



S.A.Nos.1904 & 1905 of 2001

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated : 06.04.2023

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

S.A.Nos.1904 and 1905 of 2001

Madathiammal

... Appellant in both appeals

-VS-

Pitchammal

..Respondent in both appeals

COMMON PRAYER: Second Appeals filed under Section 100 Code of Civil Procedure, against the Judgment and Decree made in A.S.Nos.111 and 112 of 2000 dated 30.03.2001 on the file of the I Additional District Court-cum-Chief Judicial Magistrate, Tirunelveli reversing the Judgment and Decree made in O.S.Nos.648 and 644 of 1997 dated 14.10.1999 on the file of the I Additional District Munsif, Tirunelveli.

In both the appeals;

For Appellant

... Mr.M.P.Senthil for
Mr.J.Antony Jesus

For Respondent

... Mr.D.Nallathambi



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COMMON JUDGMENT

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The appellant filed the suit in O.S.No.644 of 1997 before the I Additional District Munsif, Tirunelveli, for injunction restraining the respondent not to interfere with the construction made by the appellant in the suit property. The respondent filed the suit in O.S.No.648 of 1997 against the appellant before the I Additional District Munsif, Tirunelveli for declaration declaring that the second schedule property belongs to the respondent and mandatory injunction to remove the encroachment made by the appellant. Both the suits are identical and the parties also vice versa the same and therefore, both the suits were tried together and the trial Court has passed the common Judgment. The suit in O.S.No.644 of 1997 filed by the appellant was decreed and the suit in O.S.No.648 of 1997 filed by the respondent was dismissed. Challenging the said Judgment and Decrees, the respondent filed the appeals in A.S.Nos.111 and 112 of 2000 before the I Additional District Judge-cum-Chief Judicial Magistrate, Tirunelveli. Pending appeal, the respondent filed an application in I.A.No.35 of 2001 for appointment of Advocate Commissioner. The first appellate Court, after hearing the appeals, allowed both the appeals by setting aside the Judgment and Decrees passed by the trial Court in O.S.Nos.648 and 644 of 1997 and dismissed



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the application in I.A.No.35 of 2001. Aggrieved over the same, the appellant filed the present second appeals.

2. While admitting both the second appeals, this Court, considering the facts and circumstances of the case, formulated the following substantial questions of law:

“1. Whether the lower appellate Court is right in holding that the findings rendered under Exs.A3 and A5 regarding the claim of the respondent would not operate as *res judicata* is correct?

2. Whether the lower appellate Court is right in holding that the suit in O.S.No.648/1997 District Munsif Court, Tirunelveli is not a bar under Order 2 Rule 2 C.P.C especially when the allegations in the plaint in O.S.No.648/1997 clearly set out that the cause of action for the earlier suit and the present suit are one and the same?

3. Whether the findings of the lower appellate Court are vitiated by its failure to consider the extent the properties covered under Ex.A2 corroborating the evidence of P.W.1?

4. Whether the lower appellate Court is right in granting a decree for mandatory injunction and for possession in O.S.No.648/1997 District Munsif Court, Tirunelveli, having regard to the indisputable fact that



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the wall is in existence for more than a statutory period?

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3. The appellant's property is in the southern side and the respondent's property is in the northern side. The respondent constructed a wall and is enjoying the property. Earlier, the respondent filed a suit in O.S.No.368 of 1988 for bare injunction restraining the appellant to interfere with the possession and the said suit was dismissed. Thereafter, in 1997, the respondent filed the present suit in O.S.No.648 of 1997 for the very same relief and also in addition to the declaration of title and also mandatory injunction. The respondent already admitted in the earlier suit that there was an encroachment made by the appellant in the portion of the suit schedule property. Since the said suit was dismissed and there was no further appeal and the appellant is now trying to interfere with the possession and enjoyment by raising a wall, the respondent filed the suit in O.S.No.648 of 1997 stating that the respondent purchased northern side of the property and enjoying the property from the year 1987. The appellant encroached the second item in the suit property. Hence, the respondent filed the suit in O.S.No.368 of 1988 and the said suit was dismissed. Taking advantage of the said dismissal of the suit, the appellant is trying to encroach the second item of the property on



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12.12.1997. Therefore, the respondent filed the present suit in O.S.No.

648 of 1997 for declaration and injunction and also recovery of possession and mandatory injunction. Both the plaint and written statement vice versa are the plaint and written statement of the parties and in both the suits, the parties have taken rival claim and both are rival claimants and hence, joint trial was ordered and issues were also framed and the common judgment was passed by the trial Court.

4. The specific case of the respondent is that the appellant, even in the year 1988, encroached a portion of the second item of the property and therefore, the respondent had filed a suit for injunction and subsequently, in the year 1997, she further tried to encroach and also tried to put up a wall. Subsequently, during the pending proceedings, the appellant also put up a wall in the “B” second schedule property. Therefore, the respondent was constrained to file the second suit in O.S.No.648 of 1997 restraining the appellant from further encroachment and also declaration of title and recovery of possession and also mandatory injunction for demolishing the newly constructed wall.



