

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Order	Date of Pronouncing Order
08.08.2017	25.10.2017

CORAM

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

S.A.No.674 of 2015

R.Kumar ... Appellant/Plaintiff

Vs.

G.Jaganmoorthy Respondent/Defendant

Second appeal filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree of the XV Additional Judge, City Civil Court, Chennai, dated 07.01.2015 made in A.S.No.215 of 2012 reversing the Judgment and Decree of the VI Assistant Judge, City Civil Court, Chennai, dated 02.12.2011 made in O.S.No.3736 of 2010.

For Appellant : Mr.G.Ranganathan
For Respondent : Mr.T.M.Hariharan

JUDGMENT

The brief facts of the case as follows:

The plaintiff who aggrieved by the dismissal of suit before the lower appellate Court has filed the present Second appeal.

2. The appellant/plaintiff has filed a suit in O.S.No. 3736 of 2010 against the respondent/defendant for mandatory injunction to remove the illegal superstructure put up in B schedule property and hand over vacant possession to the plaintiff and permanent injunction restraining the respondent/defendant from in any manner by constructing permanent building in the B schedule property of encroached portion. According to the appellant/plaintiff, the suit property originally belonged to one Kannan, who settled the same in favour of his son Swamikannu on 22.6.1945. The said Swamikannu died on 9.3.1986

leaving behind his sons Vasanthakumar, Ravikumar and Rajakumar. Thereafter, the appellant/plaintiff purchased the suit property from the said three persons by sale deed, dated 15.12.1997 and he is in possession and enjoyment of the same. The defendant claiming to be the owner of the property comprised in S.No.56, bearing door No.7, old No.40, Varadhapuram, 2nd street, Kottur, i.e. adjacent to the plaintiff's house property has encroached the plaintiff's vacant land to an extent of 201.5 sq.ft. of his southern side of suit B schedule property and also constructed a temporary structure. The defendant's brother one K.Gunasekaran, who is residing on the northern side of the plaintiff's property also encroached the plaintiff's property to an extent of 40.5 sq.ft. The defendant and his brother with the support of each other have encroached the plaintiff's property. The plaintiff caused legal notice on 16.2.2010, but the defendant gave evasive reply on 6.3.2010 for which the plaintiff gave suitable rejoinder on 9.3.2010. The defendant planned to demolish the existing temporary superstructure in the encroached portion and trying to construct a building in the encroached portion. Hence the appellant/plaintiff has filed the suit. The sole defendant filed written statement stating that during 1980 itself, defendant's father Gopal had put up a proper building in B schedule land, when the plaintiff's vendor was in occupation of the property. The plaintiff's vendor has put up a building (now existing) in the portion of the schedule land, leaving out the B schedule property. Neither the plaintiff nor his vendor has any right over the B schedule property and it is in continuous possession and enjoyment of the defendant and his forefathers. Ever since the plaintiff became neighbour, is causing trouble and mental agony to the defendant by lodging false complaint. The trial court upon hearing arguments of both sides and upon perusal of the oral and documentary evidence, decreed the suit as prayed for. Challenging by the judgment and decree passed by the trial court, the respondent/defendant has preferred an appeal in A.S.No.215 of 2012 on the ground that the suit is bad without a plea for declaration and the suit is barred by limitation. The Appellate Court though held that the defendant has encroached the property and he has not produced any document to show that he acquired the property by adverse possession, set aside the judgment and decree of the trial court on the ground that the suit is barred by limitation.

2 This Court while admitting the Second Appeal has framed the following substantial question of law.

Whether the appellate court misconstrued Article 113 of Limitation Act and failed to look into the contrary statement of the respondent ?

3 The learned counsel for the appellant/plaintiff contended that without any documentary evidence, the

respondent/defendant simply claimed he is in possession of the property for more than 30 years and claim title over the suit property by adverse possession.

