



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 05.03.2019

DELIVERED ON : 05.04.2019

CORAM

THE HONOURABLE MRS. JUSTICE R.THARANI

C.R.P. (PD) (MD) No.894 of 2015

and

M.P. (MD) No.2 of 2015

R.Sebasthi Nadar

.. Petitioner

Vs.

1.A.Soosaiappan

2.Tamil Nadu Government,
Rep. By the District Collector,
Sivagangai.

3.Tamil Nadu Government,
Rep. By the Tahsildar,
Karaikudi,
Sivagangai District.

.. Respondents

Prayer : This Civil revision petition is filed under Section 115 of Civil Procedure Code, to call for the records relating to the fair and decreetal order passed by the learned Principal District Munsif cum Judicial Magistrate, Karaikudi in E.P.No.106 of 2013 in O.S.No.61 of 2001 dated 19.11.2014 and set aside the same.

For Petitioner : Mr.S.Kameswaran

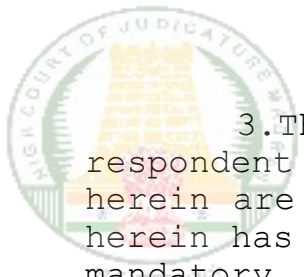
For 1st Respondent : Mr.Rajiv Rufus

For Respondents 2 and 3 : Mr.J.Gunaseelan Muthaiah, AGP

ORDER

Heard Mr.S.Kameswaran, learned counsel appearing for the petitioner, Mr.Rajiv Rufus, learned counsel appearing for the first respondent and Mr.J.Gunaseelan Muthaiah, learned Additional Government Pleader appearing for the respondents 2 and 3.

2.This Civil Revision Petition has been filed against the order passed in E.P.No.106 of 2013 in O.S.No.61 of 2001 dated 19.11.2014 on the file of the learned Principal District Munsif cum Judicial Magistrate, Karaikudi.



3. The petitioner herein is the first defendant, the first respondent herein is the plaintiff and the respondents 2 and 3 herein are the defendants 2 and 3 in the suit. The first respondent herein has filed a suit in O.S.No.61 of 2001 seeking for a prayer of mandatory injunction to remove the encroachment made by the first defendant and the suit was decreed. Against which, the petitioner has filed an appeal in A.S.No.100 of 2005 and the appeal was dismissed. Against the Judgment and decree, the petitioner has filed second appeal in S.A.(MD)No.1222 of 2006 and the second appeal is dismissed. After the dismissal of the second appeal, the first respondent has filed E.P.No.106 of 2013 and the same was allowed by the Court. Against the order passed in the E.P. proceedings, this petition is filed.

4. On the side of the petitioner, it is stated that as the suit was decreed on 27.09.2002 an appeal was filed by the respondent and the appeal was dismissed on 25.04.2006 and the second appeal was dismissed on 26.04.2007. The Review Application was also dismissed on 28.09.2011. It is further stated that the limitation for mandatory injunction is only three years and the decree was passed on 27.09.2002 and that E.P. was filed in the year 2013, after the lapse of 10 years. Though the petitioner has raised these facts in this counter that the trial Court without considering the counter has allowed the E.P., it is stated that the limitation starts from the date of decree and there is no bar for the first respondent to file E.P., even though the appeal is pending.

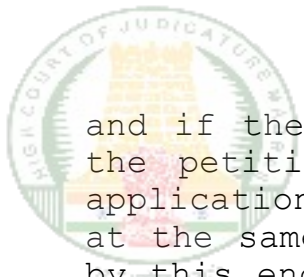
5. The learned counsel appearing for the petitioner relied on the Judgment passed by the Hon'ble Supreme Court in the case of **Ratansingh v. Vijaysingh and Others** reported in **AIR 2001 Supreme Court 278**, which reads as follows:

"Execution of decree-Period starts running from date when it 'becomes enforceable-Decree can become 'enforceable' from future date or happening of certain specified events- Filing of appeal does not affect enforceability of decree, unless stay is obtained."

