

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.07.2019

DELIVERED ON: 22.08.2019

CORAM :

THE HONOURABLE Mrs. JUSTICE R. HEMALATHA

S.A.No.150, 151 of 2012 and
M.P.No.1 + 1 of 2012

Anusuya ammal ... Appellant in both the second appeals
(Defendant in OS.NO.788/2004
Plaintiff in OS.NO.176/2006)

Vs.

Deivanai Ammal ... Respondent in both the second appeals
(Plaintiff in OS.NO.788/2004
Defendant in OS.NO.176/2006)

Prayer in S.A.No.150 of 2012: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 11.11.2011 passed in A.S.No.56 of 2011 by the Subordinate Judge, Kanchipuram upholding the decree and judgment dated 15.07.2010 passed in O.S.No.788 of 2004 by the Additional District Munsif, Kanchipuram.

Prayer in S.A.No.151 of 2012: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 11.11.2011 passed in A.S.No.46 of 2011 by the Subordinate Judge, Kanchipuram reversing the decree and judgment dated 15.07.2010 passed in O.S.No.176 of 2006 by the Additional District Munsif, Kanchipuram.

For Appellant : Mr.V.Lakshminarayanan
for Mr.V.Raghavachari

For Respondent : Mr.K.M.Balaji

COMMON JUDGEMENT

The second appeals in S.A.No.150/2012 and 151/2012 are filed against the decree and judgment passed in A.S.No.56/2011 and A.S.No.46/2011 on the file of the Subordinate Judge, Kanchipuram.

2. The appellant is the plaintiff in O.S.No.176/2006 and defendant in O.S.No.788/2004 on the file of the Additional District Munsif, Kanchipuram. The suit in O.S.No.788/2004 was filed by the present respondent for a mandatory injunction

directing the appellant to remove the obstructions in the suit property. Similarly, the suit in O.S.No.176/2006 was filed by the appellant herein against the respondent for a mandatory injunction for removal of obstructions in the common well. Since the subject matter, issues and the parties are one and the same in both the suits, the suits were tried jointly by the Additional District Munsif, Kanchipuram and evidence was recorded in common in O.S.No.788 of 2004.

3. For the sake of convenience, Deivanai Ammal (respondent herein), the plaintiff in O.S.No.788/2004 is called as plaintiff and Anusuya Ammal (appellant herein), the defendant in O.S.No.788/2004 is called as defendant.

4. The entire suit property originally belonged to one late Muniammal, who had purchased the same from one Unnamalai Ammal, way back in 1961. The middle portion of the property admeasuring 27 feet x 105 feet was settled by the said Muniammal in 1982 in favour of her daughter, who is also the plaintiff in O.S.No.788 of 2004 and the front and rear portions measuring 24 feet x 27 1/2 feet and 24 feet x 25 feet respectively were settled in favour of her grand son Madhavan. The main property facing East, along with a narasam (common pathway) measuring 3 feet in breadth on the southern side which is being used as a means of ingress and egress was found mention in the settlement deeds. The said Madhavan sold the front portion measuring 24 feet x 27 1/2 feet through a registered sale deed dated 28.04.1993 (Ex.B12) to one Vimala, who in turn sold the same to the defendant in 1996 through a sale deed Ex.B2. According to the plaintiff, the defendant demolished the existing tiled house in 2001 and started putting up RCC structure encroaching upon the narasam (common pathway) by projecting the ceiling of her house towards south and also by constructing a toilet and latrine over the same. The plaintiff in O.S.No.788/2004 therefore prayed for a mandatory injunction directing the defendant to remove all the constructions including the TNEB service wires, which are dangling above narasam (common pathway).

5. The defendant had admitted the constructions on the first floor and contended that the said construction in the form of extension covering narasam (common pathway) aerially serve the purpose of safety for both the plaintiff and the defendant. The defendant also subsequently filed another suit in O.S.No.176/2006 before the same court. The main contention in the suit in O.S.No.176/2006 was that the encroachment made in the common well by the plaintiff in O.S.No.788/2004 making it unavailable to the defendant {present appellant} would tantamount to encroachment.

6. The trial court after framing necessary issues in both the suits and after full contest, concluded that both the parties were justified in their prayers and therefore, decreed both the suits directing the removal of encroachments in the narasam (common pathway) by the defendant and also allowing

access to the common well by removing the encroachment by the plaintiff.

7. The first appeal was filed by the defendant in A.S.No.56/2011 against the decree and judgment dated 15.07.2010 in O.S.No.788/2004 . The decree and judgment dated 15.07.2010 passed in O.S.No.176/2006 was also challenged by the plaintiff in A.S.No.46/2011. Both the appeals were filed before the Subordinate Judge, Kanchipuram.