4 According to the appellant/plaintiff, under Ex.A1 sale deed, he not only purchased 'A' schedule property but also B schedule property. The respondent/defendant has admitted in his evidence that he encroached B schedule property for more than 30 years. According to the appellant/plaintiff, subsequent to the purchase of the property by the appellant/plaintiff, the respondent/defendant has encroached the B schedule property. Since the respondent/defendant has not filed any document along with the written statement to substantiate his claim of adverse possession and enjoyment of the house in B schedule property for more than 12 years, the trial Court has not framed any issue regarding adverse possession. The trial Court considering the fact that the respondent purchased the property on 15.12.1997, has rejected the contention of the respondent/defendant that his father constructed a house in the year 1980 in B schedule property. The trial Court found that subsequent to the purchase of the appellant/plaintiff only, the respondent/defendant encroached into the B schedule property. The trial Court after analyzing the oral and documentary evidence adduced by the appellant/plaintiff, decreed suit.

5 The appellate Court has considered the issue involved in the appeal suit filed by the respondent/defendant. The contention of the respondent/defendant before the appellate Court is that as per Article 113 of Limitation Act, the period of limitation for filing a suit for mandatory injunction is three years. Ex.A4 complaint, dated 1.1.2004 and Ex.A7 legal notice, dated 10.3.2004, the period of limitation starts from 1.1.2004, the present suit has been filed belatedly in the year 2010 and therefore, the suit is barred by limitation. The appellate Court has considered Ex.A4 complaint lodged by the appellant/plaintiff on 1.1.2004 with the Inspector of Police, Kottur Police station regarding encroachment made by the respondent/defendant, Ex.A7 copy of the legal notice issued by the plaintiff to the defendant on 10.3.2004 and Ex.A11 another legal notice, dated 16.2.2010 issued by the plaintiff to the defendant. As per Article 113 of Limitation Act, the period of limitation for filing a suit for mandatory injunction is three years. In the present suit, as per Ex.A4 complaint, dated 1.1.2004 and the legal notice, dated 10.3.2004 issued by the plaintiff to the defendant, the period of limitation starts from 1.1.2004, the date on which the plaintiff came to know the encroachment made by the defendant in the B schedule property. Therefore, the appellate Court came to the conclusion that the appellant/plaintiff ought to have filed the suit within three years from 1.1.2004 i.e. on or before 1.1.2007, whereas the

plaintiff has filed the suit only on 5.4.2010 and hence, the suit is barred by limitation under Article 113 of the Limitation Act.

6 The appellate Court by considering the fact that the appellant who claims right in the B schedule property has not produced any document to show that he is in possession and enjoyment of the building in B schedule property for more than 12 years to claim right or title by adverse possession, has rejected the contention of the respondent/defendant that the suit is bad without a prayer for declaration of title to the B schedule property. Therefore, the only substantial question of law involved in the Second appeal is as follows:

Whether the suit filed by the appellant is barred by limitation under Article 113 of the Limitation Act ?

7. Learned counsel for the appellant/plaintiff relied on the judgment of the Allahabad High Court in the case of Delhi Cloth and General Mills Ltd., Delhi vs. Union of India and another (A.I.R. 1983 ALLAHABAD 381) wherein in paragraph 6 it was held as follows:

"6. Article 120 Limitation Act, 1908 is Art.113 of the Limitation Act, 1963. Under Art.120 period of limitation was six years which under Art.113 of the Limitation Act 1963 the period of limitation is three years; but, the principles laid down by the authorities discussed above still hold the field for determining the question as to when the right to sue accrues. Determination of this question is to be made on the facts of each case. In the instant case the trial Court has held that the right to sue accrued to the plaintiff on receipt of the letter dated 5.1.70 although no finding has been recorded as to when that letter was received by the plaintiff. Since the suit was filed in 2.7.73, the trial court held the plaintiff's claim as barred by time."

8 The facts of the case from the aforesaid decision would show that the defendant's letter dated 5.1.1970 did not contain any relevant material to give an idea to the plaintiff about the reason for the deduction of the amount from his bills. Therefore, there is incomplete information during the relevant period. Further, plaintiff's suit is based on a cause of action which arose again on 20.5.1970 to file the suit. Therefore, it was held that the suit was not barred by limitation.

