



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 09.04.2021

Pronounced on: 28.06.2021

CORAM

WEB COPY

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.PD(MD) .No.885 of 2020
and C.M.P. (MD)No.5834 of 2020

1.Dhanabalan

2.Alwar : Petitioners/Respondents1&2/Defendants1&2

Vs.

1.Rajakumari :1st Respondent/ Petitioner/Plaintiff

2.The Executive Officer,
Town Panchayat Office,
Alanganallur, Vadipatti Taluk,
Madurai District.

:2nd Respondent/ 3rd Respondent/ 3rd Defendant

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the fair and executable order dated 20.12.2019 passed in I.A.No.516 of 2019 in O.S.No.266 of 2013 on the file of the District Munsif Court, Vadipatti.

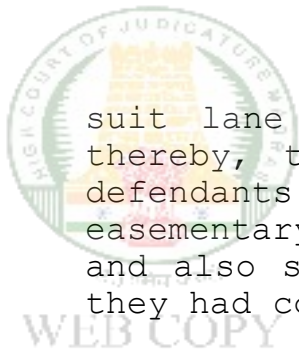
For Petitioners : Mr.J.Barathan
For Respondents : Mr.N.S.Karthikeyan, for R1.

O R D E R

The Civil Revision Petition is directed against the order passed in I.A.No.516 of 2019 in O.S.No.266 of 2013, dated 20.12.2019 on the file of the District Munsif Court, Vadipatti, allowing the petition filed under Order 6 Rule 17 CPC.

2.The revision petitioners are defendants and the first respondent/ plaintiff has filed the suit in O.S.No.266 of 2013 on the file of the District Munsif Court, Vadipatti, claiming permanent injunction, restraining the defendants and their men, as per the Easements Act and Easement Rights, from making any construction so as to prevent the peaceful convenient enjoyment of the plaintiff over the suit property.

3.The suit property is a 5 feet width lane lying on the east of the houses of the plaintiff and the defendants. According to the plaintiff, himself and her predecessors in title have been using the



suit lane from time immemorial to reach the main road and that thereby, the plaintiff has claimed easement by prescription. The defendants 1 and 2 have filed the written statement disputing the easementary right claimed by the plaintiff over the suit property and also specifically stating that long before filing of the suit, they had constructed a septic tank in the suit lane.

4.It is evident from the records that the plaintiff has filed an application under Order 20 Rule 9 C.P.C., in I.A.No.40 of 2015 for appointment of Commissioner to measure the suit property with the help of a surveyor and for filing of report and that the learned District Munsif after enquiry, has passed an order on 28.10.2015, dismissing the said petition.

5.It is further evident that subsequently the temporary injunction petition filed under Order 39 Rule 1 and 2 C.P.C., along with the plaint was taken up and after enquiry, the same was also ordered to be dismissed by the learned District Munsif vide order, dated 16.02.2018. Thereafter, the above petition under Order 6 Rule 17 came to be filed, seeking permission to amend the plaint and whereunder she has sought to replace the existing relief of permanent injunction by two prayers for declaration and for mandatory injunction and the proposed prayers are extracted hereunder for better appreciation :

"Add the prayer a(a) and a (b) instead of a

'a(a) To declare the suit mentioned property is a common pathway.

a(b) Direct the defendants by way of mandatory injunction to remove the construction of septic tank mentioned as 'MNOP' in Rough sketch in the suit pathway so as to make convenient to plaintiff for peaceful and uninterrupted enjoyment of the suit pathway property mentioned as ABCD in rough sketch"

6.Despite the serious objections raised by the defendants 1 and 2, learned District Munsif, after enquiry, has passed the impugned order dated 20.12.2019, allowing the amendment petition on costs.

7.As already pointed out, the plaintiff has claimed right over the suit property on the basis of easement by prescription in the plaint and she has also reiterated the same version in the affidavit filed in support of the amendment petition. But, in para '3' of the affidavit as well in the proposed prayer, she has claimed as a "common pathway."

8.It is pertinent to note that claiming right over the suit property on the ground that it is a common pathway, is entirely different and contradictory to the stand taken earlier, that she has been claiming only on the basis of the easement by prescription. As



plaintiff, through the proposed amendment for the declaratory prayer is attempting to change the nature of the suit itself and that cannot be permitted.

