



S.A.No.259 of 2003 & C.R.P.(MD) No.390/2017

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.07.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.259 of 2003 & C.R.P.(MD) No.390 of 2017

S.A.No.259/2003 :

Kasthuri

... Appellant

-VS-

1.K.Nellamegam,
rep.by Power Agent
Kulandiaisamy

2.K.Nellamegam

3.Krishnan

4.Chandran

5.Baskaran

... Respondents

C.R.P.(MD) No.390/2017 :

Kasthuri

... Petitioner

-VS-

K.Nellamegam

... Respondent

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PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree, dated 01.07.2002, passed in A.S.No.16 of 2001 on the file of Additional District Judge – cum – Chief Judicial Magistrate, Sivagangai, confirming the judgment and decree, dated 09.08.1999, passed in O.S.No.104 of 1998 on the file of Subordinate Judge, Devakottai.

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India against the order, dated 14.12.2016, passed in E.A.No.121 of 2015 in E.P.No.37 of 2015 in O.S.No.104 of 1998 on the file of Subordinate Judge, Devakottai.

For Appellant in Second Appeal &
Petitioner in C.R.P. : Mr.J.Anandkumar

For Respondent 1 in Second Appeal &
Respondent in C.R.P. : Mr.C.Jeyaprakash

For Respondents 2 & 4 in Second Appeal : Dismissed as abated

For Respondents 3 & 5 in Second Appeal : Dismissed



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JUDGMENT

S.A.No.259/2003 :

The unsuccessful fifth defendant in the suit is the appellant. The first respondent herein filed a suit, seeking mandatory injunction, directing the defendants to remove the encroached construction to the extent of one-fourth foot on the western side of lane portion and also for mandatory injunction to remove the first floor projection to the extent of 4 ½ ft. into the lane portion. The plaintiff also sought for permanent injunction restraining the defendants from trespassing into the suit property or altering the physical features. The suit was partly decreed, granting mandatory injunction directing the defendants to remove the 4 ½ ft. projection in the first floor and also permanent injunction, as prayed for. The prayer in the plaint for removal of half foot encroachment on ground was negatived. Aggrieved by the decree, the fifth defendant preferred an appeal and the first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the fifth defendant is before this Court.

2. According to the first respondent/plaintiff, the suit property originally belonged to her paternal grandmother and after her demise, the



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plaintiff's father Karuppaiah and the defendant's father Kannayiram, who were brothers, succeeded to her estate. In a suit for partition between the parties in O.S.No.304 of 1988, a consent decree was passed on 10.07.1990, allotting the suit pathway portion to the plaintiff along with northern side property. The property on the southern side was allotted to the defendants. The entire eastern lane portion with breadth of 4 ½ ft. east-west was allotted to the share of the plaintiff and the defendants were given right to have ingress and egress only for the purpose of effecting repairs and whitewashing of their building. Violating the terms of the said decree, the defendants put up a construction by encroaching 1/4 foot of the lane portion on the western side. Likewise, the defendants projected their first floor into the lane portion by encroaching 4 ½ ft. The said constructions were made by the defendants, in spite of objections made by the plaintiff. In these circumstances, the plaintiff was constrained to file a suit for the above said reliefs.

3. The defendants 1 to 4 remained ex parte and the fifth defendant alone filed her written statement and contested the suit. It was the case of the fifth defendant that she had not encroached the lane portion on ground. As far as the projection in the first floor was concerned, it was contended by the defendant that her first floor was projected to the extent of 4 ½ ft. into the lane



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portion with the permission of the plaintiff. Therefore, the defendant sought for dismissal of the suit. It was also averred by the defendant that the building portion constructed by the defendant would not cause any hindrance to the user of the lane portion. On these pleadings, the defendant sought for dismissal of the suit.

4. Before the trial Court, the plaintiff was examined as P.W.1 and an independent witness was examined as P.W.2. On behalf of the plaintiff, 6 documents were marked as Exs.A-1 to A-6. On behalf of the defendants, the fifth defendant alone was examined and no document was marked. The Advocate Commissioner's Report and Plan were marked as Exs.C-1 and C-2. Five other documents were marked as Exs.X-1 to X-5 through P.W.2.

