



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.02.2022

Pronounced on : 04.03.2022

CORAM

THE HONOURABLE MRS.JUSTICE R.THARANI

WEB COPY

S.A(MD)No.527 of 2015

and

M.P.(MD)No.1 of 2015

Jose Stephen

... Appellant/1st Appellant/
1st Defendant

Vs

1.John Gilbert

... Respondent/Respondent/
Plaintiff

2.Louis

... Respondent/2nd Respondent/
2nd Defendant

PRAYER :-

This Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the judgment and decree passed in A.S.No.60 of 2013 dated 18.03.2014 on the file of the Subordinate Court, Padmanabhapuram, confirming the judgment and decree passed in O.S.No.142 of 2007 dated 06.09.2013 on the file of the Additional District Munsif, Padmanabhapuram and allow the Second Appeal.

For Appellants	: M/s.G.Ramanathan
For R1	: Mr.R.Sreenivasan
For R2	: Mr.P.Subbiah

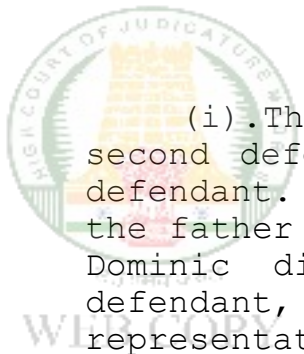
JUDGMENT

This appeal is filed against the judgment and decree in A.S.No.60 of 2013 on the file of the Subordinate Court, Padmanabhapuram, confirming the judgment and decree in O.S.No.142 of 2007 dated 06.09.2013 on the file of the Additional District Munsif, Padmanabhapuram.

2.The appellant herein is the first defendant in the original suit. The first respondent herein is the plaintiff, second respondent herein is the second defendant in the original suit. The first respondent herein has filed an original suit before the learned Additional District Munsif, Padmanabhapuram in O.S.No.142 of 2007.

3. A brief substance of the plaint is as follows:

<https://hcservices.ecourts.gov.in/hcservices/>



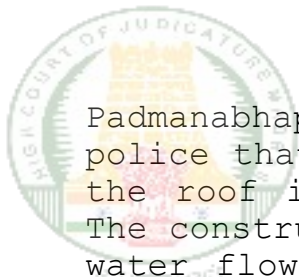
(i).The first defendant and the plaintiff are brothers. The second defendant is a building contractor who work for the first defendant. The suit property with an extent of 83 cents belonged to the father of the plaintiff and the first defendant by name Dominic. Dominic died in the year 1988, leaving the plaintiff, first defendant, his brothers and their mother as his legal representatives. On 24.10.1997, the legal representatives of Dominic partitioned the entire properties through a registered partition deed. The property was divided into 9 plots. Plot No.5 was given to the plaintiff, Plot No.4 was given to the first defendant and Plot Nos.3 and 6 were given to the other brothers. Plot No.7 was left as a common well. Plot No.8 was left as common pathway. Plot No.9 was left as a water course to let out the rain water from the common well through the road on the east. In Plot No.9 there was a wooden gate put up by the father to prevent the strangers to enter into the property.

ii). On 04.10.2002 The first defendant constructed a wall encroaching plot No.9 by removing the wooden gate. The plaintiff herein and his two brothers filed a suit in O.S.No.123 of 2003 before the trial Court for declaration, mandatory injunction and for permanent injunction. Plot No.9 was mentioned as Item No.1, Plot No.8 was mentioned as Item No.2 in the suit and the suit was decreed on 17.01.2005. The first defendant herein has filed an appeal in A.S.No.11 of 2006 and the appeal was dismissed by the Subordinate Court, Padmanabhapuram, on 07.07.2006. In the previous suit, a Court Commissioner was appointed and he filed a report and sketch which was marked as Ex.C2 and C4. After the dismissal of the earlier suit, the defendants constructed ground floor for the shopping complex in Plot No.4 and there is a projection in the roof with a width of one feet. Immediately the plaintiff presented a petition before the Thuckalay Police Station. This suit was filed to remove the roof which was projecting in item No.1 and for permanent injunction.

