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S.A.No.887 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

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1. Velu
2. Palani
3. Poongavanam
4. Kamaraj

.. Appellants

Vs.

1. Anjalai
2. Balachandar
3. Sasi

.. Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree of the Subordinate Court at Kallakurichi, dated 15.02.2012 in A.S.No.20 of 2011 reversing the judgment and decree of the II Additional District Munsif Court at Kallakurichi, dated 19.11.2010 in O.S.No.389 of 2005.

For Appellants : Mr.P.Valliappan, Senior Counsel
for Mr.S.M.S.Sriram Narayanan

For Respondents : Ms.Mahamandra Rajalakshmi
for Mr.J.Ramakrishnan



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J U D G M E N T

The present second appeal arises out of the judgment and decree of the Court of the Subordinate Judge, Kallakurichi, in A.S.No.20 of 2011 dated 15.02.2012 reversing the judgement and decree of the Court of the II Additional District Munsif at Kallakurichi in O.S.No.389 of 2005, dated 19.11.2010.

2. The appellants before me are the plaintiffs in the suit. Originally, the suit has been presented for the relief of permanent injunction restraining the defendants from interfering with the pathway that existed in and over the suit property. Pending the suit, the defendants put up a construction and therefore, the plaintiffs amended their prayer for the relief of mandatory injunction to demolish the construction that has been put up pending litigation.

3. The following facts are not in dispute. The larger extent of the suit schedule mentioned property was owned by three brothers, namely,



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Mari, Palani and Raman. The sons of Mari are plaintiffs 1 to 3, namely, Velu, Palani and Poongavanam. The son of Palani namely one Kamaraj who is the fourth plaintiff. The first defendant is the son of one Muthu and the second defendant is the wife of Ponnusamy. Muthu had purchased the property under Ex.B1 from Kaliyan and Govindan. Kaliyan and Govindan are none else the sons of Raman.

4. The plaintiffs' case is that the properties were partitioned between Mari, Palani and Raman around forty years ago. For the sake of convenience of understanding of the case, the Commissioner's plan which was filed as Ex.C1 will be utilised for description of the shares. The portion marked 'A' in the Commissioner's plan was allotted to Raman, whose sons sold the property to Muthu, to which the defendants succeeded. The portion marked 'B' was allotted to Mari and the portion marked 'C' was allotted to Palani. In other words, the plaintiffs claimed possession of the property marked as 'B' and 'C' and the defendants claimed possession of the property marked as 'A'.



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5. The dispute that I am called upon to resolve today is the portion marked 'D'. 'D' is a passage which leads from Rajaveedhi through the holdings of Raman and Mari and leading to the portion of Palani. It is the case of the plaintiffs that the brothers had left out 17 links East - West commencing from Rajaveedhi till the end of their holdings.

6. It is a practise in this part to the country that the eldest brother is allotted Eastern share and the younger brother is allotted western share. There is a further presumption that where three of them hold the property together, the partition between them would also be equal. It is possible that one brother would give up his share in favour of the other increasing the other siblings share. In such event, the burden lies on the person who pleads that he has higher share in the partition to prove the same. This position has been settled by the judgment of this Court in *Ponniammal @ Ponnamal vs. Kuppusamy Kounder and others* (2011 (4) CTC Pg.74) (paragraph No.16).



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7. After the suit in O.S.No.389 of 2005, against which the present appeal arises, Muniyapillai son of Muthu presented, an other suit in O.S.No.422 of 2005 for the relief of permanent injunction was filed. In this suit, Muniyapillai reiterated the written statement that has been presented in O.S.No.389 of 2005 and claimed that the passage marked 'D' was only to an extent of two links and not six feet as claimed by the plaintiffs. The defendants in that suit, who are the plaintiffs in the present suit, entered appearance and contested the said suit on more or less on the same lines as in O.S.No.389 of 2005. By consent of both parties, both the suits were tried together after framing of issues.

