

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :30.01.2019

Pronounced on :04.02.2019

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1285 of 2004

1.Chidambaram Pillai

2.C.Devaraj

3.C.Devakumar

4.C.Devamandhavan

5.S.Gandhimathi

6.P.Banumathi ... Appellants/D1 and Lrs of Deceased D2

/versus/

1.A.P.Namachivayam ...1st & 2nd Respondents/2nd &3rd Plaintiff's

2.Palaniammal

3.Angammal

4.Poongavanam

5.Selvi ...3 to 5 Respondents/LRs of the Deceased
1st Plaintiff

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.10.2002 in A.S.No.114 of 1999 passed by the learned I Additional District Judge-cum-Chief Judicial Magistrate, Salem District, confirming the judgment and decree dated 31.03.1999 in O.S.No.918 of 1995 passed by the learned I Additional District Munsif, Salem.

For Appellants :Mr.K.Ramanraj

For Respondents :Mr.P.Jagadeesan for R1 and R2

R3 and R4-Given up

R5-No appearance

J U D G M E N T

The defendants in the suit is the appellants herein. The suit is filed for declaration in respect of lane comprised in S.No.146 measuring 6 feet x 47 feet as a common lane and mandatory injunction to remove the wall shown as 'A', 'B' in the plan on the north south of the common lane with door and door frame.

2. The trial Court held that the plaintiffs are entitled to half right in the common lane running on east of his house in its entirety and granted relief of declaration. Further, it held that the defendants cannot claim exclusive enjoyment of suit

lane and prevent the plaintiffs access. Therefore, mandatory injunction to remove the suit wall.

3. Aggrieved by that, the defendants filed A.S.No.114 of 1999 on the file of First Additional District cum Chief Judicial Magistrate, Salem.

4. The lower appellate Court confirmed the judgment and decree of the trial Court. Hence, the second appeal is preferred against the concurrent finding of the Courts below by the defendants.

5. At the time of admission, this Court has formulated the following Substantial Questions of Law:

Whether the relief of mandatory injunction claimed in respect of the wall in question is barred by limitation?

6. The learned counsel appearing for the appellants would put forth his argument in two folds. Firstly, he would submit that the title deeds relied on by the parties consistently mentioned the length and breath of the lane as 3-½ cubicmetre (muzham) on east - west and 16 cubicmetre (muzham) on north-south. Except the self serving document of the plaintiff, which mentions the length and breath of the common lane as 5 ¼ x 45 feet, no document support the case of the plaintiffs regarding the length of the lane and their right in entirety. Therefore, the plaintiffs cannot have any claim over the entire lane. However, the Courts below without proper appreciation of the actual extent of the lane with reference to the documents Exs.A6, A8, A9 and B3 and allowed the suit. Pointing out that only in the documents Ex.A1-sale deed dated 7.6.1989 executed in favour of the plaintiff and Ex.A11-sale deed of the plaintiff's vendor, the length of the lane is mentioned as 45 feet cents. Those two documents are self serving documents and they cannot be relied upon to ascertain the actual length of the lane.

7. The second limb of the argument put forth by the learned counsel appearing for the appellants is that the period of limitation for seeking mandatory injunction is three years under Article 113 of the Limitation Act. Whereas in the plaint itself, the plaintiffs have admitted that the wall in the lane was put up in the year 1990 and the suit is filed seeking mandatory injunction to remove the wall only on 05.09.1995. Therefore, the relief of mandatory injunction is hopelessly barred by limitation.

8. Per contra, the learned counsel appearing for the respondents would submit that in the earlier litigation between the parties, for the very same suit lane, the Court has held

that the lane is a common lane and the respondents herein are entitled to place their sun-shade projected over the lane. Therefore, the right of the respondents enjoying their lane is in its entirety and cannot be restricted to 26 feet.

9. As far as the point of limitation raised by the appellants is concerned, the learned counsel appearing for the respondents would submit that in case of this nature, the right of enjoying the passage is recurring cause of action and therefore, only Section 22 of the Limitation Act, 1963 will apply and not Article 113 of the Limitation Act, 1963.

10. While the learned counsel appearing for the appellants would rely upon the judgment of this Court in M.Saminathan v. Vijayalakshmi reported in 2007(2) CTC 44, the learned counsel appearing for the respondents would rely upon the judgment in Bharathamatha Desiya Sangam Madhavaram, by its Secretary M.Subramania Naicker and another v. Roja Sundaram and 2 others reported in 1986 TLNJ 236 and the judgment of the Hon'ble Supreme Court in Sankar Dastidar v. Shrimati Banjula Dastidar and another reported in 2007 AIR (SCW) 51.