4.Brief substance of the written statement filed by the first defendant adopted by the second defendant is as follows:

(i)The legal heirs of Dominic partitioned the property with an extent of 83 cents and they divided the property into eight plots and there is no ninth plot. The defendant never removed any wooden gate. The first defendant never take any steps to put up a compound wall. The first defendant never resisted the usage of Plot-9 as a water course by the plaintiff. The first defendant obeyed the decree of the Court and caused no disturbance to Plot-9. The suit is affected on the principles of *res judicata*. As per the partition deed, the first defendant is having the title and is in enjoyment of Plot No.4 with an extent of 13.400 cents. He is paying the taxes and he put up construction in his own plot.

(ii)The plaintiff did not make any objection to the construction. Only a few days before the date of filing the suit in



Padmanabhapuram, the plaintiff has given a complaint before the police that the roof is projecting. The width of the projection in the roof is only ½ feet which is 12 feet above the ground level. The construction made by the first defendant is no way resisting the water flow in Plot No.9. There was no encroachment in Plot No.9. The first defendant is also having right over Plot No.9. Construction work was already over and that the suit become infructuous. The suit is bad for non joinder of necessary parties / other legal representatives of Dominic.

5. A brief substance of the additional written statement filed by the first defendant is as follows:

Plot No.9 was never intended to be used as a pathway. It was intended to be used as a water course for all the share holders mentioned in the partition deed. The first defendant made the construction of the roof to let out the rain water into the water course and prayed the suit to be dismissed.

6. The trial Court framed the following issues;

- i)whether the plaintiff is entitled to mandatory injunction?
- ii)whether the plaintiff is entitled to permanent injunction?
- iii)what are the other reliefs available to the plaintiff and who has to bear the cost.

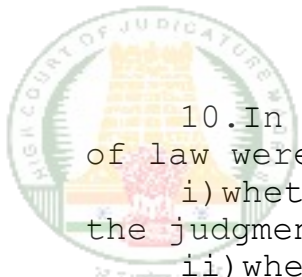
7.One witness was examined and nine documents were marked on the side of the plaintiff. Two witnesses were examined and 12 documents were marked on the side of the defendants. Two documents were marked as Court documents. The Trial Court after considering the facts and records, decreed the suit in O.S.No.142 of 2007.

8.Against the decree and judgment, the defendants filed an appeal in A.S.No.60 of 2013 on the file of the Subordinate Court, Padmanabhapuram. The first Appellate Court has framed the following issues:

- i) whether decree in the suit by the trial Court on the basis of the issues is correct?
- ii) whether any interference is necessary?
- iii)whether the delay is to be allowed?

After hearing both sides, the first Appellate Court has dismissed the appeal.

9.Against the dismissal of the appeal, the appellant has filed this Second Appeal. On the side of the appellant, it is stated that both the trial Court and the first appellate Court failed to consider that the appellant is also having a right over plot No.9. The persons who are all having a right over the suit schedule property are necessary parties in the suit. The construction of the appellant is not a disturbance to the outflow of water and the appellant did not make any construction in the suit schedule Item No.1 of the property. The projection of the roof is 12 feet above the ground level which is not a disturbance to the water course.



10. In this Second Appeal, the following substantial questions of law were raised by the appellant:

i) whether the present suit is barred by *resjudicata* in view of the judgment and decree in O.S.No.123 of 2003?

ii) whether the relief of mandatory injunction is maintainable without impleading other co-owners, when admittedly, the suit first item was a common water course?

iii) whether the appellant / first defendant is entitled for the plea of principle of acquiescence when admittedly first respondent not raised any objection during the time of construction?

iv) whether the suit is hit under Order 2 Rule 2 of CPC?.

Issue No.1:

11. On the side of the appellant, it is stated that the suit is barred by *res judicata*. Against the decree and judgment in O.S.No.123 of 2003, the appellant herein has filed an appeal and the same was dismissed on 07.07.2006 and that the Courts below failed to frame an issue regarding the non joinder of necessary parties and regarding *res judicata*. The subject matter of the suit in the earlier case in O.S.No.123 of 2003 and the present case is the same and the parties are the same.

