



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	11.01.2022
Pronounced on	31.01.2022

THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN

S.A.No.537 of 2010

&

M.P.No.1 of 2013

1. Natarajan
2. Santha

..Appellants

Vs.

Vadivel

..Respondent

Prayer: Second is Appeal filed under Section 100 Civil Procedure Code against Judgment and Decree dated 10.12.2009 made in A.S.No.8 of 2005, on the file of the Subordinate Judge, Dharmapuri in confirming the Judgment and decree dated 30.09.2004 made in O.S.No.67 of 1992 on the file of the District Munsif, Dharmapuri.

For Appellants : Mr.V.G.Suresh Kumar

For Respondent : Mr.V.R.Rajaramani for
Mr.V.R.AnnaGandhi

J U D G M E N T

This Second appeal is focussed as against the Judgment and Decree dated 10.12.2009 passed in A.S.No.8 of 2005 by the learned Subordinate Judge, Dharmapuri confirming the Judgment and Decree dated 30.09.2004 in O.S.No.67 of 1992 passed by the learned District Munsif, Dharmapuri.

2. The appellants are the defendants and the respondent is the plaintiff. The parties, for convenience sake, are referred to herein according to their litigative status before the trial court. The suit is filed for the relief of declaration declaring that the plaintiff is the absolute owner of the ABCD portion, shown in plan, which appended in the plaint, for consequential



injunction and for the relief of recovery of possession in respect to 'B' Schedule property.

3. The laconic averments found in the plaint filed by the plaintiff are as follows:-

The suit 'A' Schedule property and its remaining extent totalling the extent of 22 cents belongs to the plaintiff. The plaintiff has attached the plan with regard to the suit 'ABCD' portion in 'A' schedule property along with the plaint. The suit 'A' schedule property and other properties belongs to the joint family of the plaintiff, his father and brothers. The plaintiff, his brothers and father have partitioned the joint family property and registered partition deed dated 15.02.1971. In the said partition, the suit ABCD, 'A' Schedule and its remaining extent, totalling 22 cents along with other properties were allotted to the share of the plaintiff. After partition, the plaintiff took possession of the same and he constructed a house abutting the road and kept the remaining extent as a vacant site.

(ii) The suit 'A' schedule property and its remaining extent was a part in R.S.No.452/2 and subsequently sub-divided as R.S.No.452/2A. The suit ABCD 'A' schedule property lies between the plaintiff's building and R.S.No.452/1A and R.S.No.452/1B. R.S.No.452/1A belongs to the 3rd defendant and R.S.No.452/1B belongs to the 2nd defendant.

(iii) The defendants are not claiming any title in 'A' Schedule ABCD marked property. The 1st defendant constructed a house in his land i.e., R.S.No.452/1B. Later the defendants 1 to 3 tried to tress-pass into the ABCD marked portion. The defendants 1 and 2 subsequent to the suit tresspassed into the 'B' schedule property, which is part of the 'A' schedule property and made some constructions. The defendants 1 and 2 are not entitled to do so and the act committed by the defendants is illegal. According to the plaintiff, defendants 1 and 2 are liable to be evicted from the 'B' schedule property and the plaintiff is entitled for recovery of possession of 'B' schedule property after removal of construction, hence the suit.

4. The averments contained in the written statement as well as in the additional written statement filed by the defendants 1 and 2 are as follows:-

(i) It is false to allege that 'A' schedule 'ABCDEF' property was allotted to the share of the plaintiff. The alleged partition deed dated 15.02.1971 does not bind the defendants 1 and 2. The plaintiff constructed his house without leaving any area, particularly in the northern side. The plaintiff



WEB COPY

constructed the house without getting proper permission from the panchayat. The suit ABCDEF property belongs to the 2nd defendant. In order to get the air and light, the defendants 1 and 2 left the ABCDEF portion as a vacant site and constructed his house.

(ii) The defendants have laid the drainage pipeline in the 'A' schedule property. The 2nd defendant constructed his house after getting proper permission from the panchayat. Therefore, the defendants alone are entitled to such ABCDEF partition. The plaintiff is not entitled to any relief, hence the suit filed by the plaintiff is liable for dismissal with costs.

