Ravuru Punnamma vs Lakkaraju Venkata Subba Rao on 6 March, 1952

Equivalent citations: AIR1953MAD456, (1952)2MLJ473, AIR 1953 MADRAS 456

JUDGMENT

Subba Rao, J.

1. This second appeal arises out of O.S. No. 199 of 1946 on the file of the Court of the District Munsif, Tenali, for recovery of plaint schedule site and for removal of the wall standing thereon. The facts found and admitted may be briefly narrated. The plaintiff and defendant are the owners of adjacent houses in Tenali Municipality, In the year 1917 the defendant's father, Ramakrishniah entered into an agreement in respect of 15-5/9 square yards' in D. No. 55 belonging to the plaintiff. Ramakrishniah intended to construct a building on his site and he found it necessary to have a boundary wall between his site and the plaintiff's site. They agreed that Ramakrishniah should be allowed to construct a masonry wall on the suit site to serve as a boundary and the plaintiff should continue to be the owner of the site. Another stipulation was that Ramakrishniah should not build any house or project his eaves over the wall at any time. He also agreed to keep the said wall in good repair at all times and in case it was damaged or got demolished, he was to get it repaired and restored. According to the agreement if he did not repair it or restore it within three months from the day the plaintiff asked him to do so, she could take back the site. If the wall was kept in good condition, it was agreed that the plaintiff should not ask for the demolition of the wall or for recovery of the site. Subsequently Ramakrishniah put up buildings on his site. In so building, the roof of his kitchen was made to extend over the boundary wall by 3' 5" The bath room also rested on the wall. The Commissioner pointed out that east of the kitchen, on the top of the boundary wall, a little southward from the middle, there were two pillars 3' 8" high and resting on them was a wooden beam 51/2" thick and on this the northern wall of the defendant's bath room 6' 6" by 4' 4" was supported. So too the plaintiff in constructing her house allowed her cement beam of the terrace to rest on the wall.

It will, therefore, be seen that notwithstanding the agreement, Ex. A. 1, the plaintiff as well as the defendant made encroachments over the suit wall. Though the defendant's constructions were made twenty-five years ago or at any rate, prior to 1931, the plaintiff did not question the same. Nor did she take any steps to enforce her rights under Ex. A. 1 till she gave notice under Ex. B. 1 dated 22-2-1946. The present suit was filed by her for recovery of possession of the site mainly on the ground that as the defendant committed a breach of the terms of Ex. A. 1 she should be entitled to recover the site. She also alleged that the defendant denied her title and, therefore) forfeited his

rights under the document. Both the Courts found that the breach of the stipulation under Ex. A. 1 namely, that the defendant should not build any house or project his leaves over the wall at any time, is only a breach of warranty and not of a condition and, therefore, she would not be entitled to evict the defendant but would be entitled to recover damages. They also agreed in holding that the denial by the licensee of the owner's title would not entail forfeiture. Both the Courts accepted the contention of the defendant that the plaintiff having acquiesced in the constructions put up by the defendant, she would not be entitled to an equitable relief of mandatory injunction. To avoid future troubles the appellate Court valued the site in a sum of Rs. 200 and directed the defendant to pay the sum to the plaintiff. The plaintiff preferred the above second appeal.

2. The first question is whether under the terms of Ex. A. 1, in the circumstances that happened, the plaintiff will be entitled to evict the defendant. A perusal of Ex. A. 1 shows that the parties made a clear distinction between the stipulation prohibiting the defendant from building any house or projecting his eaves over the wall and the stipulation asking him to keep the wall in good repair or restoring tlie wall if demolished. Under the agreement the plaintiff was entitled to recover back the site only if the defendant broke the second condition. So long as he kept the wall in good repair, the plaintiff cannot recover back the site. Therefore both the Courts found that the first stipulation is only a warranty, the breach whereof enables the plaintiff to recover damages and in regard to the second condition that it goes to the root of the contract and its breach will enable the plaintiff to recover possession. I agree with the construction put upon the documents by the Courts below.