8. On the basis of the pleadings, the learned trial Judge framed the following issues:

"4. வாதியின் வழக்குரை, எதிர்வழக்குரை /
கூடுதல் எதிர்வழக்குரைகள் மற்றும் வழக்கு
ஆவணங்களின் அடிப்படையில் கீழ்க்கண்ட
எழுவினாக்கள் மற்றும் கூடுதல் எழுவினாக்கள்
வனையப்பட்டன.



1. தாவா சந்தை வாதிகள் நீண்டகாலமாக
பயன்படுத்தி வருகின்றார்களா?

2. வாதிகள் தாவா சந்தை தங்கள்
இடங்களுக்கு செல்லும் பாதையாக
பயன்படுத்துவதை பிரதிவாதிகள் தடை
செய்கிறார்களா?

3. வாதிகளுக்கு கிடைக்கும் பரிகாரம் என்ன?
கூடுதல் எழுவினாக்கள்:

1. வாதி கோரிய செயலுறுத்துக்கட்டளை
பரிகாரம் கிடைக்கத்தக்கதா?

2. தாவா வழக்கிற்கு வழக்கு மூலம்
ஏற்படவில்லையென்பது உண்மையா?

3. வாதியின் சொத்தை பிரதிவாதிகள்
ஆக்கிரமிப்பு செய்துவிட்டது உண்மையா?

4. வாதி தாவாவில் கோரிய நிரந்தர
உறுத்துக்கட்டளை பரிகாரம் கிடைக்கத்தக்கதா?"

9. On the side of the plaintiffs, the third plaintiff - Poongavanam examined himself and local resident one Arumugam as PW2 and marked Exs.A1 to A3. On the side of the defendants, three of them examined themselves as DW1 to DW3 and marked Ex.B1 to B9. Pending the suit, an Advocate Commissioner was appointed in I.A.No.2117 of 2005 who



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visited the suit property on 06.01.2007. His report and plan were marked by consent as Exs.C1 and C2.

10. On consideration of the oral and documentary evidence let in the suit, the learned trial Judge came to the conclusion that

(i) the plaintiffs have proved that there existed a pathway for six feet from the Western side of the area marked 'A' to the Eastern side of the same plot which area has been marked as 'D' in the Commissioner's plan.

(ii) Since the defendants had put up the construction pending litigation, the learned trial Judge granted the relief of mandatory injunction directing removal of the portion of the house of the defendants.

(iii) Having come to this conclusion, the learned trial Judge dismissed the suit filed by the first defendant as plaintiff in O.S.No.422 of 2005.



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11. Aggrieved by the same, an appeal was preferred only against the decree granted in O.S.No.389 of 2005. The plaintiff in O.S.No.422 of 2022, who was the first defendant in the present suit did not prefer any appeal as against the decree of dismissal.

12. The appeal as against O.S.No.389 of 2005 was taken on file by the learned Subordinate Judge at Kallakurichi as A.S.No.20 of 2011. The learned Subordinate Judge allowed the appeal on the ground that the plaintiffs have not proved the extent of the passage leading from Rajaveedhi to their portion and denied the relief of mandatory injunction as the plaintiffs had not amended the plaint within a period of three years from the date of construction, i.e., from August 2005 onwards. Against the reversal of the findings, the present second appeal was preferred before this Court.



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13. On 11.10.2013, the second appeal was admitted on the following substantial questions of law:

"The Second Appeal is admitted on the basis of the following substantial questions of law-

1. When it is axiomatic in law that an amendment of plaint will relate back to the date of the plaint, whether the Lower Appellate Court is correct in law in holding that the relief of mandatory injunction is time barred by construing the amendment application from the date of filing it?

2. When the respondents have put up illegal construction in respect of a common lane, which constitutes a continuous cause of action every minute is the finding of the Lower Appellate Court that the relief of mandatory injunction is time barred, sustainable in law?

3. When DWs1 and 2 have categorically admitted the right of the appellants and the fact that they have put up construction during the pendency of the suit, is the Lower Appellate Court correct in law ignoring the same, particularly when it is clear in law that admission of the opposite party is the best evidence?

Notice."