(iii) It is false to allege that defendants 1 and 2 trespassed into the B schedule property and constructed a house even prior to the filing of the suit. The plaintiff has failed to mention the date on which the defendants 1 and 2 have trespassed into the B Schedule property as alleged.

5. Based on the above said averments, the trial court framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 and 2 examined and 8 documents were marked as Exs.A.1 to A.8. On the side of the defendants, D.W.1 examined and 19 documents were marked as Exs.B1 to B.19, apart from those document the report and plan submitted by the Advocate Commissioner was marked as Exs.C.1 and C.2.

6. Having considered the materials placed before him, the learned District Munsif, Dharmapuri in his Judgment held that the plaintiff had proved his case and thereby he is entitled to the relief as prayed for. In the appeal, preferred by the defendants in A.S.No.8 of 2005, the learned Sub-Judge, Dharmapuri, confirmed the findings arrived at by the trial court and dismissed the Appeal. Feeling aggrieved over the same, the defendants 1 and 2 are before this Court with the present Second appeal.

7. While admitting the Second Appeal, this Court has formulated the following substantial questions of law for consideration:-

(i) Whether the Courts below were right in granting mandatory injunction when admittedly the relief sought by the respondent is barred by limitation?

(ii) Whether the Courts below were right in granting mandatory injunction based on commissioner's report in the absence of specific pleading with respect to the date of encroachment?



WEB COPY

(iii) Whether the respondent is entitled to maintain the prayer for mandatory injunction namely, prayer (,) in paragraph - 12 of the plaint and whether the said prayer for mandatory injunction is not time barred under Article 113 of the Limitation Act?

(iv) Whether the respondent is consequentially entitled to maintain the prayer for recovery of possession, namely, prayer (<) of paragraph-12, when the relief of mandatory injunction is barred by limitation?

(v) Whether the covenants and measurements contained in the Deed of Partition dated 15.02.1972 (Exhibit A-1), to which the appellants are not parties, binding on the appellants?

8. Heard the learned appearing on either side and perused the documents placed on record.

9. Here it is a case pending suit, the respondent / plaintiff herein had compromised the dispute having by him with the 4th defendant, namely, Kaliyappan, who is the legal heir of the 3rd defendant, viz., Ammasi, now, died. Later the plaintiff did not persuade the suit as against the said Kaliyappan.

10. Before the trial court, the specific case of the plaintiff is that as per partition deed dated 15.02.1971, the suit 'ABCD' 'A' schedule property and its remaining extent totalling about 22 cents was allotted to the share of the plaintiff. After filing the suit without any manner of right and title, the defendants 1 and 2 trespassed into the suit B Schedule property, which is a part of 'A' schedule property and made construction and laid pipelines. On the other hand, the specific case of the defendants 1 and 2 is that the plaintiff is not having any title and possession over ABCD 'A' schedule property. At the time of constructing his house in his property, the plaintiff left no area as a vacant site on its northern side. The 2nd defendant at the time of constructing his house, in order to get air and light, left vacant site on its southern side in the measurement of 2 ¼ feet breadth; on eastern side and 3 feet breadth; on the western side to the length of 43 feet. The 2nd defendant has also laid drainage pipe line upto the septic tank through the said lane, therefore, the 2nd defendant alone is entitled to the said property and the plaintiff is not entitled for the same.

11. The contention raised by the plaintiff is that R.S. 452/1B belongs to the defendants 1 and 2 and R.S. 452/1A belongs to the 3rd defendant. In other wise, the bone of contest between



the plaintiff and the defendants 1 and 2 is with regard to the suit 'B' Schedule property, which is a part of 'A' Schedule 'ABCD' property and both the parties claim title and possession over the same.

WEB COPY

12. After giving evidence as P.W.1, in order to prove his case, the plaintiff, has produced eight documents as Exs.A.1 to A.8. Ex.A.1 is the Original Partition deed dated 15.02.1971 entered into between one Kuttiappan, (father of the plaintiff) and his three sons, namely, Chinakutti, Vajjiram and Vadivel, plaintiff, in which the Survey No.452/2, measuring 22 cents have been allotted to the share of the plaintiff, Vadivel. Ex.A2 is the patta, for an extent of 0.09.5 hectares, stands in the name of the plaintiff with regard to the S.No.452/2A. The other documents marked on the side of the plaintiff i.e., Ex.A.3 to A.8 are kist receipts. Now, it is evident from the said documents that the plaintiff is the absolute owner of R.S.452/2A measuring an extent of 22 cents.

