

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.01.2010

PRONOUNCED ON: 30.01.2020

CORAM :

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

S.A.No.949 of 2008
& MP.No.1 of 2008

V.Subramanian ... Appellant/1st Respondent/plaintiff

Vs.

1.R.Ramasamy ...1st Respondent/Appellant/1st Defendant
2.Manickam ...2nd Respondent/2nd Respondent/2nd Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 28.04.2008 passed in A.S.No.99 of 2007 on the file of the Principal District Judge, Erode reversing the judgment and decree dated 18.04.2007 made in O.S.No.10 of 2004 on the file of District Munsif cum Judicial Magistrate, Kodumudi.

For Appellant : Mr.A.K.Kumarasamy & Prithvi J.
for M/s.S.Kaithamalai Kumaran

For Respondents : Mr.V.V.Sathya for
Mr.M.V.Venkataseshan for R1

: R2 given up

JUDGMENT

This Second Appeal has been filed against the Judgment and decree dated 28.04.2008 passed in A.S.No.99 of 2007 on the file of the Principal District Judge, Erode reversing the judgment and decree dated 18.04.2007 made in O.S.No.10 of 2004 on the file of learned District Munsif cum Judicial Magistrate, Kodumudi.

2. The facts which gave raise to the filing of the present Second Appeal are stated hereunder:

The appellant was the plaintiff and the respondents were the defendants in the suit. The plaintiff filed a suit seeking for declaration, to declare him as co-owner along with the

defendants in respect of suit 'A' schedule property and for permanent injunction restraining the defendants from in any manner interfering with the plaintiff's peaceful possession and enjoyment of suit 'A' schedule property either by putting up any construction or causing any obstruction and further for mandatory injunction, directing the first defendant to remove the wall with doorway, toilet and septic tank morefully described in suit 'B' schedule property.

3. According to the plaintiff, he purchased the properties on 14.09.1981 along with one Santhanam and second defendant. The said Santhanam was also allotted the western most side with 1/3rd share in the common pathway along with the second defendant and the plaintiff herein. According to the plaintiff, the Sale Deed mentioned about the common lane abutting the properties purchased by him, second defendant and the said Santhanam and the plaintiff was allotted eastern most property, the second defendant, who was adjacent to the plaintiff's property and the said Santhanam was allotted the western most side of the property.

4. According to the plaintiff, suddenly in the year 2003, he noticed that an illegal construction was put up on the western most side facing north containing toilet, septic tank and the bench in the common pathway, which was described as 'A' schedule lane in the suit. Therefore, the suit was laid by the plaintiff, seeking declaration to declare him as a co-owner and also to remove illegal construction with a consequential prayer for permanent injunction. In the meanwhile, the said Santhanam appears to have sold the property in year 1992 to D1. The sale to Santhanam along with the plaintiff on 14.09.1981 was through a Sale Deed, which was marked as Ex.B1 and further sale by Santhanam to the second defendant was marked as Ex.B2.

5. The suit was resisted by the first defendant stating that when he purchased the property from one Santhanam, construction was already in existence and therefore, the second defendant or the plaintiff have no right to seek common pathway right to the entire lane adjacent to the western most property. A plea of limitation was also taken stating that the construction was put up either before 1991 or 1992 and the suit was filed only in 2004 and therefore, it is a clear case of suit being barred by limitation.

6. The trial Court, after appreciating various materials placed on record and also after going through the evidence, accepted the case of the plaintiff and decreed the suit in O.S.No.10 of 2004 on 18.04.2007. According to the trial Court, the crucial documents, viz., Ex.B1 and Ex.B2 Sale Deeds to Santhanam and the first defendant, had clearly mentioned about

the right of common pathway for all the three purchasers viz., vendor of Santhanam, the second defendant and Santhanam sold the property to D1 (Ex.B2). Both the plaintiff and the defendants are having 1/3rd share in the common pathway. The trial Court has also held that the evidence of Santhanam, who was examined as D3, that he had put up construction in 1982 also could not be believed, since the document executed by way of Sale to D1 by Santhanam, the so-called construction was not reflected at all. Therefore, the oral evidence of DW3 cannot be relied upon ignoring the documentary evidence. The Trial Court has also held that the limitation aspect cannot be raised in this case since the cause of action, according to the plaintiff, arose in the year 2003 when the construction was put up by D1 and the age of the building was not established though the Advocate Commissioner was appointed and his report was taken as Court document and the Advocate Commissioner's report also mentioned that the building was recently white washed. On the whole, the trial Court was fully convinced with the prayer sought for by the plaintiff and allowed the suit.

7. As against that, the first defendant filed an appeal in A.S.No.99 of 2007 on the file of Principal District Court, Erode. The lower Appellate Court which dealt with the appeal, has placed complete reliance on the evidence of DW3 viz., Santhanam stating that the construction was put up much earlier and therefore, the law of limitation was attracted in the case and since the suit was filed only in the year 2004, after a period of limitation of three years, it was clearly barred and the suit was not maintainable. Moreover, the lower appellate Court also held that the plaintiff has not proved that the cause of action had arisen in 2003. In fact, on the aspect of delay, strangely the lower appellate Court has held that there was a delay of one year for filing the suit from the date of first cause of action, which is pleaded by the plaintiff i.e., 2003 and one month after the second cause of action i.e., when the first defendant put up the wall and the doorway morefully described in suit 'B' schedule property. Ultimately, the lower Appellate Court has allowed the appeal in favour of the defendant by setting aside the judgment and decree of the trial Court. As against that, the present Second Appeal has been filed.