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14. On notice, Mr.J.Ramakrishnan, entered appearance for the respondents. Today, the appeal was posted for hearing before me. I heard Mr.P.Valliappan, learned Senior Counsel for Mr.S.M.S.Sriram Narayanan and Ms.Mahamandra Rajalakshmi, learned counsel for Mr.J.Ramakrishnan.

15. Mr.P.Valliappan, learned Senior Counsel would contend that on the basis of the undisputed Advocate Commissioner's report, the entire area shown as 'D' suddenly is restricted from the entrance to the Rajaveedhi to their portion to two links and that too by way of construction, pending litigation. He would state that no objection had been filed to the Advocate Commissioner's report, and would point out from the evidence of PW1 that what had been purchased by Muthu from the sons of Raman was the old building that stood as it was for forty years. He would also point out that he had moved an amendment application by way of abundant caution and that this Court has power to order the removal of the building put up pending litigation, even in a suit

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for injunction. He would state that where the cause of action is based on the original plaint, amendment cannot be said to be barred. For this preposition, he would rely upon two judgments of this Court, namely, ***Palaniammal vs. Pechimuthu and others (1991-1-L.W.Pg.371)*** and ***S.Rosely vs. Lazar Nadar and others (1988-2-L.W.64)***. On the basis of these contentions, Mr.P.Valliappan, would state that the judgment of the Lower Appellate Court reversing the judgement of the trial Court is tainted with perversity as it had applied wrong law to the right facts and hence, requires interference at the hands of this Court.

16. Ms.Mahamandra Rajalakshmi, would vehemently contend that it is the duty of the plaintiffs to prove the partition between Mari, Palani and Raman. They have failed to prove the same as to the extent of partition. Therefore, the suit is bound to fail. She will further point out that there is no documentary evidence on the side of the defendants to show that there in fact existed a pathway from Rajaveedhi to the rear portion. Rejecting the argument of Mr.P.Valliappan, learned Senior



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Counsel, she would submit that the Advocate Commissioner's report cannot be relied upon as the Commissioner has visited the site only in 2007 and therefore, the report about the property as it existed in the year 2005 is beyond the appreciation of the submission.

17. I have heard Mr.P.Valliappan, learned Senior Counsel for the appellants and Ms.Mahamandra Rajalakshmi, learned counsel for the respondents and carefully perused the records.

18. On the first argument of limitation, I have to necessarily agree with Mr.P.Valliappan that this Court does have the power in a suit for injunction, in case it comes to the conclusion that the plaintiffs have proved the case to direct removal of any construction that has been made pending litigation. A reading of the plaint makes it clear that the plaintiffs had been rushing from pillar to post in order to prevent the defendants from encroaching upon the lane. This led them from knocking the doors of the local panchayathars through a Police complaint to the



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jurisdictional Police Station and finally arriving before the District Munsif Court. It is not as if when the defendants encroached upon the lane, the plaintiffs had been sitting quietly twiddling their thumbs and watching their rights of being encroached at all. The encroachment itself commenced after the pulling down of the existing structure levelling it and putting up a new structure. By the time this happened, the parties were before this Court.

19. This issue, as rightly contended by Mr.P.Valliappan is settled by the judgment of this Court in ***Palaniammal's case*** wherein the Court had held as follows:

"If the entire plaint is read, it is clear that the plaintiffs have rushed to the court as soon as the defendant started construction. It is not as if the defendant encroached upon the property and squatted on the same for some time, and thereafter began to construct thereon. The encroachment itself was by commencement of the construction on the disputed property. Hence, there is no necessity for the plaintiff to



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seek a declaration of their title or recovery of possession. If the impugned construction is removed, the plaintiffs will be certainly in possession as the property is adjacent to their admitted property and it is really part of the same. The courts below have taken the correct view on a reading of the plaint and held that there is no necessity to pray for any declaration or recovery of possession. Hence this contention of learned counsel for the appellant fails."

