



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.07.2017

CORAM

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THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.251 of 2017 and
C.M.P.(MD).No.5408 of 2017

Rasaiyan

... Appellant/Appellant/Defendant

Vs.

Arulramalingam

... Respondent/Respondent/Plaintiff

PRAYER: Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 09.12.2015, made in A.S.No.18 of 2014 on the file of the Additional Sub-Court, Kumbakonam, confirming the judgment and decree dated 01.03.2014 in O.S.No.228 of 2009 on the file of the Principal District Munsif, Kumbakonam.

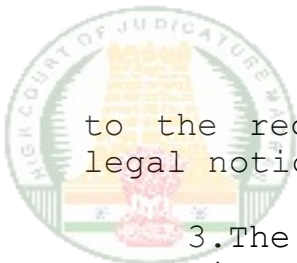
For Appellant

... Mr.G.Gomathi Sankar

JUDGMENT

The defendant, who had failed in both the Courts below, has preferred the above appeal. The suit is one for permanent injunction restraining the defendant from disturbing the possession of the suit common pathway and for a mandatory injunction to remove the construction put up by the defendant and also the septic tank constructed by the defendant in the suit pathway.

2.The case of the plaintiff is that there was a partition in the year 1942 as per Ex.A1 - Partition Deed, in which B, C, D & E schedule owners were given the right of pathway on the western side in Survey No.230/1 in common. The defendant herein was also a party to the said Partition Deed and his mother had represented him as he was a minor. The plaintiff is a descendent of one Rathinasamy Udayar. The plaintiff as well as the defendant are entitled to use the said pathway mentioned in the partition deed in common. While so, the defendant had constructed septic tank and laid pipelines to drain the waste water from his house. The plaintiff was not aware of the same as pipelines were concealed under the ground. Besides, the defendant also has put up a small shed measuring 8-1/2 feet width and 22 feet length. Only when a tiled structure was put up by the defendant, an objection was raised by the common users of the pathway including the plaintiff. However, the defendant did not heed



to the request and hence, the suit has been filed after issuing legal notice to the defendant.

3. The case of the defendant is that the relationship and the execution of the partition deed were all admitted. However, it is stated that the measurement of the suit passage has been wrongly mentioned in the plaint. The defendant had also alleged that the said pathway was never used as common pathway by anybody at any point of time. The defendant had also stated that he had purchased the property from the other sharers and he has exclusive right over the suit passage. It is further stated that even presuming that the plaintiff had the right to use common pathway, the same has been defeated by the doctrine of ouster. Hence, he prayed for dismissal of the suit.

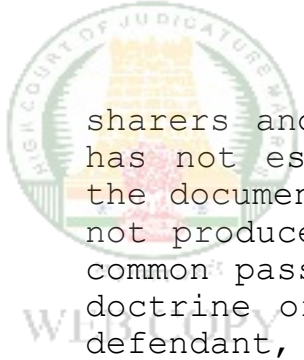
4. Before the trial Court, on the side of the plaintiff, P.Ws.1 to 3 have been examined and Exs.P.1 to P.4 have been marked, and on the side of the defendants, DWs.1 and 2 have been examined and Exs.D.1 to D.2 have been marked. Further, the Advocate Commissioner's report and plan - Exs.C1 and C2, and the Surveyor's report and plan - Exs.C3 and C4 have been marked as Court documents.

5. Both the Courts have concurrently held that the plaintiff is entitled to the relief sought for and granted permanent injunction restraining the defendant from interfering in the suit pathway and also a mandatory injunction to remove the unauthorised construction as well as septic tank put up by the defendant.

6. Heard Mr.G.Gomathi Sankar, learned counsel for the appellant.

7. The relationship between the parties and the execution of the Ex.A1 - Partition Deed, dated 12.11.1942, are all not disputed. The defendant as DW1 has categorically admitted that his mother was a party to the said partition and a common passage of 15 feet was created for the sharers. A commissioner was also appointed by the trial Court and he was filed his report and sketch. The plaintiff had caused a legal notice under Ex.A2, dated 16.06.2009, alleging that the defendant had encroached upon the property which was used in common and put up a thatched shed and also laid pipelines to drain waste water from his residence. The defendant had not sent any reply to the said notice. The plaintiff had also examined one Natarajan as PW3, who had categorically stated that earlier there was a Well in the property, which was to be used in common by all the sharers and the same has now been converted into septic tank. The construction of the said septic tank has taken away the common passage and it is difficult for the sharers to go through the narrow passage and the said alteration has been done by the defendant within two years prior to the date of filing of the suit.

8. Though the defendant had specifically pleaded that he has got exclusive right, after purchasing the property from the other



sharers and that the plaintiff lost his right by way of ouster, he has not established the same. The defendant has not even produced the documents of his purchase from the other sharers and he has also not produced any other evidence to show that he has been using the common passage in exclusion of others and that he got the right by doctrine of ouster. In the absence of any evidence adduced by the defendant, the theory of ouster is not applicable to the present case. When Ex.A1 - Partition Deed is not disputed and the predecessor in title of the plaintiff as well as the defendant have been a party to the said document, the parties are bound by the same. The defendant has got no right to encroach upon the pathway and to reduce the size of the same by putting a septic tank and the tiled structure, resulting in narrowing down the passage. In the light of the above, the plaintiff is entitled for permanent injunction restraining the defendants from interfering in the suit pathway and also for a mandatory injunction to remove the unauthorised construction as well as septic tank put up by the defendant.

9. Though the learned counsel for the defendant/appellant pleaded that the relief of mandatory injunction is barred by limitation, on consideration of facts, it is categorically stated that the said construction has been made only two years prior to the filing of the suit. A notice was also issued in this regard for which there was no response from the defendant. Therefore, on the ground of limitation also, the defendant had to fail.

10. In the light of the above discussions, there is no question of law, much less substantial question of law, arising from the second appeal. Hence, this Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar

To

1. The Additional Subordinate Judge, Kumbakonam
2. The Principal District Munsif, Kumbakonam.

+ 1 CC TO Mr.G.GOMATHI SHANKAR, ADVOCATE IN SR No. 64211

GCG

TE/JC/SAR-IV : 18/07/2017 : 3P/4C

S.A.(MD) No.251 of 2017 and
C.M.P.(MD).No.5408 of 2017
10.07.2017