8. Both the learned counsels appearing for the appellant as well as the first respondent have elaborately put forth their contentions, one supporting the trial Court's judgment and decree and the other supporting the judgment and decree of the lower Appellate Court.

9. On consideration of the elaborate submissions made by the learned counsels and also after perusing the materials and

the pleadings placed on record, what emerges is a complete lack of clarity as to when the disputed construction was put up either by Santhanam or by the first defendant No.1. According to Santhanam, the construction was put up somewhere in the years 1982 or 1983 and according to the plaintiff, it was put up by the first defendant only in the year 2003, which gave rise to the cause of action even assuming that the construction was put up earlier and the law of limitation might apply, the learned counsel for the appellant would submit that in case where, common right is claimed along with the other co-owners, the limitation will not apply since it is a continuous cause of action. In this regard, the learned counsel, would rely on a decision of the Hon'ble Supreme Court reported in (2006) 13 SSC 470 in the case of "Sankar Dastidar Vs. Banjula Dastidar(SMT) and Another". She would draw the attention of this Court to para no.8 of the above judgment, which is extracted hereunder:

"8. A suit for damages, in our opinion, stands on a different footing vis-à-vis a continuous wrong in respect of enjoyment of one's right in a property. When a right of way is claimed whether public or private over a certain land over which the tort-feasor has no right of possession, the breaches would be continuing one. It is, however, indisputable that unless the wrong is a continuing one, period of limitation does not stop running. Once the period begins to run, it does not stop except where the provisions of Section 22 apply."

10. She would also rely on a decision of the Hon'ble Supreme Court reported in (2011) 2 SCC 682, in the case of "Hari Ram Vs. Jyoti Prasad and Another", wherein, paragraph nos.16 to 18, extracted hereunder:

"16. Any act of encroachment is a wrong committed by the doer. Such an encroachment when made to a public property like encroachment to public road would be a graver wrong, as such wrong prejudicially affects a number of people and therefore is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source of wrong and injury, cause of action is created as long as such injury continues and as long as the doer is responsible for causing such injury.

"17. At this stage it would be apposite to refer to and rely upon Section 22 of the Limitation Act, 1963, which reads as follows:

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

"18. This Court had the occasion to deal with Section 22 of the Limitation Act, 1963, in the case of Sankar Dastidar v. Shrimati Banjula Dastidar and Anr reported in AIR 2007 SC 514, in which the Supreme Court held that when a right of way is claimed whether public or private over a certain land over which the tort-feaser has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, in our considered opinion the plea that the suit is barred by limitation has no merit at all."

11. In above cited judgment also, the Hon'ble Supreme Court has held as to how certain wrongs give continuous cause of action for the affected party to question the same.

12. Whether the law of limitation would apply or not in the present set of circumstances of the case, the first and the foremost fact to be established is whether as to what period of time, the disputed construction was put up in suit 'A' schedule property. Since, the trial Court relied on the documents viz., Ex.B.1 and Ex.B2 to discard the evidence of DW.3 that the construction was put up in the year 1982 or 1983 and thereafter, no construction was put up, yet, the trial Court relied more on the documents Exs.B1 and B2 which did not reflect the construction in the disputed place. On the other hand, the lower Appellate Court relied more on the evidence of DW.3 and ignored Ex.B2.

13. Further, it appears that the lower appellate Court was little confused as to what is the period of limitation since in one place it observed that the suit was laid after a period of 3 years and in other place, it was observed that it was filed after one year period of time. In fact, the lower Appellate Court has not taken any efforts to re-appreciate the evidence or in the absence of any clarity it could have directed the party to let in any additional evidence in order to clinch the issue

either in favour of the first defendant or in favour of the plaintiff. Unfortunately, it appears that the lower appellate Court has mechanically dealt with the appeal and found easier route to allow the appeal by applying the principle of limitation, which in the opinion of this Court, may not be correct in the absence of concrete and proper evidence. On the whole, this Court is of the view that the appellate Court has not approached the appeal in proper perspective and therefore, this is a fit case that the matter to be remanded back to the lower Appellate Court for fresh consideration and to pass a decree and judgment thereafter.

14. In the circumstances, the Second Appeal stands remanded back to the first Appellate Court to deal with the appeal afresh, if necessary by allowing the parties to let in additional evidence in support of their respective positions. The lower Appellate Court shall give a definite finding as to how the period of limitation is attracted in the case and also in regard to the period of construction put up in the disputed place namely, the common suit schedule lane (A schedule property) enjoyed by all the parties, viz., the defendants 1 and 2 and the plaintiff and thereafter, consider the plea of continuous cause of action also as against the plea of limitation set up by the first defendant. If necessary, the Appellate Court shall also appoint an Advocate Commissioner for the purpose of conducting fresh enquiry in order to find out the age of the disputed construction and also its proper location, since from the judgments and decrees of the Courts below, there appears to be a doubt as to the location of the disputed toilet and the septic tank.

15. The lower Appellate Court is directed to complete the above exercise and pass a fresh judgment and decree within a period of six months from the date of receipt of case records on remand. Since the matter is remanded back to the lower Appellate Court, the Registry is directed to forward all the records pertaining to the case to the lower Appellate Court. No Costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Principle District Judge,
Erode.

2.The District Munsif cum Judicial Magistrate,
Kodumudi.

Copy to

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

+lcc to Mr.S.Kaithamalai Kumaran, Advocate Sr.7107
+lcc to Mr.M.V.Venkataseshan, Advocate Sr.7032

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srg 23/09/2020



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