20. No litigant can take law in his own hands after the *lis* has approached the Court, and then plead that since he has altered the *status quo* the plaintiffs would necessarily have to amend the plaint or otherwise he is not entitled to succeed. If I were to agree to the contention of Ms.Mahamandra Rajalakshmi which goes to the aforesaid extent, I will be giving premium for the parties to encroach upon other properties pending litigation and push the plaintiffs to seek for expensive relief of recovery of possession. I have to see who is the wrong doer and if the wrong doing has taken place pending litigation, the arms of this Court are long enough to direct the removal of the offending construction



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/ encroachment rather than crediting the defendants for cocking a snook at the Court. Therefore, the view of the learned Judge that as the plaintiffs have amended the plaint seeking for mandatory injunction beyond the period of limitation, the suit has to fail, is a wrong application of law to the correct facts of the case. The plea of limitation should be seen **"before the parties approaches the Court"**. If taking advantage of the fact that no interim orders had been granted by the Court or because of the pendency of the matter before the Court, any party alters the ground situation, the question of limitation would not arise. As pointed out above, the Civil Court has the power to grant a relief by moulding the same.

21. In the light of the above discussion, I am clear that since the plaintiffs have approached the Court for permanent injunction in June, 2005, and as the construction had been put up in August, 2005, the relief that had been sought in 2009 is not barred by limitation. This is because, the plaintiffs have asserted their rights and it was the defendants who



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took advantage of the situation and altered the game. The alteration having taken place pending the litigation, the Court does have the power to rectify the situation. Had the construction been put up before the commencement of the litigation, then the view taken by the learned Appellate Judge is correct. However, on admitted facts, since the construction has come up pending the litigation, I am of the view that the reasoning of the learned Judge that the prayer sought for is barred by time requires interference, and accordingly, is interfered with.

22. This is clear from the following authorities relied upon by Mr.P.Valliappan. In ***A.K.Gupta and Sons Ltd. vs. Damodar Valley Corporation (AIR 1967 SC 96)***, the Court held as hereunder:

“It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new case or cause of action is barred: Welden v. Neale. But it is also well recognised that where



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the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: see Charan Das v. Amir Khan and L.J.Leach & Company Ltd. v. Jardine Skinner and Co. The principal reasons that have led to the rule last mentioned are, first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes Cropper v. Smith and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended Kisandas Rupchand v. Rachappa Vithoba approved in Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil.

The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in Cooke v. Gill, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an



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immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corporation Ltd. and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case" have been understood to mean "new set of ideas" : Dornan v. J.W. Ellis & Co. Ltd.. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

23. I should add that this view has found acceptance by this Court in **S.Rosely vs. Lazar Nadar and others (1988-2-L.W pg.64).**

24. Now turning to the objection of Ms.Mahamandra Rajalakshmi that the plaintiffs have failed to prove the partition between Mari, Palani and Raman, I have to state that this argument goes against the defendants. They are shooting themselves in their foot. If not for the partition between Mari, Palani and Raman, the solution for the purchaser



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Muthu, the predecessor- in-title of the defendants would have been to bring forth the suit for partition and separate possession. It is too well settled that a stranger to a joint family is not entitled to take possession of the property. The very fact that the predecessor-in-title Muthu had taken possession of the properties shows that there had been a partition between the three brothers and being the eldest brother, the Eastern portion of the property had been allotted to him. Therefore, the first argument of Ms.Mahamandra Rajalakshmi fails.

25. Her second submission is that there is no evidence on the part of the plaintiffs to show that the lane existed to lead to their property from Rajaveedhi. It is here that the nature of the property would have to be seen. The property commences from Rajaveedhi and runs through the holdings of the family on the Western side. If Ms.Mahamandra Rajalakshmi is right, then, the entire property would belong to Raman alone, leaving Mari and Palani high and dry without any access. Fortunately for me, from a look of Ex.C2, it becomes clear that the legal



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heirs of Mari and Palani are in the occupation of the very same survey number and its sub-division in area marked 'B' and 'C'. The plaintiffs are not supermen to fly from Rajaveedhi to their respective holdings without have an access to the same.