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5. The case of the appellant is that the respondent has admitted that the appellant has encroached a portion of the “B” schedule property, whereas, in 1988, the respondent has filed the suit only for bare injunction. Neither she filed a suit for declaration nor recovery of possession or mandatory injunction. Already a suit was filed and the same was dismissed and on the very same cause of action, she cannot file another suit. The second suit is hit by Order 2 Rule 2 C.P.C and also barred by *res judicata*. Though the trial Court had dismissed the respondent's suit, the first appellate Court had set aside the Judgment and Decrees and allowed the appeals. Hence, the appellant is before this Court.

6. While admitting the second appeal, this Court formulated the substantial questions of law as mentioned above.

Question No.1:

7. The main contention raised by the appellant is that earlier, the respondent filed a suit against the very same party on the very same property only for bare injunction. Since the said suit was dismissed, subsequently, she cannot file another suit. Once the suit has been decided



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between the some party on merits, the very same party or successor are restrained from filing fresh suit, subsequently, on the same issues, which was already decided by the Court. Though the trial Court accepted, unfortunately, the first appellate Court failed to appreciate and set aside the Judgment and decree passed by the trial Court. The lower appellate Court failed to consider the fact that in both the suits, the parties are same, which were earlier tried and decided on merits.

8. The contention of the respondent is that the earlier suit was only for restraining the appellant for further encroachment. Since that suit was dismissed, taking advantage of the same, the appellant tried to encroach and also put a new wall in the already encroached portion. Therefore, the cause of action is entirely different and also the earlier suit is also for bare injunction and the subsequent suit is for declaration and injunction and also recovery of possession and also mandatory injunction. Therefore, the present suit is not barred by *res judicata*. Though the parties are the same and the properties are identical, the issues involved in both the suits are different. The second suit is not for the very same issues and cause of action which were already decided by the Court. Therefore, *res judicata* would not attract.



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9. Admittedly, the respondent filed a suit in O.S.No.368 of 1988 for bare injunction for restraining the appellant from further encroachment and the said suit was dismissed. The appeal is also dismissed. There is no further appeal. The respondent subsequently filed the suit in O.S.No.648 of 1997 for declaration and recovery of possession and for mandatory injunction.

10. On a reading of the above, the issues involved and cause of action for both the suits are not the same and the second suit is not bared by *res judicata*. The substantial question of law is answered accordingly.

Question No.2:

11. The main contention of the appellant is that the respondent filed the suit in O.S.No.368 of 1988 for bare injunction and the said suit was dismissed and subsequently, for the very same suit property against the very same party on the very same cause of action, she has filed the suit in O.S.No.648 of 1997, which is hit by Order 2 Rule 2 C.P.C. When the cause of action arose in the year 1988 and when the first suit was filed, she ought to have sought for all the reliefs, which were available



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for her, but she had not done so. Subsequently, the suit as well as the appeal were dismissed on merits. In the year 1992, after five years, the respondent has filed the present suit in O.S.No.648 of 1997 for declaration, recovery of possession and also mandatory injunction and also admitted the cause of action that there was encroachment even in the year 1988. All the reliefs available to her were not sought for. Therefore, the present suit is hit by Order 2 Rule 2 C.P.C.

12. The contention of the respondent is that the cause of action for the earlier suit is different. At that time, the appellant encroached a small portion in the southern side of the respondent's property and northern side of the appellant's property. The earlier suit was dismissed on the ground that the respondent did not prove encroachment by measuring the property and also by oral and documentary evidence. However, taking advantage of the same, the appellant subsequently encroached some more extent and tried to put up a construction and also put up a new supporting wall. Therefore, the respondent filed the suit and both the suits are not on the same cause of action and not hit under Order 2 Rule 2 C.P.C. The further contention of the respondent is that the appellant never pleaded either in the written statement or in her suit that the subsequent suit is hit



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by Order 2 Rule 2 C.P.C. Further, she has not produced a copy of the
plaint. Hence, the Court below had not considered Order 2 Rule 2 C.P.C.

13. As far as this substantial question of law is concerned, reading of the entire plaint and material, absolutely would show that there are no pleadings that subsequent suit filed by the respondent is hit by Order 2 Rule 2 C.P.C, when she filed the previous suit in O.S.No.368 of 1988, the respondent failed to seek all the reliefs available to her and therefore, the subsequent suit. Hence, there is no plea and no proof also. Even the appellant has not filed a copy of the plaint in the earlier suit that the earlier suit and subsequent suits are one and the same and on the same cause of action. Therefore, the subsequent suit is hit by Order 2 Rule 2 C.P.C. When there is no specific plea and even a copy of the plaint of the earlier suit was not filed, it is settled proposition of law that without plea, no amount of evidence can be let in and the Court need not look into the said evidence without any plea. Therefore, on a careful reading of the entire materials, it is seen that the appellant absolutely, has not taken the plea of Order 2 Rule 2 C.P.C., and also produced the plaint copy. Therefore, under these circumstances, the present suit filed by the respondent is not hit by Order 2 Rule 2 C.P.C. Therefore, the substantial



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question of law is answered accordingly.

