
(2006) 12 AP CK 0037
In the Andhra Pradesh High Court
Case No : SA No. 706 of 1995

Syed Amina Bi and Another	Vs	APPELLANT
Ghantasala Krishna Murthy (died) by LR's. and Others		RESPONDENT

Date of Decision : 07-12-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10(2)

Citation : (2007) 3 ALD 163 : (2007) 4 ALT 276

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : B.V. Subbaiah, for the Appellant; P. Phalguna Rao, for the Respondent

Judgement

C.Y. Somayajulu, J.—Deceased first respondent filed the suit against the appellants, who are wife and husband, seeking a decree of perpetual injunction restraining them i.e. the appellants from making any constructions to the south of the southern wall of the house of the second respondent, and from interfering with his possession and enjoyment of the plot shown as "A" in the plaint plan up to the southern wall of the house of the second respondent, and also for a mandatory injunction directing them to remove the encroachments made into the air space and also his site by extending the R.C.C. roof of their terraced house and by encroaching in his plot shown as "A" of the plaint plan by constructing a staircase respectively. Subsequent to the filing of the suit, first respondent died, and so, respondents 2 to 4, who are his wife and sons, came on record as his legal representatives and prosecuted the suit.

2. The case of the appellants is that they, who have an easementary right to discharge the water from the eaves of their house into the site of the respondents, did not encroach into the site of the respondents and in any event since the house was constructed on the earlier existing basement several years prior to the filing of the suit, respondents, who acquiesced the construction, cannot seek a mandatory or perpetual injunction.

3. In support of their case, respondents examined the 4th respondent as P.W. 1 and marked Exs. A.1 to A.4. In support of their case, appellants examined the second appellant as D.W.1 and marked Exs.B.1 to B.5. The trial Court decreed the suit as prayed for. The appeal to the first appellate Court preferred by the appellant was dismissed by the decree and judgment under appeal. Hence, this second appeal by the defendants in the suit.

4. The second appeal was admitted by a learned Judge on the following substantial questions of law.

(a) On the facts and circumstances of this case whether the respondents have acquiesced the constructions made by the appellants and whether they are therefore estopped from seeking a mandatory injunction to demolish the structures?

(b) Whether the appellants have acquired prescriptive title to the site under the eaves portion of their house?

(c) Whether the Courts below have correctly interpreted the recitals in the documents Exs. B.1 to B.5?

(d) Whether on the facts and circumstances of the case, a mandatory injunction directing demolition of the structures is allowed under law?

5. The contention of Sri B.V. Subbaiah, the learned Counsel for appellants, is that since the reports of the Commissioners show that the encroachment allegedly made by way of construction of staircase is negligible, the Courts below ought not to have granted the mandatory injunction for removal of the staircase and since the construction of the RCC roof was made more than 2 years prior to the filing of the suit it should be deemed that the respondents acquiesced the said construction and so respondents are not entitled to the relief of mandatory injunction. He relied on *Ravuru Punnamma Vs. Lakkaraju Venkata Subba Rao*, ; *R.S. Muthuswami Gounder Vs. A. Annamalai and Others*, and *Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others*, , in support of the said contention.

6. The contention of the learned Counsel for respondents is that since there is no issue relating to acquiescence and since there is also no evidence on record to show as to when the constructions were completed and since the two Courts below have concurrently found that the encroachments made by the appellants have to be removed, the concurrent findings of fact need no interference in a second appeal.

7. Both the Courts below concurrently found that appellants have no right to any portion beyond the southern wall of their house, which belongs to the respondents, except to discharge the water from the eaves of their house. Since interpretation of Exs. B.1 to B.5 has no relevance to decide the right of the respondent to seek mandatory injunction, the only point for consideration is whether respondents are entitled to the mandatory injunction for removal of the

structures raised by the appellants on the basis of the evidence on record.

8. I find no force in the contention of the learned Counsel for respondents that inasmuch as there is no issue relating to acquiescence, appellants cannot be heard to say that respondents are not entitled to the mandatory injunction for removal of the roof extended into their site, because that contention was in fact raised before the trial and appellate Courts also by the Counsel for defendants/appellants. The trial Court while dealing with issue No. 2 framed, observed as follows in Para-7 of its judgment.

It is the contention of the defendants that the 1st plaintiff has allowed the second defendant to complete the said constructions and the 1st plaintiff did not raise any protest at the time of their constructions by March 1975 and having kept quiet all the way the 1st plaintiff is not entitled to file this suit in the year 1978. But, Ex.B.2 is the renewal of licence extended for a period of one year from 5.4.1975. So, by virtue of Ex.B.2 it is very clear that the 1st defendant was given time till 5.4.1976 to complete the proposed constructions. Whereas the 1st plaintiff has filed this case before the Court on 16.1.1978 and I feel that the said delay in filing the suit will not at all effect the case of the 1st plaintiff in any way.

The first appellate Court in Para-9 of its judgment observed

It is contended by the defendants that the 1st plaintiff has allowed the 2nd defendant to complete the above mentioned constructions and he did not raise any protest at the time of their construction and having kept quiet all the way, so he is not entitled to file the suit. Ex.B.2 is the renewal of licence extended for a period of one year from 5.4.1975. So as seen from Ex.B.2 it is clear that 1st defendant has given time till 5.4.1976 to complete the proposed constructions, whereas the suit was filed on 16.1.1978. Therefore, I am of the view that the said delay in filing the suit will not at all effect in any way the case of the plaintiffs.