8. The first appellate Judge, after going through the various aspects of both the cases and also the contents of the report of the Advocate Commissioner appointed by the trial court, conclusively decided that the common pathway cannot be usurped by one party even if it is contended that the protrusion was only on the first floor of the building. More over, it was also one of the findings of the Advocate Commissioner that the common pathway (narasam) was elevated by 1 1/2 feet when compared to the portion of the pathway abutting the plaintiff's residence. However, The first appellate court disapproved the contention of the plaintiff that drainage link through the common pathway was an encroachment, as the same complied with the terms of the settlement.

9. Another contention of the defendant that the suit itself was barred by limitation was also found to be untenable by the first appellate court stating that filing of the suit in O.S.No.788/2004 on 05.06.2004 for mandatory injunction was not barred by limitation, as the approval (Ex.B1) for the construction of the first floor was dated 20.09.2000 with a validity of three years. The first appellate court therefore concluded that the suit in O.S.No.788/2004 was very much within 3 years limitation period assuming that the construction would have taken three years to complete. However, the first appellate court found that the suit filed by the plaintiff in O.S.No.176/2006 was barred by limitation by accepting the contention put forth by the respondent that the appellant had completed her construction covering the well long before the filing of the suit. He therefore set aside the decree and judgment of the trial court in O.S.No.176/2006 and dismissed the suit. Now the present second appeals are filed by Anusuya Ammal, the plaintiff in O.S.No.176/2006 and defendant in O.S.No.788/2004.

10. This court while admitting the second appeal, framed the following substantial questions of law in both the appeals.

(i) Whether the suit is liable to be rejected on the ground of limitation wholly disregarding the date of presentation of the plaint before the Court and as well the proviso under Article 113 of the Limitation Act?

(ii) Whether the courts below ought not to have appreciated that the right of the co-owner to put up a construction over the passage and have openings overlooking the passage and drainage underneath the passage is not prohibited and should it not have appreciated the judgment of Madras High

Court in 1972(85) LW 659?

(iii) Whether the courts below are right in failing to note the right of access is very much available for the respondent herein through the common passage and the claim for mandatory injunction is not maintainable?

11. In order to gain more clarity on the exact position of encroachment, another Advocate Commissioner was appointed by Hon'ble Mr. Justice N.Sathish Kumar to visit the suit property once again and give a detailed report along with photographs.

12. Accordingly, Ms. Anuradha, learned Advocate Commissioner visited the suit property and filed her report along with photographs. The Advocate commissioner in her report has elaborated on the various encroachments found on the three feet passage. The encroachments included an out door air condition unit protruding at a height of 10 feet, the E.B. box along with wires dangling above the narasam (pathway) and several pipe connections running on the wall for supplying water to the toilet on the first floor. It was also found that the passage abutting the defendant's house was at a raised level.

13. Both the courts below have ensured that the spirit of maintaining the common passage is to be upheld. It is not the case of the defendant that there was no encroachment at all. The defendant was fully aware that she had constructed the first floor and also second floor protruding into the narasam (pathway) and justified her act by stating that the entire property was safer now. In fact, the only grievance of the defendant is that the common well was encroached upon by the plaintiff denying access to her. Covering this aspect, the plaintiff stated that the well was very old and unusable and therefore, was covered and locked and also that both the houses had separate bore well providing adequate water.

14. This contention of the plaintiff was accepted by the first appellate court in A.S.No.46/2011. Thus, the plaintiff contended that it was only a pretext to cover up the encroachment made by the defendant. However, the trial court by decreeing the suit in O.S.No.176/2006 filed by the defendant, ensured that the common well becomes accessible to both of them.

15. Mr.V.Lakshminarayanan, learned counsel appearing for the appellant/defendant relied on the decision in Subbaiah Goundan V. Ramaswamy Goundan and others in S.A.No.272 of 1970 decided on 24.02.1972 and contended that the defendant can extend the balcony over the common passage to her maximum advantage and that such an extension in the instant case does not materially interfere with or weaken the common passage of the plaintiff.

16. He also contended that the suit filed by the plaintiff is also barred under Article 113 of the Limitation Act, since the plaintiff did not approach the court within a period of three years from the date of construction put up by

the appellant. His further contention is that the acquiescence on the part of the respondent should be taken into account while exercising the discretion for the grant of equitable relief of injunction.

17. Per contra, Mr.K.M.Balaji, learned counsel appearing for the respondent contended that the common passage being very narrow in width (three feet), any obstruction including the raising of the passage in the front portion abutting the defendant's house has to be construed as an encroachment. It was also contended that merely because the house of the appellant being located at vantage place, does not entitle her to obstruct the common passage, which is the only access to reach the respondent's property and to the rear portion.

