



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 04.11.2016

C O R A M

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

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Second Appeal (MD) No.609 of 2011 & M.P(MD)No.1 of 2011

D.Soundaraj : 1st Defendant/Appellant/
Appellant

-Vs-.

1.A.Jeganathan : Plaintiff/1st Respondent/
1st Respondent

2.Pannikundu Panchayat,
Through its President,
Pannikundu,
Nakalakottai Village,
Kangayanatham Post,
Thirumangalam Taluk,
Madurai District.

:2nd Defendant/2nd Defendant/
2nd Defendant

Prayer: - Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the Judgment and Decree passed in A.S.No.19 of 2009 dated 30.06.2010 on the file of the Sub-Court, Thirumangalam (Camp) (Second Additional Subordinate Judge, Madurai) confirming the judgment and decree passed in O.S.No.107 of 2003 dated 12.01.2009 on the file of the learned Principal District Munsif, Thirumangalam.

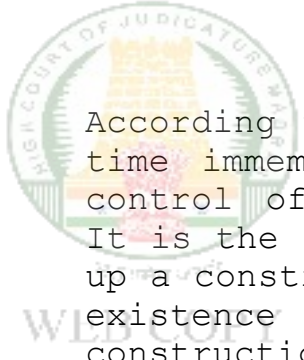
For Appellant : Mr.S.Pon Senthil Kumaran
For Respondents : Mr.T.Vadivelan for R1
: No appearance for R2

J U D G M E N T

The first defendant in the suit in O.S.No107 of 2003 on the file of the District Munsif Court, Thirumangalam, is the appellant in this appeal.

2. The first respondent in this appeal, who is the plaintiff, has filed a suit in O.S.No.107 of 2003 for permanent injunction restraining the defendants from in any way interfering with the plaintiff's peaceful possession in the suit common lane and for mandatory injunction directing the second defendant to remove the encroachment made by the first defendant in the suit common lane.

<https://hcservices.courts.tn.nic.in/hcservices> of the plaintiff is that the suit property is a common lane measuring about 9 1/4 feet X 40 feet and that the same is used by him to have access to his house bearing Door No.123.



According to the plaintiff, this small lane was in existence from time immemorial and that the lane is under the maintenance and control of the second defendant, namely, the Village Panchayat. It is the further case of the plaintiff that the appellant had put up a construction after demolishing the old mud house which was in existence in his own property. While putting up a new construction, according to the plaintiff, the first defendant had put up a staircase encroaching into the common lane on the western side of the first defendant's house by 1 1/2 feet. By this encroachment, the width of the common lane is reduced by 1 1/2 feet.

4. The plaintiff also contended that the second defendant though made a spot inspection of the suit common lane at the time of construction, there were no steps taken for removal of the encroachment by the second defendant. Hence, it was stated by the plaintiff that he was constrained to file a suit. The suit was contested by the appellant mainly on the ground that there was no encroachment as alleged by the plaintiff. According to the defendant, he put up the construction in his own property. The defendant also disputed the measurements with regard to the suit common lane as pleaded by the plaintiff. It is the further case of the defendant that he demolished the existing mud house and the new construction was put up only on the same land wherein the old mud house was in existence.

5. Since the defendant has pleaded that there was no encroachment, the trial Court appointed an Advocate Commissioner. The Advocate Commissioner, after inspection, filed a report and plan indicating that there was an encroachment into the common lane by the first defendant. It was also noticed by the Advocate Commissioner that the East-West measurement as per the title deed relied upon by the defendants would clearly show that the first defendant had encroached into the common lane by extending the new construction. On the basis of the Advocate Commissioner's report and plan, the trial Court accepted the case of encroachment alleged by the plaintiff and decreed the suit.

6. Since the Commissioner's plan was not objected to by the parties, the trial Court also granted decree based on the Commissioner's report and measurements and directed the Commissioner's plan and report to form part of the decree.

7. The plaintiff, though filed an appeal, was unsuccessful and the appellate Court dismissed the appeal in A.S.No.19 of 2009 filed by the first defendant after confirming the judgment and decree of the trial Court. The appellate Court specifically framed the issues relating to the existence of common pathway and the encroachment, by the first defendant. The lower appellate Court relied upon the Commissioner's report and justified the findings of the trial Court on appreciation of pleadings and evidence.