11. Perusal of the records including the pleadings and depositions indicates that the property bearing Door No.36A, Muniappan Koil Street, Kitchipalayam was purchased by the plaintiffs on 07.06.1989. The house property bearing door No.37 lies on the north of the plaintiffs' property. On 02.02.1973, the defendants purchased the property at Door No.37 from one Soundarammal.

12. The disputed lane is running north to south on the east of the properties of the plaintiffs and the defendants. The defendants who are the appellants in the suit, claim that the said lane is a common lane for the plaintiffs and the defendants running 6 feet by 47 feet. Whereas the defendants claim that the lane is only 35 feet length. They purchased a tiled house on 04.07.1973. Later, reconstructed the house by putting terraced. They are using the lane exclusively. The plaintiffs, who purchased the property in the year 1989 bearing door No.36A south of the defendants' property tried to put up balcony projecting on the lane and that was objected by the defendants and that the suit in O.S.No.59 of 1993 was filed. The actual length of the lane is only 35 feet beyond that there is no lane.

13. The Courts below have considered the title deeds of the respective parties and the measurement of the lane shown in their documents. The later documents in favour of the plaintiffs were the measurement of the common lane mentioned as 5 $\frac{1}{4}$ x 45 feet was accepted rejecting the description of the lane in the title document of the defendants. The Courts below have held

that the vendor of the defendants himself has no absolute right over the north backyard and common lane. So he cannot convey better title than the one he had.

14. Referring the findings of the Court below, in the earlier proceedings in O.S.No.59 of 1993, the Court below after perusal of Exs.A3 and B7, which are the judgment in O.S.No.59 of 1993 and A.S.Nos.69 and 108 of 1994, held that the length of the common lane was found as 48 feet and 45 feet respectively. Therefore, both the plaintiffs and the defendant are entitled to use the common lane running on the eastern side of their land in its entirety and no one can claim the absolute right over the same.

15. Regarding the plea of limitation for seeking mandatory injunction, the Courts below rejected the claim of the defendants that the suit wall was constructed in the year 1974. Accepted the plea of the plaintiffs that the suit wall was constructed only in the year 1990 and immediately, he lodged a complaint to the police. Before police, the defendant gave an undertaking to remove the suit wall after completion of his children marriage, but he failed to do so. Holding that the defendants failed to prove that the construction of the suit wall was in the year 1974 by producing the sanction plan, the claim of the mandatory injunction cannot be barred on the point of limitation. It was held by the Court below that being co-sharer of the common lane, the Act of the defendants putting up the wall and preventing access to the lane is unfavour and unreasonable.

16. On perusal of Ex.B7-judgment of the appellate Court in A.S.Nos.69 and 108 of 1994, which is the previous litigation between the parties in respect of the suit lane, we find that the Commissioner has inspected the suit lane and measured it. According to his report, the length of the suit lane is only 36.4 feet. The breath of the suit lane varies from 6 $\frac{3}{4}$ feet to 6 $\frac{1}{2}$ feet. However, the appellate Judge in that case has rightly observed that the length and breath of the lane were not the fact in issue in that case and he has left open about the length and breath of the lane, but has concentrated on the issue, whether the defendants in that suit, who are the respondents in the present appeal are entitled to put up sun-shade and balcony projecting the lane. In that context, the appellate Court in the earlier proceedings has held that the respondents shall be permitted to put sun-shade, which shall not exceeded 2 feet projecting on the lane, so that the access of the appellants not disturbed.

17. From Exs.A3 and B7 this Court does not find that the length of the lane has been held to be 45 feet in the earlier proceedings. On that score the Courts below have erred granting declaration for the lane in entirety which described in the plaint as 45 feet length. In fact, even in the earlier proceedings, when the Commissioner has inspected the lane, he has found that the length of the lane is only 34 ½ feet.

18. It is an admitted fact, even according to the plaint that the defendants are the owners of the rear side of the street and the plaintiffs are on the front portion. The disputed lane is running north to south on the east of their properties. No doubt, the title document of the respondents/defendants indicates that the length of the lane is 47 feet. However, as admitted by the parties and shown in the Commissioners plan the appellants herein have put up the wall on the 35th feet of the lane. As observed by the Court in the earlier proceedings, since the respondents herein had no necessity to have access further north beyond their property, they have not opposed the appellants herein putting up the wall and annexing the lane with their house property. Therefore, though there may be some later documents which confers common ownership to the respondents along with the appellants to the lane in entirety, the earlier documents indicate that the length of the lane was only 27 feet and thereafter, the entire portion on the north belongs to the appellant. In any event, having allowed the appellants to put up wall and not objected till filing of the suit, the question of limitation seeking mandatory injunction gains significance.

19. It is contended by the learned counsel appearing for the appellants that the limitation has to be reckoned at least from 1990, since the respondents themselves have admitted in the plaint that the said wall was put up by the appellants in the year 1990. Whereas the counsel appearing for the respondents would submit that being a recurring cause of action, the Limitation prescribed in Article 113 of the Limitation Act will not apply.

