPONDENT

Date of Decision : 21-08-2007

Acts Referred:

Citation : (2007) 08 KL CK 0040

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : D. Krishna Prasad, for the Appellant; Kodoth Sreedharan, for the Respondent

Final Decision : Dismissed

Judgement

M. Sasidharan Nambiar, J.—Defendants 2 to 4 in O.S.38/1999 on the file of Munsiff Court, Kasaragod are the appellants. Plaintiffs are the respondents. Respondents instituted the suit seeking a decree for permanent prohibitory injunction and recovery of possession. Plaint A schedule property belongs to respondents and Plaint B schedule property to appellants. Plaint C schedule property is alleged to be portion of Plaint A schedule property trespassed upon by appellants. It was contended that in between A and B schedule properties, there has been compound wall along the major portion of the boundary and a portion of the northern wall of the building constructed above the wall also serve as a boundary and to a length of about 14ft. there was a barbed wire fence and originally there was an old building in the Plaint B schedule property and one month prior to the institution of the suit, appellants demolished major portion of that building and started construction of a new building. It was alleged that while so constructing, appellants encroached upon a portion of Plaint A schedule property, having a width of 2 feet and length of 14 ft which is shown as Plaint C schedule property, and started construction of a building with laterite stones and inspite of the objection by respondents, appellants did not remove the structure or surrender vacant possession of the building and therefore suit was filed

seeking recovery of possession of plaint C schedule property and for a permanent prohibitory injunction restraining further encroachment into the remaining portions of the plaint A schedule property. Appellants in the written statement contended that plaint C schedule property does not form part of plaint A schedule property and they did not encroach upon any portion of plaint A schedule property or the property of respondents. It was contended that the original building in the plaint B schedule property was demolished and a new building was constructed and respondents have no right to get any portion of their property recovered or and are not entitled to the mandatory injunction for demolishing of the structure in the plaint C schedule property.

2. Learned Munsiff on the evidence of Pw1, Dws.1 and 2, Exts.A1 to A5, Exts.B1 to B7 and Exts.C1 and C2 found that plaint C schedule property is part of plaint A schedule property. Learned Munsiff also found that in plaint C schedule property a temporary structure was put up with hollow bricks and respondents have title to the property and are entitled to get a decree for recovery of possession of plaint C schedule property after getting the structure removed. A decree for perpetual injunction in respect of the remaining portion of plaint A schedule property and a mandatory injunction for removal of the structure in plaint C schedule property and recovery of R.S.A.1112/2006 4 possession of plaint C schedule property was granted. Appellants challenged the decree and judgment before Sub Court, Kasaragod in A.S.121/2002. Learned Sub Judge on reappraisal of evidence confirmed the findings of learned Munsiff that plaint C schedule is part of plaint A schedule property and it belongs to respondents. Learned Sub Judge also confirmed the findings of learned Munsiff that the structure in plaint C schedule property is a temporary one made of hollow bricks and respondents are entitled to a decree for recovery of possession of plaint C schedule property. Though a plea of estoppel by acquiescence was projected, courts below did not accept the same and held that respondents are entitled to the decree for recovery of possession and perpetual injunction. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial question of law.

1) As property sought to be recovered after demolition of the constructions made by appellants is in respect of a small extent whether courts below were justified in granting a decree for mandatory injunction instead of awarding sufficient compensation.

4. Learned Counsel appearing for appellants and respondents were heard.

5. Case of respondents is that plaint C schedule property is part of plaint A schedule property. it was disputed by appellants, learned Munsiff on the evidence found that plaint C schedule property is part of plaint A schedule property. Plaint B schedule property belonging to the appellants is in R.S. No. 10/6A, while plaint A schedule property belonging to respondents is in R.S.10/7B. Exts.C2 plan and

Ext.C1 report of the Commissioner establish that plaint C schedule property is part of R.S. No. 10/7B. Learned Munsiff on the evidence found that plaint C schedule property is part of plaint A schedule property. First appellate court also confirmed that finding. That factual finding cannot be challenged in the second appeal.

