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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.01.2022

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P.(PD) (MD) Nos.1169 & 1170 of 2017
and
C.M.P.(MD) Nos.5453 & 5454 of 2017

S.Megharbanu .. Petitioner/Petitioner/ Defendant in both CRPs

-vs-

S.Nallathambi .. Respondent/Respondent/ Plaintiff in both CRPs

Prayer :- Petitions filed under Section 115 Civil Procedure Code to call for the records relating to the orders and decretal orders dated 01.02.2017 in I.A.Nos.121 of 2015 and 746 of 2014 in O.S.No.163 of 2014 respectively passed by the Principal District Munsif Court, Madurai Town and set aside the same.

For Petitioner (In both CRPs) : Mr.D.Malaichamy
For Respondent (In both CRPs) : Mr.S.Parthasarathi for Mr.M.Balakrishnan

ORDER

The defendant has filed these two revisions challenging the following orders:-

(i) C.R.P.(PD) (MD) No.1169 of 2017 is filed challenging the order dated 01.02.2017, passed in I.A.No.121 of 2015 in O.S.No.163 of 2014 (application under Order VII Rule 11 of the Code of Civil Procedure), in and by which the learned Principal District Munsif, Madurai Town, dismissed the application filed by the defendant to reject the plaint;

(ii) C.R.P.(PD) (MD) No.1170 of 2017 is filed challenging the order dated 01.02.2017, passed in I.A.No.746 of 2014 (filed under Order XXVI Rule 9 of the Code of Civil Procedure), in and by which, the learned Judge allowed the application filed by the plaintiff to pass an order for appointment of an Advocate Commissioner to inspect the suit property with the help of the Surveyor and to note down the physical features and to file a report.

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2. The facts in brief are as follows:-

2.1. The plaintiff/respondent herein had filed the suit in O.S.No.163 of 2014 on the file of the learned Principal District Munsif, Madurai Town, for an injunction restraining the defendant, her men or agents from interfering or obstructing the use of the suit I Item of property, which is a common pathway and for a mandatory injunction to remove the construction up up on the II Item of property, which was the part of suit I Item of property.

3. It is the case of the plaintiff that the property, which has been described as ABEQRSTCDD1D2 & A in the plaint annexed to the plan belonged to one Savarimuthu. Savarimuthu had appointed one Ramalingam as his Agent under a registered Deed dated 25.07.2002. The plaintiff had purchased the property described as ABEQRFGHM & D2 under a registered Sale Deed dated 17.02.2003 and he has also constructed a house thereupon after obtaining necessary loans. The defendant had purchased the portion described as D2MHGFRSJ1ND1 & D2 under a registered Deed dated 24.03.2001. The remaining extent described as DNIJSTCDD1 was purchased by one Santheesmani under a registered deed dated 17.10.2003. Under the above Sale Deed, all the predecessors were advised to set aside pathway measuring 10 feet in width branching out from the Pandiarajan Veedhi proceeding Westwards.

4. The case of the plaintiff is that the defendant, who has property in the middle, has now encroached into the common pathway and put up a septic tank etc. Therefore, he has come forward with the above suit. That apart, the defendant has also extended her balcony into this common pathway.

5. The defendant has filed her written statement *inter alia* contending that the plaintiff has an access on the main road on the East and that there is no access for her in the 10 feet pathway. The defendant would further contend that her construction had not come up over night and that it had taken considerable time to complete and all these while, the plaintiff had not raised any objection. The owner of Plot No.11, which is situate North of the 10 feet pathway, had constructed a compound wall and there upon, the 10 feet space was covered. The defendant would submit that she had not encroached into the suit pathway. She would deny the contents of the plaint. Along with the said application, the defendant had filed an application to reject the plaint invoking the provisions of Order VII Rule 11 and the plaintiff, in turn, had filed an application for appointing an Advocate Commissioner to note down the physical features of the suit property with the help of the documents of both parties and with the help of the Surveyor and to note down the encroachments made on the A-Schedule, file a plan and a report.

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6. The application for rejecting the plaint was filed on the ground that earlier, the defendant herein had filed a suit in O.S.No.745 of 2011 for the relief of permanent injunction against the respondent herein in respect of the very same pathway. The allegation therein was that the plaintiff therein while constructing her house, tried to clear the common pathway by removing the karuvela trees therein on 08.07.2011, which was prevented by the defendant/revision petitioner herein. An electricity pole was also erected in the common pathway. Therefore, the defendant had filed the suit for a bare injunction.

7. A written statement was filed by the plaintiff and thereafter, the suit was decreed by judgment and decree dated 26.08.2014. The defendant/revision petitioner would therefore, submit that the present suit in respect of the very same property is clearly barred by *res judicata.* That apart, there was no cause of action for filing the present suit and further, the plaintiff could have filed a counter claim in the earlier suit, but had omitted to do so.

8. The plaintiff had filed a counter stating that the defendant had admitted the existence of the common pathway and since there was an obstruction, which is a continuing cause of action, the plaintiff has come forward with the present suit, as the obstruction in the suit pathway had come into existence after the filing of the earlier suit.

