



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 16.03.2021

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.(MD)No.64 of 2015

1.Basheer Ahamed
2.Abdul Kader Jailani
3.Mathar Fathima
4.Peer Fathima

..Appellants/Respondents/Plaintiffs

Vs.

1.M.Hayath Raja
2.M.Mohamed Maideen

..Respondents/Appellants/Defendants

PRAYER:- Second Appeal filed under Section 100 of Code of Civil Procedure, against the Judgment and Decree passed in A.S.No.37 of 2014 dated 30.06.2014, on the file of the Principal Sub Court, Tirunelveli, reversing the judgment and decree passed in O.S.No.447 of 2007, dated 03.09.2013, on the file of the Principal District Munsif Court, Tirunelveli.

For Appellants : Mr.H.Arumugam
For Respondents : Mr.T.Selvan

J U D G M E N T

The plaintiff in O.S.No.447 of 2007 are the appellants. Challenge is to the judgment of the Appellate Court, reversing that of the trial Court and dismissing the suit filed by the plaintiffs, seeking mandatory injunction, requiring the defendants to close the doorways in the first item of the second schedule and to remove illegal construction shown as the second item of the second schedule properties.

2.According to the plaintiffs, the suit property was purchased by their father, in the name of their grand mother, namely, Peer Fathumal. It is also claimed that the second defendant, who is the brother of the plaintiffs father, along with other brothers filed a partition suit in O.S.No.3 of 1983, in which, the suit property was also shown as items 4 & 5 of sixth schedule. Though the suit for partition was dismissed by the trial Court, upon appeal by the second defendant and his brothers in A.S.No.237 of 1991, this Court granted a preliminary decree for partition, declaring 4/6th share of the plaintiffs in O.S.No.3 of 1983 in the sixth schedule property. A review application was filed by the present plaintiffs' father, seeking review to confine the decree in respect of Items 4 and 5 of 6th schedule property and the said review application was allowed by this Court. It is also stated that



the judgment in the review application was challenged in Special Leave Petition and the Honourable Supreme Court had remanded the matter to this Court for reconsideration, since the legal representatives of one of the heirs was not brought on record. It is not in dispute that the Review application remanded by the Honourable Supreme Court is still pending. While things stood thus, according to the plaintiffs, the first defendant, who is the son of the second defendant, who had purchased the property, on the western side of the suit property, had unauthorizedly constructed over the western wall of the suit property and had also made certain openings in the suit property. Claiming that he had no right to do so, the plaintiffs has come up with the present suit.

3.The suit was resisted by the defendants contending that the plaintiffs who are not the absolute owners of the suit schedule property, are not entitled to maintain the suit. It is their further contention that the second defendant is a sharer and therefore the plaintiffs cannot complain about the construction made.

4.At trial, the 1st plaintiff was examined as PW 1 and Exs.A1 to A3 were marked. The first defendant was examined as DW 1 and Exs.B.1 to B9 were marked. A Commissioner was appointed by the trial Court. His report and plans were marked as Exs.C1 to C3.

5.The learned trial Judge, upon consideration of evidence on record, concluded that the action of the first defendant in putting up construction over the western wall of the suit schedule property amounted to infringement of the right of the plaintiffs and therefore, he is liable to be removed the said construction. On the said conclusion, the learned trial judge granted a decree for mandatory injunction as prayed for.

6.Aggrieved the defendants preferred an appeal in A.S.No.37 of 2014. The learned Appellate Judge, upon reconsideration of the evidence of record, concluded that the plaintiffs, who are not the absolute owners of the property, cannot seek a decree for mandatory injunction. The absence of prayer for declaration of title was also made a ground to reject the claim of the plaintiffs. On the said conclusion, the learned Appellate Judge, allowed the appeal and dismissed the suit. Hence, this Second Appeal.

7.At the time of admission, the following substantial questions of law were framed.