9 The learned counsel for the respondent relied on

the decision of Madhya Pradesh High Court in the case of Mohanlal vs. State of Madhya Pradesh and others (A.I.R. 1980 M.P. 1) wherein it was held as under:

"5. We do not find any reason to differ with the opinion expressed by the Division Bench which to us appears to be the correct view of the provisions of law. There is no separate Article provided under the Limitation Act for a suit for injunction. So a suit for injunction has to be governed by the residuary Article i.e. Article 113. Under this Article, a suit can be filed within 3 years from the date of accrual of the cause of action. The Division Bench has rightly held that the cause of action for a suit for injunction arose each time when there was a threat of recovery by the respondents. Every threat of recovery gives a fresh cause of action. Until the recovery is made it cannot be said that a suit for injunction becomes barred. The reason is that if recovery of the amount is not justified under the terms of the contract, the State could not acquire that right on the facts of the case by prescription."

10 In S.Sivakumar and another vs. The Assistant Executive Engineer, TWAD Board and another (2009-5 L.W. 315) this court has held as under:

"4. The plaintiffs filed O.S.No.296 of 1995 on the file of District Munsif Court, Nannilam against the defendants for mandatory injunction directing the defendants to remove two pipeline laid in the suit property.

.....
15. With regard to the laches and delay, the learned counsel for the appellants submitted that since it is a continuous cause, there is no limitation for filing the suit. This submission made by the learned counsel for the appellants cannot be accepted for the reason that the pipeline was laid in August 1992 and immediately on 17.9.1992, under Ex.A1, appellants'/plaintiffs issued notice to the respondents to remove the pipelines. But they did not choose to file the suit immediately. The suit was filed only on 11.10.1995 i.e. After three years from the

date of issuance of Ex.A1 notice. The reason for filing the suit belated has not been explained by the appellants/plaintiffs to accept the contention of the continuous cause.

.....

17. Further, it could be seen that there is no specific provision in the limitation Act 1963 which prescribes the period of limitation for the relief of mandatory injunction to remove a particular thing like pipeline, etc. Therefore, the case on hand will attract Article 113 of the Limitation Act which reads as follows:

Description of Period of from Application of which period limitation begins to run	Time
--	------

113. Any suit for Three	When the
which no period years	right to sue
of limitation is accrues	provided elsewhere
in this schedule.	

In the present case, the appellants/plaintiffs filed the suit for mandatory injunction to remove the pipeline. The pipeline was laid in August 1992 and Ex.A1 notice dated 17.9.1992 was issued to the respondents/defendants to remove the pipeline. The appellants filed the suit only on 11.10.1995 i.e. After three years from the date of right to sue accrues. Therefore, in view of Article 113 of the Limitation Act, the suit is barred by limitation.

.....

21. In these circumstances, the suit is liable to be dismissed on the ground of delay and laches. The lower appellate court has rightly dismissed the suit on that ground. Further, as already found the suit is liable to be dismissed on the ground of limitation, therefore, I find no ground much less substantial questions of law to interfere with the judgments and decrees of the courts below. The above second appeal is liable to be dismissed. Accordingly, the above Second appeal is dismissed. However, there will be no order as to costs."

11. In Faqir Chand (through L.Rs.) vs. Lila Ram (through L.Rs.) (1993 SCC Online Del 371 = AIR 1994 Del 161) wherein the Hon'ble Supreme Court has held as under:

"26. Facts of the present case are in pari materia with the facts of the case decided by the Lahore High Court in the Full Bench judgment. So, following the Full Bench judgment of the Lahore High Court which stands approved by the Supreme Court, I hold that in the present case the construction of the tin-shed in the common passage amounted to complete ouster of the right of common use to that portion of the joint passage where the tin-shed stood constructed. Hence, the injury was complete when the tinshed was constructed and limitation was three years for filing the suit for seeking the relief of mandatory injunction.