3. It is then contended that the defendant denied the title of the plaintiff and, therefore, forfeited his rights under the document. The question is whether.the denial of the owner's title by the licensee entails forfeiture. Unlike the case of lease, there is no statutory provision stating, that the licence is determined by forfeiture it the owner's title is denied. Section 60, Easements Act, prescribes the conditions under which a licence may be revoked. It reads:

> "A licence may be revoked by the grantor unless
>
> (a) it is coupled with a transfer of property and such transfer is in force;
>
> (b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

In the present case the licensee acting upon the license has built up a wall which is admittedly of a permanent character and incurred expenses in constructing the same. The licence is, therefore, irrevocable.

4. Learned counsel for the appellant relied upon Section 116, Evidence Act, in support of his contention that the law of forfeiture will apply equally to a lease as well as licence. Under Section 116, Evidence Act, "No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny

that such person had a title to such possession at the time when such licence was given."

This section embodies the rule that a lessee as well as a licensee are estopped to deny the title of the landlord or the licensor as the case may be. But this section does not expressly state or even indirectly give assistance in considering the question whether the law of forfeiture will apply to the case of a licensee denying a licensor's title. The forfeiture of a right is in the nature of a penalty. In the absence of an express condition or a statutory provision prescribing for forfeiture on the denial of the owner's title, it is not permissible to invoke the law of forfeiture applying the analogy of a Sessor and lessee. The reason for this distinction between a lease and a license is also apparent. In the case of a license except in the two cases mentioned in Section 60(a) and (b) it is revocable at the will of the owner. For that reason, unlike in the case of a lease, the legislature did not provide for forfeiture in the case of a licence. Nor was learned counsel for the appellant able to place before me any case which applied the rule of forfeiture to a licence, "indeed all the cases that were cited at the Bar took the view that a denial of title of the owner by the licensee will not entail forfeiture -- see

-- 'Dharmkunwar v. Fakira', 1901 All WN 157;

-- 'Mt. Durga v. Baburam', AIR 1923 All 403;

-- 'Akbar Ali Khan v. Shah Muhammad', 39 All 621; -- 'Amjad Khan v Shaffiuddin Khan'. AIR 1925 All 203 and -- 'Tripathi Anand Nath Tewari v. Jokhu Kumari', 113 Ind Cas 757. As there is unanimity of opinion it is not necessary to consider the cases in detail. I respectfully agree with the views expressed in the said judgments. I, therefore, hold that the licence was not forfeited in this case.

5. The next point is whether this is a fit case for issuing a mandatory injunction. Section 55, Specific Relief Act says:

> "When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

Courts invariably refuse to give this discretionery remedy if the plaintiff acquiesced in the act complained of. Pollock and Mull a in their commentary on the Indian Contract and Specific Relief Acts say at page 790:

> 'The result of authorities on the subject is that where a person had a legal right, it could be destroyed by hi.s acquiescence, that is, if he stood by and allowed his neighbours to incur expenditure in doing what he knew would injure his property."

> In this case it is abundantly clear on the facts found that both the plaintiff and the defendant's father, notwithstanding the terms of Ex. A. 1, put up structures encroaching upon the wall presumably with the knowledge of each other. As the defendant's father is dead, it is not possible to say whether the constructions were put

> up by some other subsequent agreement; but it is not likely that the constructions were put up on the sly. The nature of the constructions put up and the fact that both the parties encroached upon the wall indicate that they must have done it with the consent of each other and the plaintiff allowed the defendant to put up the structures encroaching upon the wall and did not question it for about a quarter of a century. On the facts I must hold that the plaintiff had acquiesced in the construction of the structures and is now not entitled to the discretionary remedy of a mandatory injunction. The two Courts below refused to exercise their discretion in her favour and I do not think I am justified in taking a different view on the facts found.

6 The learned Subordinate Judge valued the site in the sum of Rs. 200 and directed that amount to be paid to the plaintiff and gave a declaration that the defendant will have full rights in the site. In my view the Court cannot compel the plaintiff to sell the site to the defendant. If she insists to have her title to the site, she is entitled to have it. But as the defendant broke one of the warranties in the agreement Ex. A. 1, he would be liable to pay nominal damages to the plaintiff in view of his subsequent conduct, which I fix at a sum of Rs. 20.

7. With the aforesaid modification the second appeal is dismissed with costs. No leave.