6. The learned counsel appearing for the petitioner relied on the Judgment passed by the Hon'ble Supreme Court in the case of **Manohar Shankar Nale & Ors. v. Jaipalsing Shivlalsing Rajput and Ors** reported in **AIR 2001 Supreme Court 278**, which reads as follows:

"Review- Doctrine of merger-Does not apply when review petition is dismissed"

7. On the side of the respondents, it is stated that the suit property is a public pathway. The villagers filed a suit and the suit was decreed and the appeal and second appeal filed by the petitioner were dismissed. The Review application was also dismissed. Regarding public pathway, the limitation of time as per Section 1(11) of Limitation Act is 30 years and the suit and E.P. are not barred by limitation. Even after the dismissal of the review application, the petitioner has approached the Hon'ble Supreme Court



and if the case is bared by limitation, there is no necessity for the petitioner to file an appeal and second appeal and a review application and S.L.P. The petitioner cannot approbate and reprobate at the same time. It is stated that even if any person is affected by this encroachment, the local authorities can take action and the direction was given only against the local authorities and there is no necessity to interfere in the order passed by the lower Court.

8. On the side of the respondents, it is stated that the petitioner cannot approbate and reprobate at the same time which will amount to estoppel. In support of his contention, the Judgment passed by the Hon'ble Supreme Court in the case of **State of Punjab and Ors. v. Dhanjit Singh Sandhu** reported in **AIR 2014 Supreme Court 3004**, which reads as follows:

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that " a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage"

9. On the side of the respondents, it is stated that the appeal is a continuation of suit and there is no question of limitation. In support of his contention, the Judgment passed by the Hon'ble Supreme Court in the case of **Chandi Prasad and others v. Jagdish Prasad and Others** reported in **2004 (5) CTC 67**, which reads as follows:

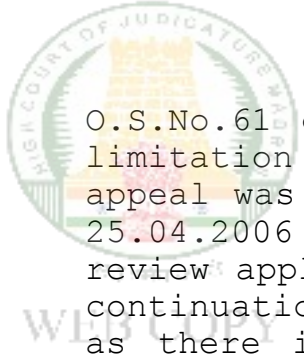
"Plea of judgment debtor that application for execution of decree was barred by limitation was negatived by trial Court and High Court-On appeal to Supreme Court it was held that doctrine of Merger operates even when Appellate Court dismissed appeal and confirmed decree-Application for execution was held to be within limitation and order of High Court was confirmed in appeal.

Appellate Court decree merges in Trial Court decree in all such cases-However when Special Leave Petition is dismissed summarily Doctrine of Merger does not apply but when appeal is dismissed by Supreme Court it applies."

10. On the side of the petitioner, it is stated that when other persons are using the suit property as a back yard of their house, action is taken only against this petitioner and the first respondent is having personal motive against this petitioner and prayed the revision petition to be allowed.

<https://hcservices.ecourts.gov.in/hcservices/>

11. It is seen that the trial Court has passed a decree in



O.S.No.61 of 2001 on 27.09.2002. According to the petitioner, the limitation for filing E.P. starts from the date of decree. The appeal was filed against the decree and the appeal was dismissed on 25.04.2006 and the second appeal was dismissed on 26.04.2007 and the review application was dismissed on 28.09.2011 and the appeal is a continuation of the suit. The contention of the respondents is that as there is continuous legal proceedings, the date of limitation starts only on 28.09.2011.

12.Admittedly the suit property is a common pathway. The limitation under Section 1(11) of the Limitation Act for removal of encroachment in the common pathway is 30 years.

13.In the above circumstances, E.P. cannot be treated as barred by limitation. From the photograph produced by the petitioner, it is seen that there is a separate shed and wall constructed in survey No.174/5. There is no sufficient reasons to interfere in the order passed by the trial court. It is directed that the petitioner has to remove the encroachment within a period of two weeks from the date of receipt of copy of this order, failing which the respondents 2 and 3 are directed to remove the same within a period of two weeks therefrom at the cost of the petitioner.

14.With the above direction, this Civil Revision Petition is disposed of. No Costs. Consequently, M.P.(MD)No.2 of 2015 is closed.

Sd/-

Assistant Registrar(CO)

// True Copy //

Sub Assistant Registrar(CS)

To

The Principal District Munsif cum Judicial Magistrate,
Karaikudi.

+1 CC to M/s.V.RAJIV RUFUS, Advocate in SR-59477
+1 CC to M/s.S.KAMESWARAN, Advocate in SR-59832

C.R.P. (PD) (MD)No.894 of 2015
05.04.2019

mrn

PK/23.04.2019 : 4P/4C