9.The plaintiff, by alleging that the defendants 1 and 2 are taking steps for constructing septic tank in the suit property, has claimed preventing injunction restraining the defendants from making any construction. The defendants 1 and 2, as already pointed out, in their written statement has specifically averred that long before filing of the suit, septic tank was constructed in the suit property, which is owned by the first defendant. It is not in dispute that the defendants have filed the written statement on 25.03.2014. Admittedly the plaintiff has not filed any reply statement disputing the above averments of the defendants.

10. It is further evident that after one year since the filing of the written statement, he has filed the commission petition to measure the suit property and the same was ended in dismissal. As rightly contended by the learned counsel for the revision petitioner, though the plaintiff in the affidavit filed in support of the above petition has stated that taking advantage of pendency of the injunction petition in I.A.No.508 of 2013, the defendants have stealthily within a night, had constructed the septic tank in the suit property and by alleging so, she has sought to include the relief of mandatory injunction for removal of the septic tank constructed in the suit property.

11.It is pertinent to mention that the plaintiff has nowhere stated in her affidavit as to when the said septic tank was constructed by the defendants in the suit pathway. At this juncture, it is necessary to refer the decision of the Hon'ble Supreme Court in **L.C.Hanumanthappa (since dead) represented by his Legal Representatives vs. H.B.Shivakumar** reported in (2016) 1 Supreme Court Cases 332.

" 29. Applying the law thus laid down by this Court to the facts of this case, two things become clear. First, in the original written statement itself dated 16th May, 1990, the defendant had clearly put the plaintiff on notice that it had denied the plaintiff's title to the suit property. A reading of an isolated para in the written statement, namely, para 2 by the trial court on the facts of this case has been correctly commented upon adversely by the High Court in the judgment under appeal. The original written statement read as a whole unmistakably indicates that the defendant had not accepted the plaintiff's title. Secondly, while allowing the amendment, the High Court in its earlier judgment dated 28th March, 2002 had expressly remanded the matter to the trial court, allowing the defendant to raise the plea of limitation. There can be no doubt that on an application



of Khatri Hotels Private Limited (supra), the right to sue for declaration of title first arose on the facts of the present case on 16th May, 1990 when the original written statement clearly denied the plaintiff's title. By 16th May, 1993 therefore a suit based on declaration of title would have become time-barred. It is clear that the doctrine of relation back would not apply to the facts of this case for the reason that the court which allowed the amendment expressly allowed it subject to the plea of limitation, indicating thereby that there are no special or extraordinary circumstances in the present case to warrant the doctrine of relation back applying so that a legal right that had accrued in favour of the defendant should be taken away. This being so, we find no infirmity in the impugned judgment of the High Court. The present appeal is accordingly dismissed."

12. Considering the above, the position of law is well settled that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of application. As already pointed out, in the present case, the defendants have specifically denied the rights of the plaintiff over the suit property and also claimed that the septic tank was constructed long before filing of the suit. Admittedly, the plaintiff has filed the amendment application on 27.08.2019. Hence, the plaintiff has come with the proposed amendments 5½ years after filing of the written statement to convert the suit from bare injunction suit into a suit for declaration and for mandatory injunction.

13.As rightly contended by the learned counsel for the revision petitioners, applying the legal dictum laid down by the Hon'ble Supreme Court, this Court has no hesitation to hold that the proposed amendments are hopelessly barred by limitation. But, the learned trial Judge by raising a wrong question by himself that the defendants 1 and 2 did not mention the date on which septic tank was constructed in the suit property, that the plea of limitation raised is a mixed question of law and the fact and that the same has to be gone into only at the trial, dismissed the petition.

14.It is pertinent to mention that the plea of limitation cannot be considered as a mixed question of law and fact in all the cases and if the Court is able to decide from the pleadings of the parties and no further materials or evidence are necessary, then there is no bar or prohibition for the Court to conclude that the claim is time barred or not. Considering the above, this Court is of the clear view that the impugned order passed by the learned trial Judge is not good in law and the same is liable to be set aside.



15. In the result, the Civil Revision Petition is allowed and the order passed in I.A.No.516 of 2019 in O.S.No.266 of 2013 on the file of the District Munsif Court, Vadipatti, is set aside and the petition in I.A.No.516 of 2019 is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note:

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

The District Munsif, Vadipatti.

+1 CC to M/s.T.R.JEYAPALAM, Advocate (SR-20645[F] dated 30/06/2021)

order made in
C.R.P.PD(MD).No.885 of 2020
and
C.M.P. (MD)No.5834 of 2020
28.06.2021

(CO)

TR(13.07.2021) 5P 3C