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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2021
PRONOUNCED ON : 04.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.1351 of 2010

1.Kamaludeen
2.Saiyudeen
3.Jawahar Ali
4.Hussain Ali
5.Jawahar Nisha

...Appellants/Respondents/
Plaintiffs 2 to 6

versus

Jayaraman

...Respondent/Appellant/Defendant

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 19.04.2010 made in A.S.No.47 of 2009 on the file of the learned Principal Subordinate Judge, Mayiladuthurai, in reversing the judgment and decree dated 06.08.2008 made in O.S.No.138 of 2006 on the file of the learned Principal District Munsif, Mayiladuthurai.

For Appellants : Mr.A.Muthukumar

For Respondent : Mr.S.Southar

J U D G M E N T

This Second Appeal is focussed as against the judgment and decree dated 19.04.2010 passed in A.S.No.47 of 2009 by the learned Principal Subordinate Judge, Mayiladuthurai, in reversing the judgment and decree dated 06.08.2008 passed in O.S.No.138 of 2006 by the learned Principal District Munsif, Mayiladuthurai.

2. For the sake of convenience, the parties are hereinafter referred to as per their litigative status before the trial Court.



3. The laconic averments made in the plaint, are as follows:

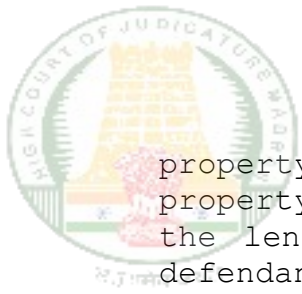
(i) The suit A schedule property belongs to the first plaintiff. The defendant is the western neighbour of the first plaintiff, as detailed in B schedule of the plaint. In earlier, both of them have demolished their respective buildings and put up a new and pucca building. Originally, and as well as now, the western wall of the first plaintiff exclusively belongs to the plaintiffs. At the time of construction, the defendant and his brother gave numerous troubles. So, the first plaintiff has filed the suit in O.S.No.213 of 1993 on the file of the learned Principal District Munsif, Mayiladuthurai, and the same was decreed in her favour.

(ii) Afterwards, the defendant has filed a suit for permanent injunction, as against the first plaintiff in O.S.No.429 of 2000 on the file of the learned Principal District Munsif, Mayiladuthurai and after contest the suit was dismissed. The defendant has left a lane of nearly 4 feet inbetween the first plaintiff western wall and his eastern wall. The western face of the first plaintiff's western wall could not be cement plastered or white washed. When at the time the plaintiffs were arranging to plaster the same, the defendant has refused to allow them. For the same, the defendant had attributed the reasons as if he has incurred heavy expenses in the litigations and the first plaintiff has to bear the same. The first plaintiff is entitled to go through the lane portion of the defendant to cement plaster. In view of the easement of necessity also, the plaintiff is entitled to go there. So, an Advocate notice was issued to the defendant on 20.09.2005. Though the defendant acknowledged the same on 28.09.2005, he has neither replied nor complied with the demands. Hence, the suit.

4. The case of the defendant as per the averments found in the written statement, is as follows:

(i) The description of the property found in the plaint is a misconceived one. The prayer sought by the plaintiffs cannot be entertained. The father of the defendant on 17.02.1953 purchased the defendant's property and the property situated on the west side of the defendant's property and from the date of purchase he is in the possession and enjoyment of the same. On 20.06.1986, he sold the said property in favour of the defendant and his brother.

(ii) While at the time, the father of the defendant purchased the said property, the length of East-West is 30 feet. During such time, on the eastern side of the suit property, a hut belongs to one Rajammal was there. After purchasing the said



property from the said Rajammal, the purchaser has encroached the property, which was possessed by the defendant's father, near to the length of 11 feet. After made encroachment as above, the defendant and his property are having only 26 feet in the year 1992-93. When at the time, the defendant constructed his house in the Eastern side, he left 2½ feet. In the further East of the said land, the predecessors of the plaintiffs, after made encroachment constructed a wall, near to the length of 11 feet. Accordingly, the wall under dispute was constructed in the land belongs to the defendant. Hence, the plaintiff is not entitled to ask any relief.

(iii) O.S.No.213 of 1993 was filed by the first plaintiff, wherein she prayed the relief of injunction, for not to construct any building on the western side of the wall, which belongs to her. The said suit was dismissed before the trial Court. In the appeal, the prayer sought by the plaintiff was granted with a direction that the defendant should not construct any house on the eastern side of the AB wall. Thereafter, during the pendency of the said suit, the first plaintiff constructed a compound wall, and the same was extended till the land having by the defendant.