12. On the side of the respondent it is stated that though there is a earlier Court decree against the appellant, he has not paid any regard or respect to the Court order. Equity cannot be a ground to disobey the earlier Court order. The appellant has violated the Court order. When the appellant tried to occupy plot No.9, the earlier suit was filed. The appellant has admitted that the earlier decree will be binding on him.

13. It is the admitted case of both the parties that the property belong to one Dominic. He had six legal heirs. The legal heirs of Dominic divided the property into 9 divisions. Each one of the legal heir was given one share in the property. 3 plots were kept as common Well, common pathway and common water course. The present dispute is regarding the water course.

14. It is stated that the appellant tried to encroach the suit property and tried to construct a building in the suit property which is adjoining his plot. The plaintiff and his brothers filed a suit in O.S.No.123 of 2003 and they obtained a decree in their favour. An appeal filed by the present appellant against the decree in the earlier suit, was dismissed. There was no second appeal. The decree became final.

15. The contention of the appellant is that the present suit is barred by *res judicata*. On the side of the first respondent, it is stated that the earlier suit was filed for injunction, not to encroach the entire suit property and the present suit is for mandatory injunction to remove the projection in the suit property. The commissioner report was not objected by the first respondent /



plaintiff. The report clearly reveals that there is 6 inches projection in plot No.9. It is seen that the appellant has constructed a roof projecting into the suit property. There is ½ feet projection into the suit property. Since a new cause of action has arisen, it is held that the present suit is not barred by res judicata.

Issue No.2:

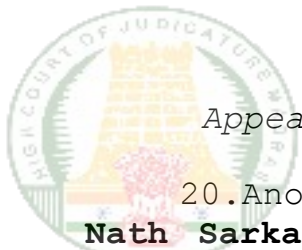
16. On the side of the appellant, it is stated that the appellant has not made any obstruction in the water course. The first respondent /plaintiff has also projected his roof in the plaint schedule property.

17.Appellant and the first respondent were brothers. Their father purchased the suit property with an extent of 83 cents. After his death, six of his legal representatives divided the property into 9 plots. The property was divided into 9 plots and six plots were allotted to the legal heirs. A Well, a pathway and a water course were kept as common. The common water course is the subject matter in the suit. Already the plaintiff and his two brothers filed a suit for declaration and injunction. The trial Court declared the title and has held that Plot Nos.8 and 9 are belong to all the legal representatives of Dominic.

18.The Commissioner report clearly reveals that there was a 6 inches projection in the plaintiff's building, projecting in the common water course. There is absolutely no disturbance to the water course. The projection is ½ feet width and 12 feet above the ground level. Since there was no disturbance in the enjoyment of the water course, there is no disobedience of the Court order.

19.To substantiate the above point, a judgement of this Court in **N.E.Sankarasubbu Pillai vs K.Parvathi Ammal and others** reported in **[1961 MLJ 480]** is cited, wherein it is observed as follows:

"2.The encroachment was true but the compound wall occupied only a width of 5 inches on a margin of the lane while the encroachment by the building covered a little longer space on the same margin of the lane. The land comprised in T.S.No.1551 belonged to the plaintiff as well as defendants 1 to 7 in common. The encroachment had come into existence even before June, 1947 and neither the plaintiff's vendor nor defendants 1 to 6 appeared to have objected to it. The encroachment did not cause material or substantial injury or inconvenience to the co-owners in the use of the lane as a passage. On these findings the trial Court dismissed the suit. The lower appellate Court agreed with it so far as the compound wall was concerned as it encroached upon a width of only 5 inches. But it disagreed with the trial Court and ordered removal of the encroachment by a part of the building on the ground that it occupied a wider space on the lane. Hence this Second



Appeal by defendant 7."

