

Krothapalli Satyanarayana

Vs

Koganti Ramaiah and Others

Civil Appeal No. 3198 of 1983

(D. A. Sesai, A. N. Sen JJ)

11.03.1983

ORDER

1. Special leave granted.
2. Petitioner is the original plaintiff. He filed a suit for a declaration and for removal of an encroachment by first constructing a wall in a passage used as a lane for passing and repassing at points W W-1 and also by dumping some earth from A to A-1 in the sketch referred to by the learned Munsif in his judgment and thereby obstructed the plaintiff from passing and repassing with cattle and carts from the lane.
3. This suit was resisted by the defendants 2 and 3 as per the written statement, inter alia, contending that the compound wall has been constructed at the boundary of the land of their ownership which defendant 2 purchased in 1912 from the Kodali Subbaiah. It was alleged that about 13 years back, defendants 2 and 3 raised the level of the open land to the west of the wall to a height of one yard because they are owners of half of the area divided north south of the open space beyond the western wall of their house. The measurements given by the plaintiff were disputed.
4. The learned trial Judge decreed the suit against defendants 2 and 3 holding that the construction of the wall was undertaken few days prior to the filing of the suit and this wall is constructed by defendant 2 and 3 after encroaching upon the open space which was to be used as passage. It was also held that raising the level of a part of the land adjacent and to the west of the wall was also an act of encroachment. Accordingly, the learned Munsif gave a mandatory injunction directing the defendants to remove the wall as also lower the level of a portion of the space so that the plaintiff can have a full use of the passage. In reaching this conclusion, the learned Judge implicitly relied upon the reports and the maps submitted by Court Commissioners and recorded a specific finding that defendants 2 and 3 have encroached in to the suit passage to an extent of 21 1/2" on the southern side and 8" on the northern side by constructing a wall and also by placing a Tandu adjacent and to the west of the compound wall. The learned Munsif accordingly directed removal of encroachment. The suit against the other defendants was dismissed.
5. Defendants 2 and 3 preferred A. S. No. 110 of 1973 in the Court of the Subordinate Judge, Tenali. The learned appellate Judge held that the wall W W-1 was constructed by defendant 2 and 3 in 1956 while the plaintiff filed the suit for mandatory injunction in 1965. The learned Judge also held that in the plaint as originally filed, there was no prayer for removal of the wall on the ground that it constitutes an encroachment on the passage land and that this was added by an amendment to the plaint in 1969 after the report of the first Commissioner was received. The learned Judge then held that this delay on the part of the plaintiff in approaching the court for such discretionary relief

of mandatory injunction is sufficient to deny him the relief for removal of wall on the maxim that 'delay defeats equity'. The learned Judge accordingly moulded his relief in para 40 of the judgment as under :

In view of my finding on point No. 4 the appeal is allowed to that extent only viz., with regard to the relief of mandatory injunction for removing the wall W W-1. With regard to the other reliefs the judgment and decree of the lower court are confirmed and the appeal is dismissed with costs.

The net effect of the judgment is that even though construction of the wall W W-1 by defendants 2 and 3 constituted an encroachment in land used for passage, the plaintiff was held to be disentitled to a relief of removal of encroachment but the raising of the level by spreading of Tandu in a portion of land to the west W W-1 was held to be an encroachment and which the defendants 2 and 3 were directed to remove and keep the passage open.

6. Plaintiff preferred Second Appeal No. 68 of 1977 in the High Court of Judicature, Andhra Pradesh at Hyderabad. The learned single Judge before whom the appeal came up for hearing observed that the wall W W-1 by which the passage was encroached upon was constructed in 1956 and the suit for removal of the same filed in 1965 and if in these circumstances the learned appellate Judge was disinclined to grant a discretionary relief of mandatory injunction on the ground that the plaintiff had acquiesced in it, no case is made out for interfering with the same. So saying the learned Judge dismissed the second appeal.

7. The plaintiff has filed this appeal by special leave.

8. The sketch Annexure-I shows the situation of the wall W W W-1, the house of defendants 2 and 3 as well as the house of the plaintiff. Plaintiff's house abuts on the passage and it is adjacent and to the south off the house of the plaintiff. This passage appears to be the only access the plaintiff has from his house to the road beyond the point G-1 and G-2 and marked as 'R' in the sketch. The question is whether any case is made out for removal of the wall which appears to have been constructed in 1956 i.e. about 27 years back. If there is an encroachment and if the suit is brought within the period of limitation, ordinarily the relief ought to be granted, save and except where the plaintiff has disentitled himself to a discretionary relief by his conduct. In this case both the appellate Court and the High Court have concurrently held that the plaintiff was guilty of acquiescence in that even though the wall was constructed to his knowledge in 1956, he approached the court in 1965 and even in that year he did not seek the prayer for removal of wall which prayer was for the first time introduced in 1969. In this background, we are not inclined to entertain the submission on behalf of the plaintiff-appellant that defendants 2 and 3 should be directed to remove the wall W W-1 and clear that passage of encroachment. But at any rate, defendants 2 and 3 are not entitled to dumping of Tandu adjacent and to the west of the wall in the name of a support to the wall and thereby further reduce the width of the passage. Therefore, having heard learned counsel on both sides, we are satisfied that original defendants 2 and 3 should remove Tandu or any dumping of earth just adjacent and to the west of the wall W W-1 and keep the passage of the width between G-1 and W-1 open encroached and of the same level for passing and repassing including the passing of the cart, animals and vehicles. We direct that no an inch of land beyond the wall W W-1 to the west shall be used or enjoyed by defendants 2 and 3 and the whole of the passage of the width between G-1 and W upto W-1 shall be kept open by removal of encroachment including the dumping of Tandu or any earth filling to be used as passage. We grant mandatory injunction to that extent and direct that the defendants shall remove the encroachment within four weeks from today

failing which the Court shall get it removed at the cost of the defendants 2 and 3. A fair copy of the sketch at page 77 of the record (Annexure 1) should be annexed to this judgment and should be treated as part of the judgment. The appeal is allowed to the extent herein indicated with no order as to costs.

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