(iv) Subsequently, O.S.No.429 of 2000 has been filed wherein the Advocate Commissioner appointed by the Court noted down the physical features and found the encroachment made by the first plaintiff. Being an encroacher, the first plaintiff cannot seek any relief as stated in the plaint. The plaintiff has not shown his right to cement plaster the wall. Hence, the suit filed by the first plaintiff is liable for dismissal.

5. From the above averments, the trial Court framed the necessary issues and tried the suit. On the side of the plaintiffs, the husband of the 1st plaintiff viz., Kamaludeen was examined as PW1 and six documents were exhibited as Ex.A1 to Ex.A6. Similarly, on the side of the defendant, wife of the defendant was examined as DW1. However, no documents were marked on his side.

6. Having considered the materials placed before him, the learned Principal District Munsif, Mayiladuthuri, came to the conclusion that the plaintiff has proved his case and accordingly, granted a decree as prayed for. In the appeal, the learned Principal Subordinate Judge, Mayiladuthurai, set aside the decree granted by the learned Principal District Munsif, Mayiladuthurai and accordingly, dismissed the suit filed by the plaintiffs.



7. Feeling aggrieved over the same, the appellants/plaintiffs 2 to 6 are before this Court with the present Second Appeal. When the Second Appeal is taken up for admission, the following substantial questions of law were framed for consideration.

"1. Whether the Lower Appellate Court erred in law holding that the suit is barred under Order II Rule 2 of C.P.C., when the causes of action for the present suit and that of earlier suit O.S.No.213 of 1993, were entirely different ?

2. In the absence of any defence raised with regard to Order II Rule 2 of C.P.C., whether the Lower Appellate Court is justified in law in holding that the suit is barred under Order II Rule 2 of C.P.C. ?

3. When the existence of the lane between the plaintiffs' western wall and the defendant's eastern wall is not in dispute and the identity of the suit property is also not in dispute, whether the Lower Appellate Court erred in law in rejecting the suit on the ground that the suit properties are not properly described ?"

8. Heard Mr.A.Muthukumar, learned counsel appearing for the appellants and Mr.S.Southar, learned counsel appearing for the respondent and also perused the materials available on record.

9. It is not in dispute, previous to the filing of this suit, first plaintiff filed a suit in O.S.No.213 of 1993 on the file of Principal District Munsif, Mayiladuthurai and the said suit went against her. The copy of the decree dated 16.10.1996 pertains to the said suit was marked as Ex.A1. Further, aggrieved over the said judgment, the plaintiffs herein filed an appeal in A.S.No.30 of 1997 wherein the learned Principal Subordinate Judge, Mayiladuthurai, after elaborate trial allowed the appeal and restrained the defendant from constructing any building near to AB wall. The copy of the decree dated 11.09.1997 made in A.S.No.30 of 1997, was marked as Ex.A2.

10. Now, on going through the cause of action portion, it appears that the said suit was filed for not to construct any building in the eastern side of ABCD wall. On the other hand, here it is a case, the cause of action is for cement plastering in the wall. Further, on going through the pleading set out in the plaint, as well as taking through the evidence given by PW1,



it seems, on account of the prolonged litigation, the western face of the wall could not be cement plastered or white washed and on account of the same, the wall is much affected. In this regard, the counsel appearing for the appellants/plaintiffs rightly contended that the inaction on the part of the plaintiffs in plastering the wall, is nothing but a continuous cause of action.

11. DW1 has also admitted in her cross examination as if the western portion of the wall is not plastered there may be a possibility for further damage. So, in view of the above, it cannot be held that both the suits are filed on the same cause of action. Accordingly, it cannot be held that the suit filed by the plaintiffs is hit under Order II Rule 2 of Code of Civil Procedure.

12. The first appellate Court mainly has held that the suit filed by the plaintiffs is on the same cause of action, and thereby the suit is hit by Order II Rule 2 of CPC, which is nothing but erroneous one.

13. Though it was contended that the plaintiff is having a right in plastering the wall under easment of necessity, being the reason that his case, not upon the fact that both the properties purchased by the plaintiff and defendant, are from the common ancestors, it cannot be held that the plaintiff is entitled to the relief of declaration on the ground of easement of necessity.

14. The sum and substance of the case placed before this Court is that there is a wall inbetween the plaintiff's and defendant's property. For the past 10 years, one portion of the wall which is abutting the defendant's property, after construction by the plaintiff, is not plastered by using the cement. Hence, the same was under the exposure of sun and light. For reaching the said particular wall, the plaintiffs have no access except through the land which is under the possession of the defendant. In otherwise, no hindrance is caused to the defendant due to plastering the said wall by the plaintiff. Though, the defendant has claimed that the wall under dispute is constructed in his portion, in order to prove the same, he has not produced any relevant documents.