6. Learned Counsel appearing for appellants argued that plaint C schedule property is only having an extent of about 28 sq.ft and it is the land occupied by part of the building in plaint B schedule property. It was argued that the finding of courts below that it is a temporary structure is not correct and the report of the Commissioner does not establish that it is a temporary structure. Learned Counsel also argued that eventhough suit was filed seeking a decree for perpetual prohibitory injunction in respect of remaining portion of plaint A schedule property, apart from a decree for mandatory injunction, no application was filed seeking an order of temporary injunction restraining appellants from constructing further in the plaint C schedule property and it establishes that construction of the building was completed prior to the institution of the suit. The argument of learned Counsel is that in such circumstance, courts below should have found that construction of the building in plaint B schedule property inclusive of part of the building in plaint C schedule property was completed before the institution of the suit and construction of the structure in the Plaint C schedule property was completed without any objection by the respondents and therefore principles of acquiescence would apply and courts below were not justified in rejecting the case of appellants. It was argued that though in the plaint it was alleged that respondents have filed a police complaint and construction work in the plaint C schedule property was stopped, no evidence was adduced to establish a police complaint much less stopping of the work and in such circumstance, it is to be found that construction in the plaint C schedule building was completed much before the institution of the suit and when plaint C schedule property is only having an extent of 28 sq.ft and its existence will not cause any nuisance or disturbance to the respondents, instead of granting a decree for mandatory injunction and recovery of possession courts below should have granted the market value of the plaint C schedule property to the respondents. It was argued that appellants were prepared to pay the market value of plaint C schedule property to respondents, respondents were not agreeable for that course and in such circumstance, the decree granted by courts below in respect of plaint C schedule property is to be set aside. Reliance was placed on the decision of this Court in Koya Haji v. Bhaskaran 1984 KLT 929, Saraswathy Amma v. Bhaskara Pillai 1987(1) KLT SN 47 (Case No. 63 and decision of Apex Court in Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others, and a learned single Judge of the High Court of Madras in S. Palanivelu Vs. K. Veradammal, and in R.S. Muthuswami Gounder Vs. A. Annamalai and Others, .

7. Learned Counsel appearing for respondents pointed out that evidence of DW1 establish that the roof of the structure in the plaint C schedule property is not a

concrete slab but fibre sheet and the report of the Commissioner establish that the structure is made of hollow bricks and iron grills and is not part of the main building in the plaint B schedule property but only an extension encroaching upon plaint A schedule property and in such circumstance, decisions relied on by the appellants have no application to the facts of the case. It was argued that there was no acquiescence as in the cases relied on by the appellants and even according to appellants, structure in the plaint C schedule property was completed only in January 1999 and suit was also filed in January 1999 and in such circumstance, principles of acquiescence or estoppel have no application. It was further argued that when title of the respondents to plaint C schedule property, being part of plaint A schedule, is established, they are entitled to a decree for recovery of possession and as structure was constructed in the plaint C schedule property disregarding the objection raised by respondents, respondents are entitled to a decree for mandatory injunction for removal of the structure and factual findings of the courts below cannot be interfered.

8. Ext.C1 report of the Commissioner establish that plaint C schedule property is the encroached portion of plaint A schedule property, having a measurement of 0.002.64 sq.metres namely about 28 sq.ft. The report also shows that when the main hotel building in the plaint B schedule property is a new R.C.C. Building, the structure in the plaint C schedule property which is an extension of the building was constructed using cement hollow bricks at a height of 10 ft. and enclosing that portion by putting up an iron grills to a length of 8 ft. Evidence of DW1 establish that the roof of that structure is of fibre sheet. Therefore though Ext.C1 report does not specifically state that the structure in the plaint C schedule property is a temporary structure, learned Munsiff and learned Sub Judge on the evidence found that it is a temporary structure. That factual finding is in accordance with the evidence and cannot be challenged.

9. Though learned Counsel appearing for appellants vehemently argued that respondents did not object to the construction of the structure in plaint C schedule property and by their act they acquiesced in the construction and therefore courts below should not have granted a decree for recovery of possession or mandatory injunction and instead should have awarded monetary compensation being the market value of the plaint c schedule property. It was vehemently submitted that by granting a decree for recovery of possession or mandatory injunction except satisfying the sentimentality of respondents or their ego, no purpose will be served and therefore the decree for mandatory injunction and recovery of possession may be modified to payment of market value of the property. On the facts and circumstances of the case, I cannot agree with the submission. The facts of the decided cases relied on by learned Counsel appearing for appellants are entirely different. The cases relied on are rendered on the peculiar facts of those cases establishing that plaintiffs in those suits did not take action for years, when under their nose constructions were made in their property after encroaching it, it is on those basis, courts below held that a decree for recovery of possession or mandatory injunction cannot be granted. Evidence in this case

establish that the structure in the plaint C schedule property was put up only in January, 1999 and suit was also instituted in the same month. As found by courts below the very nature of the structure in the plaint C schedule property establish that it was constructed with hollow bricks and fibre sheet roof. In such circumstance, when respondents established that they have title to the plaint A schedule property and plaint C schedule property is part of plaint A schedule property and the encroachments in plaint C schedule property was only just days or week prior to the institution of the suit, respondents are entitled to the decree for recovery of possession and mandatory injunction and perpetual injunction granted by the courts below. I find no reason to interfere with the decree granted by the courts below. Appeal is dismissed.

Appellants are granted three months time to surrender vacant possession of plaint C schedule property, after demolition of the structure therein, from today on condition that appellants shall file an unconditional undertaking before the trial court within two weeks from today to surrender vacant possession of plaint C schedule property after demolishing the structure, on the expiry of three months from today.