18. Both the courts below had concurrently held that the encroachments made above the three feet common passage should be removed. As far as the common well is concerned, the lower appellate court accepted the contention of the plaintiff that the suit itself was barred by limitation and allowed the appeal in A.S.No.46/2001. It is further observed by the first appellate court that the defendant had come into possession of the property in the year 1996 and the well being much older and unusable, the filing of the suit in O.S.No.176/2006 is definitely barred by limitation. The first appellate court did not consider that this limitation aspect was not pleaded in the written statement in O.S.No.176/2006. However, the same appellate court took a stand that since the validity of the construction permission of the building was three years from 20.09.2000, the suit is not barred by limitation. It is quite surprising that the lower appellate court presumed that the construction was completed by June 2001 and therefore, filing of the suit for mandatory injunction (in O.S.No.788/2004) on 05.06.2004 was well within the period of limitation. This reasoning defies logic. सत्यमेव जयते

19. Mandatory injunction is generally sought when the encroachment is evident and it is not required that the construction has to be completed. In the instant case, filing of the suit in O.S.No.788/2004 is definitely much beyond three years period. Interestingly, the suit being time barred, was not pleaded by the defendant in O.S.No.788/2004. It is also not the case of the plaintiff that she has been deprived of light and air. Except for the elevated portion abutting the defendant's residence, no other encroachment is apparently found in the common passage blocking the ingress and egress to the plaintiff's property. The plaintiff has all along been a mute spectator to the construction happening right in front of her . She has seen the other party dealing with the property in a manner inconsistent with her right and did not make any objection while the act was in progress. She has approached the court only during the year 2004, even though she contends that the construction was completed during June 2001. Therefore, the doctrine of acquiescence would apply to the facts of the present

case. The word acquiescence relates to inaction during the performance of an act.

20. Article 113 of the Limitation Act reads thus.

Any suit for which no period of limitation is provided elsewhere in this schedule	Three years	When the right to sue accrues
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As per article 113 of the Limitation Act, right to sue accrues when there is an accrual of the rights asserted in the suit and an unequivocal threat by the defendant to infringe the right asserted by the plaintiff in the suit.

21. in the decision in Subbaiah Goundan V. Ramaswamy Goundan and others reported in 1972 (85) Law Weekly 659, Justice Palanisamy as he then was held that " each co-owner is entitled to enjoy the common property in the best and most advantageous manner so long as there is no invasion of infringement of the rights of the other or co-owners. He further held that the plaintiff cannot dictate the defendant as to how best he is to enjoy his right.

22. As already observed, the plaintiff did not approach the court immediately after the defendant started putting up construction over the common passage. The observation of the first appellate court that the defendant completed the construction during June 2001, based on the evidence of the defendant that she started constructing in the Tamil month of Avani, (approximately during 16th of August) and completed within 9 months, cannot be construed that the construction was completed during June 2001. It is also incomprehensible as to why the plaintiff waited for more than 3 years to file a suit, especially when she states that the 3 feet wide passage was being encroached upon. Therefore, the second appeal in A.S.No.150/2012 is liable to be allowed on the following grounds.

(i) The plaintiff in O.S.No.788/2004 did not approach the court within 3 years after finding her rights were being infringed upon by the defendant and therefore, the suit is barred by limitation.

(ii) Doctrine of acquiescence would apply in the instant case since the plaintiff in O.S.No.788/2004 was a silent spectator and without raising any objection for the construction put up in the first floor over and above the common passage, especially when the said construction could not have been completed overnight.

(iii) The plaintiff did not complain that she is deprived of light and air to her portion because of the construction made in the first floor over and above the common passage.

(iv) The defendant in O.S.No.788/2004 can enjoy his property to his maximum advantage and there is nothing to show that free ingress and egress to the plaintiff's property was obstructed.

23. As far as the second appeal in S.A.No.151/2012 is concerned, the first appellate court found that the suit is barred by limitation. The appellant came into possession of her property in the year 1996 and it is also evident from the records that the common well was unusable and therefore was closed. Therefore, the findings of the first appellate court that the suit is barred by limitation cannot be found fault with.

24. In the result,

i) The second appeal in S.A.No.150/2012 is allowed. No costs. The connected miscellaneous petition is closed. The decree and judgment dated 11.11.2011 passed in A.S.No.56 of 2011 by the Subordinate Judge, Kanchipuram is set aside and the decree and judgment dated 15.07.2010 passed in O.S.No.788 of 2004 by the Additional District Munsif, Kanchipuram is dismissed.

(ii) The second appeal in S.A.No.151 of 2012 is dismissed. No costs. The connected miscellaneous petition is closed. The decree and judgment dated 11.11.2011 passed in A.S.No.46 of 2011 by the Subordinate Judge, Kanchipuram is upheld and the suit in O.S.No.176 of 2006 on the file of the Additional District Munsif, Kanchipuram is dismissed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

mst

To

1. The Subordinate Judge, Kanchipuram.

2. Additional District Munsif, Kanchipuram.

Copy to:

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

+2ccs to Mr.K.M.Balaji , Advocate SR.No. 73288

+2ccs to Mr.V.Ragavachari , Advocate SR.No. 71800 71798

S.A.No.150, 151/2012 and
M.P.No.1 + 1 of 2012

A.SK(16/03/2020)

A.SK(23/07/2020)