15. At this juncture, it is relevant to see the judgment of this Court in Lakshmanan and Two others, Vs. G.Ayyasamy, reported in 2011 (2) CTC 182, wherein, in a similar situation, this Court has held as follows:



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"12. The owner of the property is entitled to have his right exercised up to the sky and in such a case aerial projection cannot be permitted.

13. I would like to refer to the relevant passages in the famous treatise 'The Law of Torts ((25th Edition 2006 page 374):

"Trespass, in its widest sense, signifies any transgression or offence against the law of nature, of society, or of the country, whether relating to a man's person or to his property. But the most obvious acts of trespass are (1) trespass quare clausum fregit "because he (the defendant) broke or entered into the close" or land of the plaintiff; and (2) trespass de bonis asportatis, wrongful taking of goods or chattels. Here we are concerned with the former, i.e. trespass to land.

Trespass to land is also an offence under the Indian Penal Code(s.441) provided the requisite intent is present.

To constitute the wrong of trespass neither force, nor unlawful intention, nor actual damage, nor the breaking of an enclosure is necessary. "Every invasion of private property, be it ever so minute, is a trespass."

Trespass may be committed (1) by entering upon the land of the plaintiff, or (2) by remaining there, or (3) by doing an act affecting the sole possession of the plaintiff, in each case without justification.

(1) Entry is essential to constitute a trespass.

A man is not liable for a trespass committed involuntarily, but he is liable if the entry is intentional, even though made under a mistake, e.g., if, in mowing in his own land, a man inadvertently allows his blade to cut through into his neighbour's field, he is guilty of a trespass. Notwithstanding the decision of Court of Appeal in Letang v. Cooper, approving Fowler v. Lanning, which lays down that intention is a necessary element to constitute trespass to person, it is still the law that an entry upon another's land constitutes trespass to land whether or not the entrant knows that he is



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trespassing. If the defendant consciously enters upon a land believing it to be his own but which turns out to be of the plaintiff, he is liable for trespass. But a person is not liable if the entry is involuntary, e.g., when he is thrown upon the land by someone else. In such a situation, there is no act of entry at all by the defendant. It is also possible that the defendant may successfully plead inevitable accident in his defence.

The presumption is that he who owns the surface of land owns all the underlying strata. So an entry, beneath the surface at whatever depth, is an actionable trespass at the instance of the owner of surface. But it is possible that the underlying strata may be in possession of a different person, e.g., when mining rights are held by a person who is not in possession of the surface. So if the surface of land is in possession of A and the subsoil in possession of B, entry on the surface will be trespass against A and entry in the subsoil will be trespass against B, e.g., a tunnel dug from the adjoining land; and in case of a vertical hole dug on the land that would be trespass both against A and B.

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. . . .

(3) Every interference with the land of another, e.g., throwing stones or materials over a neighbour's land, is deemed constructive entry and amounts to trespass. Deliberate placement of matter, e.g., jettisoning of oil, in such circumstances, as will carry it to the land of the plaintiff by natural forces, may constitute trespass. The matter may not be tangible; it may be gas or invisible fumes.

A trespass may be committed by driving a nail into a person's wall, or by placing anything against his wall, or by shooting over his land, or by placing anything above and overhanging his land, or by planting trees in his land, or placing any chattel upon his land, or causing any physical object or noxious substance to cross the boundary of his land. But trespass of the nature described above must be distinguished from private nuisance which resembles trespass. The distinction is



or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

Section 17. Rights which cannot be acquired by prescription - Easements acquired under Section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired

-

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

(b) a right to the free passage of light or air to an open space ground;

(c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(d) a right to underground water not passing in a defined channel."

15. The above provisions of law and the passages extracted supra from the famous treatise on Law of Torts would amply make the point clear that the defendants should arrange their own roof in such a manner that the rain water falling on their roof does not flow into the suit property. There is nothing to indicate and exemplify that the suit property is the joint property of the plaintiff and the defendants. In fact, from a mere perusal of the written statement and the counter claim, it is clear that the defendants claim only easementary right to have ingress and egress



into the suit property, which is situated to the West of the defendants' wall and they also pray for retaining the projection over that suit property, as an easement only.

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16. At this juncture, I would like to extract hereunder Section 4 of the Indian Easements Act, 1881:

"Section 4: "Easement" defined - An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners - The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner."