So, it is clear that though the contention of acquiescence was raised before both the Courts below, they negated that contention on the ground that they were given time till 5.4.1976 for construction and since the suit was filed on 16.1.1978, it cannot be said that the respondents acquiesced the constructions made by the appellants.

9. The finding of fact recorded by both the Courts below is that the encroachment by way of staircase is 71/2 and by way of construction of R.C.C. roof is 1'3" beyond the southern wall of the appellants. Since construction of a R.C.C. roof is not a secret affair and since houses of both appellants and respondents are separated by the southern wall of the appellants, appellants laying a slab extending beyond 1'3" their site and into their air space can easily be noticed by the respondents. They, as ordinary prudent persons, should have raised an objection for the slab being constructed by encroaching 1'3" into the air space over their site. Why they did not object to the laying of the slab by the appellants by encroaching 1'3" into their air space when the slab was being laid

is not explained. Respondent does not seem to have issued any notice to the appellants raising objection to the encroachment being made by them. So, it cannot but be said that respondents acquiesced the construction of the R.C.C. by encroaching 1'3" into their air space.

10. The facts in Punnamma's case (supra), relied on by the learned Counsel for appellants are different from the facts in this case. In that case, the constructions were made 25 years prior to the filing of the suit. In those circumstances, it was held that a person having a right to object, if acquiesces, any constructions of the structures encroaching upon the wall, is not entitled to the discretionary remedy of a mandatory injunction.

11. In Muthuswami Gounder's case (supra), the plaintiff who was residing about a mile away from the suit property kept quiet until the defendant had completed his constructions and sent a notice 7 or 8 months later asserting his right to the suit property and filed the suit for mandatory injunction. It was dismissed and market value of the suit property, in lieu of relief of recovery of vacant possession of the property, was ordered.

12. In K. Satyanarayana 's case (supra), the suit for mandatory injunction was filed 9 years after the encroachment was made, and prayer for removal of wall was introduced 4 years thereafter. In the facts and circumstances of the case, the apex Court partly reversed the decree of the High Court and dismissed the prayer for mandatory injunction for removal of the encroachments.

13. In this case, the suit is filed with regard to two encroachments i.e., RCC roof and Staircase. In respect of the encroachment by stair-case, the report of the Commissioner appointed in LA. No. 3 of 1978 shows that the staircase of the appellants, which was of recent origin, extends beyond 71/2 their southern wall and that its centering was not completely removed and two wooden planks fixed underneath the two stairs were still there by the time of his visit. In the objections to the Commissioner's report filed by them, appellants stated that the construction of the staircase was completed by March 1975 and that its centering was removed in March 1975 itself and that they only stored some wooden planks underneath the staircase and the Commissioner by mistake stated that the centering was not removed.

14. Though in his report the Commissioner stated that the second appellant informed him that as the staircase constructed in 1975 collapsed due to a cyclone it was reconstructed about one month prior to his visit i.e. in the month of November, 1977, I do not wish to take that observation into consideration because the warrant issued to him did not authorize him to record the statements made to him by the parties, and authorized him to note the physical features obtaining in the sites of appellants and respondents only.

15. At the behest of appellants, another Commissioner was appointed in I.A. No. 1004 of 1985, for taking measurements of their site. That Commissioner filed his report giving the measurements and reporting that the staircase looks old and

that centering material was not there at the time of his visit and that the staircase extended 1/2 link towards south from the southern wall of the appellants.

16. Though the Commissioners appointed by the Court were not examined, in view of Order XXVI Rule 10(2) CPC, their reports form part of the record and so they can be taken into consideration for deciding the point for consideration. Appellants who took a plea that they completed the construction in 1975 did not adduce evidence to establish that fact. The fact that the report of the second Commissioner appointed in I.A. No. 1004 of 1985 i.e. about seven years after the visit of the first Commissioner in I.A. No. 3 of 1978, shows that the staircase appears to be old and that there was no centering, that observation is not of any help to the appellants because centering would be removed after completion of the construction. After more than seven years of its construction the staircase in open cannot appear new. There are no grounds to disbelieve the report of the first Commissioner in I.A. No. 3 of 1978. The objection that the Commissioner mistook storing of planks under the staircase as centering is but a lame excuse, to explain away the observation of the Commissioner. From the report of the Commissioner in I.A. No. 3 of 1978, it is clear that the staircase was constructed just prior to the filing of the suit. So, in respect of the encroachment into the space of the respondents by staircase it cannot be said that respondents acquiesced the construction of the staircase. Therefore, mandatory injunction for removal of the staircase encroaching into the site of the appellants is concerned; it requires no interference by this Court in a second appeal.

17. Since the evidence on record shows that the suit is filed nearly two years after the completion of the construction of R.C.C. roof, and since the said construction could not have been made without the knowledge of the respondents, instead of granting a mandatory injunction, appellants can be directed to pay damages to the respondents. Inasmuch as the encroachment of 1'3" of air space of the respondents by projecting the roof of the appellants over their land would not hamper their use of the land by the respondents, but it may cause inconvenience to them. In the facts and circumstances, I am of the opinion that an amount of Rs. 5,000/- would be a reasonable amount of damages for the encroachment made by the appellants over the air space of the respondents by extending their roof. The point is answered accordingly.

18. In the result, the appeal is allowed in part and the decree of mandatory injunction for removal of the roof of the R.C.C. roof of the appellant only is dismissed and in lieu thereof appellants are directed to pay Rs. 5,000/- to respondents as damages with interest at 9% per annum from today till the date of payment. In all other respects the decrees of the Courts below stands confirmed. Parties are directed to bear their own costs in this appeal.