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Question No.3:

14. Before the trial Court, it is the case of the respondent that the appellant has encroached some of the portion of the southern side of her property and she has filed the suit for declaration and recovery of possession and also mandatory injunction. P.W.1 also has categorically stated the same and the Advocate Commissioner was appointed and the Advocate Commissioner inspected the property and filed a report. The report of the Advocate Commissioner was marked as Ex.C1 and the plan annexed with the report was marked as Ex.C2. An interim report filed by the Advocate Commissioner was marked as Ex.C3 and survey plan produced by the Advocate Commissioner was marked as Ex.C4. The contention of the appellant is that it is an exparte Commission Report and she was not given an opportunity and in her absence, they measured the property and Ex.A2 was not proved. Therefore, based on the Advocate Commissioner's report, finding cannot be given.

15. The contention of the respondent is that after filing of the suit, till the notice served to the respondent, the respondent did not



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participate. The Advocate Commissioner issued notice for re-inspection and at that time, the appellant did not appear. Therefore, the Advocate Commissioner inspected and measured the property and filed the report and based on the report, the lower appellate Court found that there was an encroachment and there was a new construction and supportive walls and granted decree. When the opportunity was given, the appellant did not utilize the first available opportunity. Pending appeal, the appellant filed an application for appointing an Advocate Commissioner. The appellant did not follow the Order 41 Rule 27 C.P.C., hence it was rejected.

16. A reading of the entire materials would show that both the appellant and the respondent's properties are adjacent. The appellant's property is situated in southern side and the respondent's property is situated in northern side. The dispute is regarding the encroachment and the appellant was said to have encroached some of the portion of the respondent's property and also constructed a wall and when the Advocate Commissioner was appointed, notice was also duly served to the appellant, but the appellant failed to cooperate with the Commissioner during the inspection. Even he did not file objection to the Advocate



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Commissioner's Report. Hence, the extent of the property covered under A2 was proved. Therefore, the third substantial question of law is answered accordingly.

Question No.4:

17. As far as the fourth substantial question of law is concerned, a reading of the entire materials would show that the earlier contention raised by both the parties and submissions made by both the counsel and also going through Exs.C1 to C4 as already stated that despite giving opportunity to the appellant, she did not utilize the opportunity and she did not cooperate with the Advocate Commissioner to measure the property. Further, the appellant has not filed any objection to the report of the Advocate Commissioner. From the oral and documentary evidence and report of the advocate Commissioner, it is proved the encroachment and further construction. The lower Appellate Court also rightly re-appreciated the evidence and given finding in favour of the respondent. There is no reason to interfere with the findings. Therefore, the fourth substantial question of law is answered accordingly.



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18. As far as the mandatory injunction is concerned, a reading of the evidence and Exs.C.1 to C4 would show that the respondent proved that there was a newly constructed supporting wall and therefore, the lower appellate Court had granted decree. Though the contention of the learned counsel for the appellant is that the relief sought for by the respondent is barred by limitation, the mandatory injunction ought to have been sought within three years from the date of encroachment, he also referred to the earlier plaint filed by the respondent in the year 1988 that the respondent admitted that there was an encroachment. But a careful reading of both the plaints would show that the earlier suit was filed only for restraining the appellant from encroachment and her subsequent suit is for declaration, recovery of possession and also mandatory injunction. The Advocate Commissioner's report also clearly shows that there was an encroachment and also a new construction. The appellant has not proved that the construction was made or put up three years prior to the filing of the suit and therefore, there is no plea of limitation and further question of limitation is purely a mixed question of law and fact and it has to be specifically pleaded and proved and the appellant has not specifically stated when they put up the construction or put up a new wall and it is beyond three years prior to the filing of the



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suit. Therefore, the contention of the appellant is not acceptable.

Therefore, as discussed above, the appellant has not substantiated his claim and also she has not satisfied the Court. The substantial questions of law are answered in favour of the respondent. In view of the above discussion, there is no specific plea and evidence to succeed the appeals and therefore, both the second appeals fail and the same are liable to be dismissed.

19. In the result, these Second Appeals are **dismissed**. No costs.

06.04.2023

NCC : Yes/No

Index : Yes/No

Internet: Yes

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To:

- 1.The I Additional District Judge-cum-
Chief Judicial Magistrate,
Tirunelveli.
- 2.The I Additional District Munsif,
Tirunelveli.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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