Here the plaintiff is the owner of the servient heritage and the defendants are the owners of the dominant heritage."

16. Further in the case of N.Kamalammal, Wife of A.Manjia Pillai Vs. S.Chakravarthy and others, reported in 1965 (2) M.L.J.241 this Court has held as follows:

". It is settled that there is no other access to the southern wall and therefore the appellant has an easement by necessity. On behalf of the appellant reliance is placed on Bhagavatula Subramanaya Sastry v. Bhagavatulu Lakshminarasimhan. In that case all that was held was that a house owner in order to repair his wall on his neighbour's side of the premises had the right to go to the other side of the wall on the land of his neighbour, the right being in the nature of a necessary easement. But it was also pointed out in that case that such an easement did not extend to going over the neighbour's roof for that purpose. But that is what the appellant precisely wants in this case, namely, to have access, through the staircase, to the open terrace of the 1st respondent's house, so that she might effect repairs to her southern wall, and the windows on that wall. Apart from that, the trial Court



as a matter of fact found that there were other methods of attending to the repairs from within the property of the plaintiff himself. That finding is clearly fatal to the claim of easement of necessity."

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17. Now, applying the principles set out in the above referred judgment, by virtue of Order 41 Rule 33 of CPC, this Court while dealing with the matters of this nature should necessarily rectify the error of law committed by the Courts below. Further, in the judgement referred above, this Court has held as follows:

19. At this context, I would like to refer certain excerpts from the Broom's Legal Maxims (Tenth Edition page Nos.238 and 240):

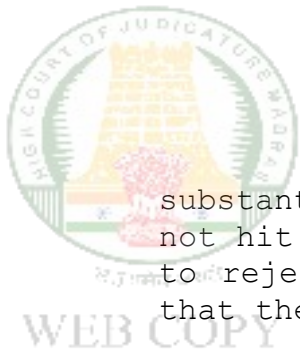
'Sic Utere tuo ut alienum non laedas' Enjoy your own property in such a manner as not to injure that of another person.

A man must enjoy his own property in such a manner as not to invade the legal rights of his neighbour: expedit reipublicae ne sua re quis male utatur. "Every man," observed Lord Truro, "is restricted against using his property to the prejudice of others"; and :the principle embodied in the maxim, sic utere tuo ut alienum non laedas, applies to the public in at least as full force as to individuals.

. In trespass quare clausum fregit, the defendant pleaded that he had land adjoining plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, ipso invito, fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer, judgment was given for the plaintiff, on the ground that, "though a man do a lawful thing, yet if damage thereby befalls another, he shall answer it, if he could have avoided it."

18. Therefore, considering the facts and circumstances of the case, it would be necessary to direct the defendant to give access to the plaintiffs for repairing their wall on a particular time.

19. In this regard, the trial Court has clearly directed the defendant to provide access to the plaintiffs on a particular date and time with necessary conditions.



20. Therefore, in the light of the above discussion, the substantial questions of law are answered as the present suit is not hit under Order II Rule 2 of CPC. Further, it is not correct to reject the suit filed by the plaintiffs in view of the fact that the property has not been identified properly.

21. Therefore, the judgment and decree dated 19.04.2010 made in A.S.No.47 of 2009, on the file of the learned Principal Subordinate Judge, Mayiladuthurai, is set aside. Consequently, the suit filed by the plaintiff is decreed, as prayed for and the following reliefs are granted:

(i) the plaintiffs and their men shall have the right of ingress and egress into the suit property for the purpose of cement plastering and white washing their wall.

(ii) The plaintiffs are directed to complete the work of cement plastering and white washing within a period of 15 days from 10.01.2022 to 24.01.2022.

(iii) Further, after giving 15 days advance notice, the plaintiffs shall enter into the defendant's portion and white wash the wall every year during the period between 1st of May and 10th of May.

(iv) The said works shall be carried out by the plaintiffs without any hindrance or damage to the defendant's house.

(v) The Second Appeal is allowed, accordingly. No Costs.

Sd/-

Assistant Registrar(CS-IV)

// True Copy //

Sub Assistant Registrar

sri/ars

To

1.The Principal Subordinate Judge,
Mayiladuthurai.

2. The Principal District Munsif,
Mayiladuthurai.



Copy to: The Section Officer,
V.R.Section, High Court,
Madras-104.

+lcc to Mr.A.Muthukumar, Advocate SR.No.898
+lcc to Mr.S.Sounthar, Advocate SR.No.996

S.A. No.1351 of 2010

GJ(CO)
CB(17/02/2022)