20. Section 22 of the Limitation Act, 1963 reads as follows:

22. Continuing breaches and torts: In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation beings to run at every moment of the time during which the breach or the tort, as the case may be, continues.

21. Article 113 of the Limitation Act, 1963 reads as follows:

Description of application	Period of Limitation	Time from which period beings to run
113. Any suit for which no period of limitation is provided elsewhere in the schedule.	Three years	When the right to sue accrues.

22. In judgment relied upon by the appellants in M.Saminathan v. Vijayalakshmi reported in [2007] 2 MLJ 393 cited supra, this Court has held as below:

"12. In AIR 1983 SC 452 (Krothapalli Satyanarayana v. Koganti Ramaiah and others) a Division Bench of the Andhra Pradesh High Court in an identical case, held thus:-

"Where the defendant had constructed the wall in the passage used as lane for passing and repassing by the plaintiff and also by dumping some earth in the passage obstructed the plaintiff from passing and repassing with cattle and carts from the lane, and the plaintiff approached the Court after 9 years from his knowledge as to the construction of wall and even in that year he did not seek the prayer for removal of wall which prayer was for the first time introduced 4 years thereafter, the Court declined to direct the defendant to remove the wall and clear the passage of encroachment as the plaintiff was guilty of acquiescence"

In the case on hand also, the plaintiff is guilty of acquiescence since he was very well aware of the fact of beginning of construction even at the time of institution of the suit. "सत्यमेव जयते"

23. Whereas in the judgment Bharathamatha Desiya Sangam, Madhavaram, by its Secretary M.Subramania Naicker and another case cited supra, the learned single Judge of this Court has held as below:

"That leaves for consideration the plea of limitation. Learned counsel for the appellants, drawing attention to paragraph 8 of the plaint, contended that the offending structures were put up five or six years prior to the filing of the suit on 06.10.1967 and that the suit should have been instituted within three years, when the right to sue

accrued as per Article 113 of the Limitation Act, 1963 and not having been so filed, it was barred. On the other hand, learned counsel for the first respondent referred to Section 3 (1) and 22 of the Limitation Act, 1963 and contended that the invasion of the right of the first respondent to have access was from day to day and continues and therefore, a fresh period of limitation began to run at every moment of time when the invasion of the right continued. Reliance was also placed in this connection upon the decision in AIR 1957 Andhra Pradesh 419.

No doubt, it is seen from paragraph 8 of the plaint that it has been stated that the offending constructions have been put up five or six years ago. It is, however, significant to note that the cause of action for the institution of the suit also included the persisted squatting upon the portions trespassed. This would mean that though the constructions had been put up earlier, the interference with the exercise of the right of access by the first respondent continued from day to day up to the date of the filing of the suit. In such a situation, Section 22 of the Limitation Act, 1963 provides that every moment of the continuance of the wrong would afford a fresh cause of action. The wrongful act is the obstruction and it may be that the construction resulting in the wrongful act had come into existence long before. But by the construction, the exercise of the right of access by a person entitled to have such access is interfered with every time he wants to exercise that right by the offending constructions."

24. On going through the facts of the case cited by the respective counsels, the judgment relied on by the appellants is more appropriate to the facts of the case, since it is directly regarding the removal of obstructing the construction beyond the period of limitation of three years. Whereas the principle laid down in Bharathamatha Desiya Sangam, Madhavaram, by its Secretary M.Subramania Naicker and another case cannot be applied to the present case, because in that case it is in respect of a passage to have access to the adjoining street. Whereas in the case in hand, there is no necessity for the respondents herein to go beyond the offending wall by permitting the defendants to put up a wall and door, plea to remove it after five years as a counter-blast to the suit filed by the

defendants it not sustainable. The plaintiffs have to suffer for their guilty of acquiescence. The plaintiffs had never used the lane beyond offending wall admittedly after 1990. This suit is filed only in the year 1995. While Article 113 of the Limitation Act prescribes three years period for seeking mandatory relief, the present suit is hopelessly barred by limitation. When there is no necessity to use the lane beyond the wall, the plaintiffs cannot escape from the limitation on the ground of recurring cause of action. To that extent the appeal is liable to be allowed. Accordingly, this second appeal is partly allowed.

25. In the result, the Second Appeal is partly allowed. The decree and judgment passed by the Courts below granting mandatory injunction is set aside. No order as to costs.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

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To

1. I Additional District Judge-cum-Chief Judicial Magistrate, Salem.
- 2.The I Additional District Munsif, Salem.

Copy to

The Section officer
VR Section, High Court, Madras 104.

+1 CC to Mr.P.Jagadeesan, Advocate sr 9330.

+1 CC to Mr.K.Ramanraj, advocate sr 9283.

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