- i. Whether under the Mohammeden Law, the son, the 1st defendant is entitled to claim any right during the life time of father, the 2nd defendant and whether the lower Appellate Court is right in not deciding the same while reversing the judgment and decree of Trial Court?



ii. Whether admittedly the 1st defendant is not the co-owner did not produce any document of title, whether the lower Appellate Court is right in deciding that the suit for mandatory injunction without declaration is not maintainable under "Section 34" of Specific Relief Act, 1963?

iii. When the pendency of appeal in A.S.No.237/91, before this Hon'ble Court is no way connected with the relief sought for in the plaint and it will give any right on the 1st defendant as he is not a co-owner and not a party whether the lower Appellate Court is right in giving a finding that the suit is not maintainable by travelling beyond the pleadings and out of the scope of the suit?

iv. When the suit was filed for mandatory injunction within 3 years as contemplated under Article 135 of Limitation Act, 1963 Whether the lower Appellate Court is right in rejecting the same on the ground that the suit was not filed during the stage of construction even after issuing legal notice?

8. I have heard Mr.H.Arumugam, the learned counsel appearing for the appellants and Mr.T.Selvan, the learned counsel appearing for the respondents.

9. Mr.H.Arumugam, the learned counsel appearing for the appellants would vehemently contend that the Appellate Court was not right in concluding that the plaintiffs cannot maintain the suit for mandatory injunction. He would submit that the Appellate Court lost sight of the fact that the second defendant has no right over the suit property, during the life time of the first defendant and hence his act of construction over the western wall of the suit schedule property could only amount to trespass and transgression of the rights of the plaintiffs and therefore, the plaintiffs would be entitled to seek a decree for mandatory injunction. The learned counsel would also point out the fact that the first defendant has no right over the suit property and it is admitted in the evidence of the second defendant. It is further contention of the learned counsel for the appellants that the plaintiffs being sharers in the suit property are entitled to protect the property from encroachment and therefore, they are entitled to maintain the suit. The fact that the property stands in the name of the mother of the plaintiffs' father and the second defendant is not in dispute. The prior proceedings are also not in dispute. As of today, there is a decree, declaring a 4/6th share of the second defendant and his brothers in the suit schedule property in O.S.No.3 of 1983. Though the review is said to be pending, the plaintiffs cannot be said to be the absolute



owners of the property as of now. The other sharers have not objected to the action of the first defendant in putting up the construction, no doubt that by itself will not justify the encroachment/transgression made by the first defendant. At the same time, the plaintiffs who are only sharers and who do not have absolute right over the property, cannot seek a decree for mandatory injunction, directing removal of the construction. After all, mandatory injunction is a discretionary relief and the Court need not grant a decree, just because it is found to be legal to do so. The fact that the other co-owners have not objected is definitely a ground to be borne in mind. No doubt, the first defendant has no right in presentee over the suit property. At the same time, the fact that the father has right over the suit property cannot be lost sight of. The first question of law will have to be necessarily answered against the appellants inasmuch as they do not have absolute right over the suit property in order to enable them to claim a decree for mandatory injunction. The fact that the first defendant's father is a co-owner is admitted. The plaintiffs have not sought for declaration that they are not the absolute owners of the property. Unless the plaintiffs are in a position to seek relief of declaration, I do not think that the Court will be justified in granting a relief of mandatory injunction in favour of the plaintiffs. Hence the second question of law is answered against the appellants.

10. The third question of law may not arise. The fact that the review challenging the judgment in A.S.No.237 of 1991 is still pending is not denied. Therefore, the rights of the parties is yet to be crystallized. The pendency of the review is a fact that has to be borne in mind, while deciding the rights of the parties in this suit, that too when the reliefs sought for is mandatory injunction for removal of certain constructions. The Appellate Court has also taken note of the fact that there is some delay in filing the suit. Though the notice complaining the construction was issued in 2004, the suit came to be filed only in September 2006. No doubt, the suit is within the limitation, but the latches will be definitely a ground for rejection of the discretionary relief of mandatory injunction. The fourth question of law is also answered against the appellants. The Appeal fails and it is accordingly dismissed. No costs.

Sd/-

Assistant Registrar (CS II)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)



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To

- 1.The Principal Sub Court, Tirunelveli.
- 2.The Principal District Munsif Court, Tirunelveli.

Copy to:

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai. (2c)

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-11926[F] dated 17/03/2021)

S.A. (MD)No.64 of 2015

Dated 16.03.2021

KK(19.05.2021) 5P 6C