13. Contrary to the case of the plaintiff, on the side of the defendants, to prove their case, 19 documents were marked as Exs.B.1 to B.19. Ex.B1 is the original sale deed dated 31.05.1950 executed by one S.P.Rajamanickam Chettiar and others in favour of Valamuthu Gounder in respect to 2.74 acres in S.F.No.452. Ex.B.2 is the original sale deed dated 15.04.1961, through which the 3rd defendant, Ammasi has purchased 1 acre 97 cents in Survey No.452/1. Ex.B.4 is the patta stands in the name of Amasi in respect of S.F.No.452/1. Ex.B.13 is the certified copy of the sale deed dated 14.03.1984 executed by the 3rd defendant in favour of 2nd defendant, Santha in respect to certain extent in respect to R.S. No.452/1. Ex.B.4 marked on the side of the defendants is the patta issued by the Special Tahsidar under UDR Scheme to the 2nd defendant in respect of R.S. No.45/1B for an extent of 0.10.0 Ares.

14. Ex.B.5 is the patta in No.15 issued to the 3rd defendant, Amasi in respect of the R.S.No.452/1A for an extent of 0.79.0 Ares. Ex.B.15 is the order for construction given by Panchayat to the 2nd respondent. Ex.B.16 is the Plan for the 2nd defendant's house, and the other documents relied on by the defendants are kist receipts.

15. The perusal of Exs.B.1 to B.19 reveals that 3rd defendant has purchased 1 acre and 97 cents in R.S.No.452/1, vide Ex.B.2, from which he sold certain property to the 2nd defendant, Santha under Ex.B.13. After sale, the remaining property having by the 3rd defendant was sub-divided as 452/1A and the property purchased by the 2nd defendant has been sub-divided into 452/1B. The said facts narrated by the defendants has been admitted by the plaintiff in the plaint itself.



16. In the said occasion, it would necessary to see whether the 'B' schedule property was in Survey No.452/2A or in 452/1B. To find out the same, before the trial court, the Advocate Commissioner has been appointed to measure the suit property. By way of complying the order passed by the trial court, the Advocate Commissioner, visited the suit property with the help of the Village Administration Officer and Surveyor. After visiting the property, he filed his detailed report and plan as Exs.C.1 and C.2. In the report as well as in the plan, he has categorically mentioned that 'ABCD' portion marked in the plan was in the 'A' schedule property. Since the said measurement was conducted by the Advocate Commissioner with the help of Village Administrative Officer and Surveyor, the report submitted by the Advocate Commissioner is suffice to accept the case of the plaintiff that 'A' schedule property is within the R.S. No.452/2A, which was allotted to the plaintiff through partition deed dated 15.02.1971. In this occasion, it is the submission made by the learned counsel appearing for the appellants / defendants that in the partition deed dated 15.02.1971 (Ex.A.1), the appellants are not parties, hence the same cannot bind the appellants.

17. Now on considering the said submission with relevant records, as already observed, the defendants 1 and 2 has purchased the land in Survey no.452/1 alone and not in S.No.452/2. Accordingly, here is a case the crucial issue which has to be decided is that whether the 'ABCD' marked property is within SF 452/2 or 452/1B, in this regard, the report submitted by the Advocate Commissioner is sufficient to accept that the said ABCD portion is in R.S.452/2, therefore, the submission that the defendants are not party in the partition deed, is not having much significance to decide the issue in favour of the appellants.

