



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.04.2022

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD) No.776 of 2010

1.Boomadevi

2.Munnamalayandi

.. Appellants/Respondents/
Defendants

-vs-

1.Ramachandran

2.Sethu

.. Respondents/Appellants/
Plaintiffs

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree passed in A.S.No.85 of 2008 dated 28.07.2009 on the file of the 1st Additional Sub-Court, Madurai reversing partly the judgment and decree passed in O.S.No.86 of 2006 dated 26.03.2008 on the file of the District Munsif Court, Melur.

For Appellants : Mr.V.Meenakshi Sundaram for
Mr.P.Nallathambi

For Respondents : Mr.Gnanagurunathan
for Mr.K.Samidurai

JUDGMENT

The defendants in O.S.No.86 of 2006 on the file of the District Munsif, Melur are the appellants in this Second Appeal. The suit was filed for the relief of mandatory injunction to direct the defendants to remove the suit pipe shown as "C2" in the rough sketch and for other reliefs. The defendants filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues. The 1st plaintiff, Ramachandran examined himself as P.W.1. Ex.A1 to Ex.A8 were marked. The 2nd defendant, Munna Malaiyandi examined himself as D.W.1, while one Pandi was examined as D.W.2. Ex.B1 to Ex.B4 were marked. After consideration of the evidence on record, the trial court by judgment and decree dated 26.03.2008, dismissed the suit. Challenging the same, the plaintiff filed A.S.No.85 of 2008 before



the I-Additional Sub Court, Madurai. By the impugned judgment and decree dated 28.07.2009, the first appellate court reversed the decision of the trial court and partly allowed the appeal. Challenging the same, this Second Appeal came to be filed.

2. The Second Appeal was admitted on 09.03.2022 on the following substantial question of law:-

"Whether the first Appellate Court is correct in granting mandatory injunction when the plaintiff himself admitted that the defendants have put up their house 15 years back and as such claim of mandatory injunction is barred by limitation?"

3. During the pendency of the appeal, the 1st appellant passed away. However, there was no necessity to take steps because the 2nd appellant, who is her legal heir, is already there on record.

4. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial court.

5. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree do not call for any interference.

6. I carefully considered the rival contentions and went through the evidence on record. The suit property is a common pathway comprised in S.No.115/87-C in Vandiyur Village and measures 4 feet x 39.7 feet. The suit property originally belonged to one Seenii @ Periya Karuppan Ambalam. The 1st plaintiff was born to the said Seenii @ Periya Karuppan Ambalam through his first wife. The 1st defendant is the 2nd wife of Seenii @ Periya Karuppan Ambalam, while the 2nd defendant was born to him through the 2nd wife. Partition took place on 28.02.1977 and the family properties were divided. The certified copy of the registered partition deed was marked as Ex.A1. There is no dispute that the suit property is a common pathway.

7. The grievance of the plaintiff is that the defendants have unauthorisedly and without getting their permission installed a pipe described as "C2" so as to reduce the width of the common pathway. The defendants pleaded that the suit pipe has been virtually affixed on their wall and that it does not affect the right of the plaintiffs to use the common pathway in any manner. The defendants also denied that they have any intentions to dig borewell in the common pathway.



8. Now the only question that arises for consideration is whether the suit pipe described as "C2" has to be removed or not. While the trial court held that the same need not be removed, the first appellate court came to the conclusion that it is liable to be removed.

WEB COPY

9. The learned counsel appearing for the appellant contended that the prayer for mandatory injunction is clearly barred by limitation because the house was put up some 15 years ago and that the pipe line is only on their eastern wall. This contention does not have any force for the simple reason that the suit was filed in the year 2006 only for the removal of the pipe and nothing else. Admittedly, the pipe was laid only in 2006. Even permission from the Public Works Department was obtained only on 19.06.2006 (Ex.B3). Therefore, the suit for mandatory injunction is very much within time. I therefore, answer the substantial question of law against the appellant.

10. The next contention strongly advanced by the learned counsel appearing for the appellant is that the defendants are entitled to use the common pathway to their maximum advantage and that by no stretch of imagination, the right of the plaintiffs to enjoy the pathway is not affected, as the suit pipe line has circumference of hardly 3 inches and the plaintiffs can as before reach their property that is lying on the Northern side through the suit pathway. The learned counsel relied on the decision rendered in S.A.No.686 of 2004 dated 09.04.2018 and S.A.No.1822 of 2004 dated 06.07.2018. Though the proposition canvassed by the learned counsel is quite sound, coming to the facts and circumstances of the case, it is to be noted that the common pathway is a very small one. It has a width of just 4 feet. If 3 inches is excluded or deducted, certainly the width would get permanently minimised. Therefore, to that extent, the plaintiffs can be said to have suffered injury and infraction of their rights. In more or less similar circumstances, a learned Judge of this Court vide judgment dated 16.12.2011 in S.A. (MD) No.76 of 2010 held that so far as the common pathways are concerned, it should be taken as an invariable and inflexible rule that whenever there is an encroachment by any of the common owners, they should necessarily be ordered to remove such encroachment. It was further held that the surface of the pathway must be made available to both sides as a common passage fully. This decision, in my view, squarely applies to the case on hand. I come to the conclusion that the first appellate court has not committed error either in applying the law or in appreciating the facts of the case. I do not find any merit in this Second Appeal and the same stands dismissed. However, the 2nd appellant, Munna Malayandi is at liberty to approach the plaintiffs seeking their permission to retain the offending pipeline. He also states that he would be willing to appropriately compensate the plaintiffs. After all the plaintiffs



Court to the High Court. In the event of the plaintiffs agreeing to the 2nd appellant's request, well and good. In the event of the plaintiffs not acceding to the 2nd defendant's request, the 2nd defendant will be granted sufficient time to make appropriate alterations. No costs.

WEB COPY

Sd/-

Assistant Registrar(CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

abr

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

1.The 1st Additional Sub Judge, Madurai.

2.The District Munsif, Melur.

Copy to

The Section Officer,

V.R. Section,

Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.K.SAMIDURAI, Advocate (SR-16648[F] dated 05/04/2022)

+1 CC to M/s.D. NALLATHAMBI, Advocate (SR-17256[F] dated 07/04/2022)

S.A.(MD) No.776 of 2010

05.04.2022

SS(CO)

TR(27.04.2022) 4P 7C