5. The trial Court, on appreciation of oral and documentary evidence, came to the conclusion that there was no encroachment on the ground portion of the lane, as alleged in the plaint. However, the trial Court found that the defendant projected her first floor portion by 3 ½ ft. into the lane portion. Therefore, the suit was partly decreed by directing the defendant to remove the offending portions of the first floor. The trial Court granted permanent injunction restraining the defendants from interfering with the



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plaintiff's possession over the lane portion. Aggrieved by the said judgment and decree, the fifth defendant preferred an appeal in A.S.No.16 of 2001 on the file of Additional District Court – cum – Chief Judicial Magistrate, Sivagangai. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the same, the fifth defendant is before this Court.

6. At the time of admission, this Court formulated the following substantial question of law, by an order, dated 21.03.2003 :

On the face of the findings of both the Courts below that there is no encroachment in the suit property, whether the grant of mandatory injunction for demolition of the sunshade can be sustained ?

7. The learned counsel appearing for the appellant submitted that though the plaintiff claimed that the defendant encroached one-fourth foot of the lane portion on ground, the same has been falsified at the time of trial. As far as the projection of the first floor of the defendant is concerned, the same was constructed with express permission from the plaintiff and the permission pleaded by the defendant had not been taken into consideration by the Courts below in proper perspective.



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8. The learned counsel appearing for the respondent submitted that though the fifth defendant pleaded as if the plaintiff permitted her to project the first floor portion into the lane portion, the same has been denied by the plaintiff and the defendant failed to lead any acceptable evidence in support of the said plea. Therefore, both the Courts below, by proper appreciation of the evidence available on record, came to the conclusion that the plaintiff was entitled to relief of mandatory injunction in respect of the projected construction of the fifth defendant and therefore, the said finding of fact need not be interfered by this Court.

9. A perusal of the pleadings of the parties would establish that the plaintiff and the defendant are cousins and in an earlier partition suit, the plaintiff was allotted the property on the northern side and the defendant was allotted the property on the southern side, abutting the road. In order to facilitate the plaintiff to have access to his property on the northern side from the road, lane portion was formed on the eastern side of the property allotted to the defendant. In the partition decree, the lane portion with a width of 4 ½ ft. along with northern property was allotted to the share of the plaintiff. However, the defendant's right to have ingress and egress in the lane portion for the purpose of repairing and whitewashing the building was reserved.



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Therefore, it was clear that the 4 ½ ft. lane portion should be kept as a lane and there should not be any construction or encroachment in the lane. The trial Court appointed an Advocate Commissioner to note down the physical features. The Report and the Plan submitted by the Advocate Commissioner are marked as Exs.C-1 and C-2. A perusal of the same would indicate that the plaintiff projected his first floor by 3 ½ ft. into the lane portion and covered the lane portion on the top. Though the fifth defendant pleaded that the said projection was made by her with the permission of the plaintiff, in order to prove the said permission, the fifth defendant failed to lead any evidence. The only evidence available on record in support of the permission pleaded by her is the interested testimony of the fifth defendant herself as D.W.1. She had not chosen to lead any oral or documentary evidence. In such circumstances, the defendant's plea of permission is not at all proved. Taking into consideration Exs.A-1 and A-2, judgment and decree passed in the earlier partition suit, and Exs.C-1 and C-2, Advocate Commissioner's Report and Plan, both the Courts below came to the conclusion that the defendant had put up a construction by projecting her first floor by 3 ½ ft. into the lane portion. Therefore, the Courts below granted a decree for mandatory injunction, directing the fifth defendant to remove the offending projected portion of the building. Taking into consideration the projection made by the



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fifth defendant, the Courts below rightly granted a decree for permanent injunction, restraining the defendants from interfering with the plaintiff's right to enjoy 4 ½ ft. lane without any disturbance.