20. Another Judgment of the Calcutta High Court in **Sachindra Nath Sarkar and others Vs. Binapani Basu** and others, reported in **[AIR 1976 CALCUTTA 277]** is cited and the relevant portion is extracted hereunder:

"17. In *Khimji Mulji vs. Popatlal Bhanji*, AIR 1951, Sau 85, a case strongly relied on by the defendants, following the Calcutta decisions and on a conspectus of the relevant cases the Court refused an injunction when the projection over common passage was 3 ½ feet at a height of over 12 feet and no inconvenience or discomfort was likely to be caused to the plaintiff nor his right of way was likely to be injured by the overhanging balcony.

18. Consistent with the decisions of this Court, the position in law is as follows:

(a) the co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply because he is a co-owner.

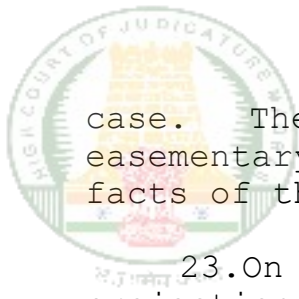
(b) before an injunction can be issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with.

(c) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

21. A judgment of the Madras High Court in **Kokila Kaliamoorthy vs K.Mani and other** reported in **[2010(1) CTC 799]** is cited. The relevant portion is as follows:

"36. Of course, the plaintiff has every right to question the construction put up by the first defendant only when she establishes that her right to enjoy her property was in any way affected by such construction put up by the first defendant. The First Appellate Court has rightly held that the claim for easementary right for light and air was not established by the plaintiff. Under such circumstances, the plaintiff cannot question the wisdom of sanction of the plan by the Corporation or MMDA or the construction put up by the first defendant in his premises.

22. On the side of the respondent, it is stated that the trial Court has made an observation that the facts of the case reported in **AIR 1976 calcutta 277** is not applicable to the present fact of the



case. The case reported in **[2010(1) CTC 799]** is with regard to easementary right and the facts of the case is different from the facts of the present case and prayed the appeal to be dismissed.

23.On the side of the respondent, it is stated that the projection was made only by the appellant and the suit relief for mandatory injunction can be prayed for only against the defaulters / defendants, and hence there is no necessity to implead the other legal heirs.

24.The Commissioner report reveals that there is a projection in the suit property. The second respondent herein is supporting the case of the appellant. For a prayer of mandatory injunction, the person who interferes with the right of the other person, is a necessary party and the other are not necessary. Hence it is decided that the prayer for a relief of mandatory injunction is maintainable without impleading the other co-owners.

Issue No.3:

25.On the side of the appellant, it is stated that the first respondent failed to make any objections at the time of construction. He has filed this suit, only after the completion of the construction.

26.On the side of the respondent, it is state that when the appellant, tried to encroach the entire Plot No.6, the first respondent has filed a suit in O.S.No.123/02. As soon as the appellant started the construction, protruding the suit property, the first respondent has filed a police complaint and then he has filed this case and hence the plea of Principles of acquiescence is not applicable.

Issue No.4:

27.On the side of the appellant, it is stated that the suit is hit under Order 2 Rule 2 of CPC. It is stated that the suit has to include the whole claim and the first respondent failed to pray for mandatory injunction in the earlier suit filed by him and that the present suit is not maintainable.

28.A relief of mandatory injunction can be sought for only when there is a need. The appellant has constructed the protruding structure subsequent to the decree in the earlier suit. The present cause of action is different and has arisen subsequently and hence the suit is not hit under Order 2 Rule 2 of C.P.C.

29.It is seen that the appellant has put up some construction projecting in the common property. Appellant is entitled to let in water but he cannot put up any construction.



30.The question raised by the appellant are not substantive questions of law and are not sustainable and the appeal is dismissed. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (C.S.II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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.

Enclosure:- Description of Property

To

- 1.The Subordinate Court, Padmanabhapuram.
- 2.The Additional District Munsif, Padmanabhapuram.

Copy To:

The Record Clerk,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1 cc to Mr.G.RAMANATHAN, Advocate, SR.No.10267

+1 cc to Mr.R.NANDAKUMAR, Advocate, SR.No.10706

ORDER

IN

S.A(MD)No.527 of 2015

04.03.2022

SA(15.03.2022) 8P 7C