8. Aggrieved by the concurrent findings of the Courts below, the present appeal has been filed by the first defendant. The appellant has raised the following questions of law in the memorandum of grounds:-

"1) Whether the Court below are correct in granting the relief of injunction and mandatory injunction in the absence of relief of declaration?

2) Whether the Court below is right in entertaining the suit in the absence of pre-suit notice under Section 231 of the Tamil Nadu Panchayat Act?

3) Whether the Courts below are right in allowing the suit when the plaintiff has no right to sue in his individual capacity?"

9. The learned Counsel for the appellant submitted that the suit without a prayer for declaration of title or right is not maintainable. The learned Counsel further submitted that the properties have not been properly described by the plaintiff in the schedule and that the discretionary relief of permanent injunction cannot be granted where the identity of the suit property is doubtful.

10. He further submitted that the suit has been filed by the plaintiff in his individual capacity, even though the plaintiff pleaded that the common lane is a public property vested with the local body and that the local body is the authority to maintain the common way.

11. With regard to the first submission, it is to be noticed that the suit for permanent injunction is filed for restraining the appellant from interfering with the plaintiff's right in the common lane and for mandatory injunction for removal of encroachment made by the appellant in the common lane. Though the defendant disputed the encroachment by claiming that he has put up a construction only in his patta land and the Courts below have come to the conclusion that the defendant has encroached into the common lane after considering the material evidence and the Commissioner's report and plan. There is no serious dispute with regard to the existence of the common lane. The extent of common lane and the enjoyment of the lane by the public are shown from the material documents filed by both sides apart from the Commissioner's report and plan. That apart, the document filed by the first defendant proves that he has constructed the building beyond the east-west measurement found in his title deed.

12. In such circumstances, the suit for bare injunction can be
<https://hcservices.com.in> the Court has also accepted the plea of plaintiff. The suit for injunction when title is seriously in dispute, may be objected to and the plaintiff could have been given an opportunity



to amend the plaint. The defendant has not even raised any objection in the written statement filed by him. Further, having regard to the nature of relief and fact that the encroachment is in respect of the common lane, this Court is not in a position to appreciate the objections as sustainable.

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13. With regard to the second question, though the suit property has not been properly described in the schedule, I find that the description of the property can be gathered even from the body of the plaint as the plaintiff has given the measurement with regard to the common lane which is the subject matter of the suit and the extent of encroachment made by the first defendant. The defendant has not pleaded any grievance because of some defect in the description of the property. Absolutely, there is no dispute with regard to the identity of the suit property. After the Commissioner has filed the report and plan with all particulars and the measurements locating the property of the plaintiff and defendant apart from the extent of encroachment, the trial Court has also directed the plan of Advocate Commissioner to form part of the decree.

14. In such circumstances, absolutely, there is no scope for considering the objections as having any merit. The third submission of the learned Counsel for the appellant is with regard to the maintainability of the suit.

15. According to the learned Counsel for the appellant, the suit ought to have been filed in a representative capacity, when the suit property is admittedly a common lane belonged to the local body. It is a well settled law that the plaintiff pleaded personal injury and on infringement of his civil rights, the plaintiff is entitled to seek remedy even in respect of a public property. The present suit is filed with specific averments as to the legal injury suffered by the plaintiff on account of the encroachment made by the first defendant. Hence, I am of the view that the suit filed by the plaintiff in his individual capacity is maintainable.

16. For all the above reasons, I find that no question of law, much less a substantial question of law, is involved in this second appeal and accordingly, there is no merit in the second appeal. Therefore, the second appeal is dismissed. No costs. Consequently, connected Miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(co)

/True copy/



To

1.The II Additional Subordinate Judge, Thirumangalam (camp)
Madurai

2.The learned Principal District Munsif,
Thirumangalam.

+1cc to MR.S.Pon Senthil Kumaran, Advocate Sr.No.65836

+1cc to Mr.T.Vadivelan, Advocate SR.No.66461

gsr

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