12. In Chinnu Padayachi & another vs. Dhanalakshmi & others (2012-1 L.W.74) this court in paragraph 13 and 14 held as follows:

"13.1. The judgment reported in Vol 99 Law Weekly 833, Bharathamatha Desiya Sangam, Madhavaram v. Roja Sundaram, does not relate to the case where an order was passed under Order 6 Rule 17 CPC. Hence, I am of the considered view that the said decision may not be of any use to the case of the respondents.

13.2. In the judgment reported in 2004 (4) CTC 231, Pankaja and Another v. Yellappa (D) Lrs and Others, the Hon'ble Apex Court has held that if granting amendment subverts ultimate justice and avoids further litigation, the same should be allowed and there can be no straight jacket formula for allowing or disallowing amendment of pleadings which depends on the factual background of the case. Paragraph 12 of the said judgment which was emphasized by the learned counsel appearing for the respondents is usefully extracted here under:

"12. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction

to allow or not to allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case. "In the said decision, the Hon'ble Apex Court has held that there is no absolute rule that in every case where a relief is barred because of limitation, an amendment should not be allowed. However, the Hon'ble Apex Court in the said decision also held that the discretion in such cases depends on the facts and circumstances of the case. Paragraphs 14, 15 and 17 could establish that if limitation is a disputed question of fact and law, then the question of limitation could be relegated at the time of final disposal of the suit.

13.3. However, in the present case on hand, as already held, the respondents have filed an application for amendment, admittedly after 5 years from the date of filing of the report of the Advocate Commissioner who has pointed out about the construction that has been put up in the common lane. Hence, I am of the considered view that there is no disputed question of fact with regard to limitation, which requires to be considered only at the time of final disposal of the matter.

14. Regarding the other contention raised by the learned counsel appearing for the respondents that as per Section 22 of the Limitation Act, if a person continuously breaches or torts, a fresh period of limitation begins to run at every moment of time is concerned, I am of the considered view that it is not a continuous breach, in the present case on hand. What constitute continuous breach was considered by the Delhi High Court in the judgment reported in AIR 1994 Delhi 161, Faqir Chand (through L.Rs.), v. Lila Ram (through L.Rs.). Paragraph 18 of the said judgment is usefully extracted here

under:

"18. In the plaint it was averred that this construction was made about 32 months prior to the filing of the suit. There was no specific denial of this particular fact in the written statement but still the court thought it advisable to examine the defendant-respondent in order to clarify his plea with regard to the date in the construction of the aforesaid tin-shed. At any rate, as the plaintiff-appellant himself had admitted in his testimony about the existence of this tin-shed for more than 3 years prior to filing of the suit the first appellate court was not wrong in taking notice of this admission of fact and then drawing the legal inferences available flowing from such facts."

13. In the aforesaid case, this Court has held that as there was no continuous breach, the appellant is not entitled to file a suit for mandatory injunction under Article 113 of the Limitation Act. In the facts of the present case, plaintiff issued legal notice on 10.3.2004 to the defendant and also lodged police complaint to remove the encroachment made by the defendant. Therefore, it is clear from the facts that the defendant has already encroached and constructed a temporary structure in the suit property in the year 2004 itself. In view of the above fact, there is no continuous breach or threat to the plaintiff as averred in the plaint. Therefore, the appellant/ plaintiff has not proved his case that the suit filed by him for the relief of mandatory injunction is within a period of three years under Article 113 of the Limitation Act. Therefore, there is no error or illegality in the judgment and decree passed by the appellate Court and the same is confirmed. The substantial question of law raised in the Second appeal is answered accordingly. सत्यमेव जयते

14 In the facts and circumstances and the decisions cited supra, the Second appeal fails and accordingly Second Appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (CS VIII)

//True copy//

Sub Assistant Registrar

Vaan

To

1.The XV Addtional Judge,
City Civil Court, Chennai.

2.The VI Assistant Judge,
City Civil Court, Chennai.

3.The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.G.Ranganathan, Advocate SR.No.75121

+1cc to Mr.T.M.Hariharan, Advocate SR.No.75924

S.A.No.674 of 2015

KJI (CO)
GN(19/12/2017)



WEB COPY