18. The next submission which was raised by the learned counsel appearing for the appellants is that prayer in respect to mandatory injunction is not been asked by the plaintiff within a period of limitation. Since there was no limitation fixed to the relief of mandatory injunction, under Section 113 of the Limitation Act, the same has to be asked by the plaintiff within a period of three years. But, here, it is a case after knowing the details of Commissioner Report, wherein it was stated that there was some construction is going on, the plaintiff has not amended the prayer for mandatory injunction within a period of three years and therefore, on that score alone, the relief prayed by the plaintiff cannot be entertained. In support of his claim, he referred the Judgment of this Court reported in 2005 (5) CTC 619, [Rameeza Beevi and others Vs. S.Mohammed Ibrahim] wherein this Court has held that "if



amendment is made after the period of limitation, the same cannot be sustained".

19. The learned counsel appearing for the appellants further relied on the Judgment of this Court reported in 2012-1-Law Weekly-74 [Chinnu Padayachi and Raja Vs. Dhanalakshmi and others], wherein this Court has held "that putting up a construction in the common wall is not continuous wrong and therefore, it cannot be construed that putting up a construction in the common wall is giving a continuous cause of action".

20. Now, applying the principles set out in the above said cases with the facts of the present appeal, it is seen that in those cases, the construction has been made before instituting the suit. Further, the first case referred by the appellants' counsel is in respect to the setting aside the sale deed and therefore, the factual position found in the above referred case are different from the present case. Here it is a case, obviously, after filing the suit, while the Advocate Commissioner visited the suit property as a first time, defendants 1 and 2 made construction in the disputed area and it was the report that, when the Advocate Commissioner visited the suit property as a second time in the year 1992 construction was completed. Thereafter, though the application for amendment is not filed within a period of limitation, the same cannot held that the said application has not been filed within a period of limitation.

21. In the said situation, it is necessary to see the Judgment of our Hon'ble Apex Court reported in 2004 (4) CTC 231 [Pankaja and Another Vs. Yellappa (D) Lrs and others] wherein it is held as follows:-

"If granting amendment subserves ultimate justice and avoids further litigation, the same should be allowed and there can be no straight jacket formula for allowing or disallowing amendment of pleadings which depends on the factual background of the case. Paragraph 12 of the said judgment which was emphasized by the learned counsel appearing for the respondents is usefully extracted here under:

"12. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not to allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and



WEB COPY

circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case."

In the said decision, the Hon'ble Apex Court has held that there is no absolute rule that in every case where a relief is barred because of limitation, an amendment should not be allowed. However, the Hon'ble Apex Court in the said decision also held that the discretion in such cases depends on the facts and circumstances of the case. Paragraphs 14, 15 and 17 could establish that if limitation is a disputed question of fact and law, then the question of limitation could be relegated at the time of final disposal of the suit."

22. Therefore, applying the principles set out in the above referred case herein, it is evident that only in the situation if the plaint is amended for the relief of mandatory injunction, the real justice is to be done. Therefore, I am of the considered view that submission made by the learned counsel for the appellants on the point of limitation is not applicable to the present case. More than that against the order passed by the trial court in the application filed for amendment, no revision has been preferred by the appellants.

23. Further, it is necessary to see the Judgment of this Court reported in 1996-1-L.W. 145 [B.Gangadhar Vs. B.G.Rajalingam], it is held as under:-

"..... But, when the decree for possession had become final and the Judgment Debtor or a person interested or claiming right through the judgment debtor has taken law in his hands and made any constructions on the property pending suit, the decree- holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the Court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the code expressly prohibits such multiplicity of proceedings"

24. Therefore, applying the principles referred, here it is a case though application for amendment has been filed after a period of three years, in order to avoid multiplicity of



proceedings, it was necessary to order the same in favour of the plaintiff. More than that, as of now, the decree passed by the trial court has been executed and delivery receipt is also obtained on 10.07.2014. Therefore, at any cost, if the appeal is allowed, the same leads to another litigation. The Substantial Questions of Law all are answered as above.

In the result, the Second Appeal is dismissed. Consequently connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

True Copy//

Sub Assistant Registrar

ssd

To

1. The Subordinate Judge,
Dharmapuri.
2. The District Munsif,
Dharmapuri.

+1cc to Mr.V.G.Suresh Kumar, Advocate, S.R.No.5924
+1cc to Mr.V.R.AnnaGandhi, Advocate, S.R.No.5963

S.A.No.537 of 2010 &
M.P.No.1 of 2013

SSV[co]
NSK 01/04/2022