26. This argument of Ms.Mahamandra Rajalakshmi does not appeal to me for the other reason that the brothers while dividing their property would not only divide the Eastern-Western portions, as understood in their part of the country, but also create an access to their respective portion. That an access exists for 'B' and 'C' through the area marked 'D' is clear. Apart from that, it is the defendants' case themselves that the plaintiffs have access over the lane which exists but only for to a length of two links. If the argument of the learned counsel for the respondents were to be right, then this two links area that has been granted, should not have been existed at all.



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27. To her last submission that the Advocate Commissioner's report cannot be relied upon, I find this rather curious submission. At the outset, I had point out that Exs.C1 and C2 had been received in evidence by consent. Ms.Mahamandra Rajalakshmi's clients having consented to mark the documents before the trial Court cannot turn around at the Second Appellate Court to plead that the documents ought not to have been received. Furthermore, if the defendants wanted to contest the Advocate Commissioner's report, they should have filed objections to the same or should have called upon the Advocate Commissioner to enter the witness box in order to be cross-examined. Such a procedure is not unknown to the Code of Civil Procedure. If the Advocate Commissioner's report is disputed, then it is always open to the parties to cross-examine the Advocate Commissioner. Having failed to do so, it is not open them to raise this plea for the first time before the Second Appellate Court. This is another error committed by the learned Appellate Judge. He had failed to take note of the position of law and had rejected the Advocate Commissioner's report which had found an



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uniform access from the rear end of the portion occupied by the plaintiffs till the end of the holdings of the family.

28. Now turning to the crux of the matter, that is, what is the extent of the lane that was under occupation, I have to see the purchase that was made by Muthu from Kaliyan and Govindan, sons of Raman. This purchase is under Ex.D1. The document being of 1969 vintage written in the rural parts of this State that the extent has been given only in காலடி or length of a human feet. One காலடி is equivalent to 3/4 of a feet in the metric scale. What had been purchased by Ms.Mahamandra Rajalakshmi's client was 20 feet East-West and 32 human feet North-South. This corresponds to 24 feet in breadth and 15 feet in length. When compared to the Advocate Commissioner's report under Ex.C2, it is clear that the plaintiffs have constructed a portion to the extent of 40 links which corresponds to 27 feet.



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29. Reading of Ex.C2 with Ex.D1 makes it clear that the plaintiffs were right in pleading that the defendants have encroached the property but were wrong in specifying the area as 6 feet instead of 5 feet. The situation under Ex.D1 prevailed from 22nd May 1969 till August 2005. This shows that the passage of about 5 feet existed from Rajaveedhi to the rear portion of the plaintiffs' holdings. The defendants having purchased only 32 human feet seems to have succumbed to the temptation and had extended their holdings by a few more feet thereby broadening their access of to their property.

30. It is the duty of the person who purchased the property from a sharer to maintain the understanding that existed between the sharers. Kaliyan and Govindan, sons of Raman could not have alienated more, than what was allotted to their father. Similarly, Muniyapillai, the first defendant and the legal heirs of Ponnusamy were duty bound to maintain the extent that had been purchased by them even if they decided to pull



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down the old super structure and raise new one. They have failed in their duty to do so and had altered the position in the pending litigation. Consequently, the Court necessarily would have to interfere. The encroachment having been shown from the very documents of the defendants, the excess has to be removed by the defendants.

31. Consequent to the above discussion, the Second Appeal succeeds. The judgment and decree of the Court of the Subordinate Judge at Kallakurichi in A.S.No.20 of 2011 dated 15.02.2012 is set aside. The defendants shall remove the extent of 3½ feet encroached by them in portion marked 'D' running from Rajaveedhi to a distance of 15 feet till the end of their holdings in the portion marked 'A'. The time period for removal is three months, failing which, the plaintiffs will be at liberty to approach the Executing Court to put the decree into execution.

32. The questions of law are answered accordingly. The defendants having violated the covenant under which they purchased the property



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and having encroached upon the lane which was enjoyed common by the brothers, they will have to bear the cost of the litigation throughout.

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Speaking Order : Yes / No

Neutral Citation: Yes / No

vji

To

1. The learned Subordinate Judge,
Kallakurichi.
2. The II Additional District Munsif,
Kallakurichi.

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