9. The learned Principal District Munsif, Madurai Town, by order dated 01.02.2017, was pleased to dismiss the said application on the ground that the defendant had admitted the existence of the common pathway and she had earlier filed a suit and obtained an injunction with reference to her enjoyment of the same. Now the plaintiff want to protect his enjoyment, since there has been an obstruction in the pathway. These are matters, which have to be considered only if a full-fledged trial has taken place and the plaint cannot be thrown at the threshold. Challenging the same, the petitioner is before this Court by way of C.R.P.(PD) (MD) No.1169 of 2017.

10. Likewise, the learned Judge had allowed I.A.No.746 of 2014 filed by the plaintiff for appointing an Advocate Commissioner to note down the physical features of the suit property with the help of the Surveyor and to file his report. The learned Judge after hearing the arguments on either side, was of the opinion that the plaintiff had alleged an encroachment which has been denied by the defendant and therefore, there was a necessity to verify as to whether there has been an encroachment or not. Challenging this, the revision petitioner had come forward to file C.R.P.(PD) (MD) No.1170 of 2017.

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11. Mr.D.Malaichamy, learned counsel appearing for the petitioner would address his argument in respect of C.R.P.(PD) (MD) No.1169 of 2017 on the grounds of (a) *res judicata;* (b) absence of cause of action; (c) failure to file a counter claim in the earlier suit; (d) the suit is at the evidence giving stage; and (e) on the ground that the defendant had clearly expressed that he had no objection to the plaintiff using the pathway as a common pathway. He would rely on the judgment in ***Kuzhanthaiappa Gounder vs. nachimuthu and Others*** reported in ***2015 (1) CTC 623*** with particular reference to paragraph Nos.14, 15 and 21 to substantiate his argument that the plaintiff ought to have filed his counter claim even in the earlier suit and in view of the failure, the subsequent suit is clearly barred by *res judicata*.

12. As regards C.R.P.(PD) (MD) No.1170 of 2017, the learned counsel has not very seriously put forward his arguments, since the main allegation made by the plaintiff was that a septic tank had been put up in the common pathway as also a soak pit and the defendant having denied the same, the Commissioner had come to be appointed.

13. Per contra, Mr.S.Parthasarathy, learned counsel appearing for the respondent would submit that the vendor of the plaintiff and the defendant and the vendor of the property to the West of the defendant's property was a common owner viz., one Savarimuthu. Under the sale in favour of each of them, a clause had been put that a 10 feet pathway on the north would be left by all the three parties for access to the main road. The agreement further stipulated that this 10 feet pathway will be kept in common and not encroached upon by any of the other owners. It is no doubt true that the earlier suit was also in respect of the common pathway. However, the plaintiff has come forward with the present application only on account of the fact that the defendant has now put up a soak pit and septic tank into the common pathway thereby obstructing its use both by the plaintiff as well as by the other owner on the West.

14. He would contend that this disturbance is a continuing cause of action and therefore, it cannot be said that the filing of the earlier suit would act as *res judicata* for the instant suit. He would submit that the learned Judge has rightly dismissed the application for rejecting the plaint and no cause of action can be taken to the same.

15. As regards the application to appoint the Advocate Commissioner, he would submit that the Commissioner's report would help and aid the Court to come to the conclusion regarding the encroachment. That apart, the encroachment had already been accepted by the defendant herself.

16. Heard the learned counsels on either side and perused the records.

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17. The only main ground for seeking rejection of the plaint is on the ground of *res judicata*. The vehement argument made by the learned counsel for the petitioner is that the plaintiff ought to have filed a counter claim in the earlier suit filed by the defendant. Having failed to do so, he cannot be permitted to file a fresh suit. I am unable to subscribe to this argument for the simple reason that the encroachment into the suit pathway as well as its obstruction is a continuing cause of action and therefore,it cannot be stated that the earlier suit would act as *res judicata*. In the earlier suit, it has been held that the suit I Item is a common pathway. The plaintiff's grievance is that the defendant had encroached into this common pathway and put up the septic tank as well as the soak pit. Therefore, everyday that the offending structure remains, the cause of action for filing the suit would enure to the plaintiff. Therefore, it cannot be stated that the suit is barred by *res judicata*. The learned Judge has rightly held that it is a continuing cause of action while allowing the said application.

18. In the result, C.R.P.(PD) (MD) No.1169 of 2017 is dismissed confirming the order dated 01.02.2017 in I.A.No.121 of 2015.

19. As regards C.R.P.(PD) (MD) No.1170 of 2017, the report of the Commissioner would definitely enable this Court to come to the conclusion regarding the encroachment that has been made on the common pathway. The plaintiff's case is that a septic tank and a soak pit have been put up thereon after the suit. In these circumstances, the report of the Commissioner would clarify the said position. Therefore, I do no find any reason to disagree with the learned Judge and consequently, C.R.P.(PD) (MD) No.1170 of 2017 is also dismissed confirming the order dated 01.02.2017 passed in I.A.No.746 of 2014.

20. In the result, both the Civil Revision Petitions are dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar ()

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/ /2022

Sub Assistant Registrar(CS)

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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.

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To

The Principal District Munsif,
Madurai Town.

+2 CC to M/s.M.BALAKRISHNAN, Advocate (SR-1866[F] dated 20/01/2022)

C.R.P.(PD) (MD) Nos.1169 & 1170 of 2017
Dated: 19.01.2022

RK(10/02/2022) 6P 4C

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