10. I do not find any error in the finding of fact reached by the Courts below with regard to the cause of action for the suit or the offending constructions put up by the defendant. Therefore, the question of law, framed at the time of admission, is answered against the appellant and in favour of the respondent. Accordingly, the Second Appeal stands dismissed, by confirming the judgments and the decrees passed by the Courts below. No costs.

C.R.P.MD.No.390/2017 :

11. This Civil Revision Petition is filed, challenging the order passed by the Court below, dismissing the application filed by the petitioner/judgment debtor under Section 47 of the Code of Civil Procedure.

12. The respondent herein obtained a decree for mandatory injunction, directing the petitioner to remove the offending constructions put up by her. The said decree was put into execution by the respondent by filing



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a petition in E.P.No.37 of 2015 and in the said execution petition, the petitioner filed a petition under Section 47 of the Code of Civil Procedure, seeking dismissal of the execution petition, on the ground that the execution petition filed by the respondent was time barred. The petitioner also raised a point that there was a second floor in her house and if the first floor was demolished in execution of the decree for mandatory injunction, it would affect her second floor and, therefore, E.P. should be dismissed, as the decree was unexecutable.

13. The learned counsel appearing for the petitioner submitted that the Second Appeal was dismissed for default on 26.09.2008 and, thereafter, E.P. was filed only in the year 2015 and hence the same was barred by limitation, as the decree was for mandatory injunction. The learned counsel further submitted that the executing Court failed to see that if mandatory injunction to remove the offending portions of the petitioner's building was executed, it would cause damage to the second floor of the building.

14. As per Article 135 of the Limitation Act, limitation for executing a decree for mandatory injunction is three years. It is seen from the records, the decree for mandatory injunction passed by the trial Court was challenged in A.S.No.16 of 2001 on the file of Additional District Court – cum – Chief



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Judicial Magistrate, Sivagangai, and the said appeal was dismissed on 01.07.2002. Challenging the same, the petitioner herein preferred an appeal in S.A.No.259 of 2003 and the same was dismissed for default on 26.09.2008. Thereafter, the present E.P.was filed on 31.03.2015.

15. It is pertinent to mention that the Second Appeal No.259 of 2003, which was dismissed for default, was later restored and the same was disposed of by this Court today on merits. In such circumstances, in view of doctrine of merger, the respondent is entitled to three years' time for executing the decree from today. Therefore, the contention raised by the learned counsel for the petitioner on the ground of limitation is not acceptable to this Court. Though technically the learned counsel was correct, when the E.P. was filed, in view of the subsequent restoration of the Second Appeal and disposal of the same on merits today, the limitation point raised by the petitioner is not available to her.

16. As far as the contention of the petitioner regarding the second floor construction is concerned, a perusal of Advocate Commissioner's Report and Plan filed in the suit, namely, Exs.C-1 and C-2, would suggest that the Advocate Commissioner noted only projection to the extent of 3 ½ ft. in the first floor of the building and he has not noted any existence of second floor.



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Learned counsel for the petitioner would submit that the second floor was put up by the petitioner subsequent to the filing of the suit. In respect of construction put up by the petitioner on the encroached portion pending suit, he is not entitled to any equity. Therefore, the 3 ½ ft. projection in the building of the fifth defendant into the lane portion is liable to be removed in execution of the decree for mandatory injunction.

17. With the above clarification, the Civil Revision Petition stands dismissed, by confirming the order passed by the Court below. No costs. Consequently, the connected C.M.P.(MD) No.1927 of 2017 is closed.

18. The learned counsel for the appellant in Second Appeal / petitioner in Civil Revision Petition submits that six months' time may be granted for the appellant / petitioner to remove the offending construction.

19. Taking into consideration that the offending construction is a residential building, this Court is inclined to grant time of three months for the appellant/petitioner to remove the offending portions.

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NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To:

- 1.Additional District Judge/
Chief Judicial Magistrate,
Sivagangai.
- 2.Sub-Judge,
Devakottai.
- 3.Section Officer,
V.R. Section,
Madurai Bench of Madras High Court.



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