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A.S.No.78 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.06.2025

CORAM:

The Hon'ble MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

A.S.No.78 of 2024

Mr.Manivannan

...Appellant

-Vs-

1. Mrs. Elta Joseph
2. Mr.Anton Joel.J
3. Ms. Annie Velma.J

...Respondents

Prayer:- Appeal Suit is filed under Section 96 r/w. Order XLI Rule 1 of the C.P.C against the judgment and Decree in O.S.No.4607 of 2020 dated 30.11.2023 passed by the learned VI Additional Judge, City Civil Court, Chennai.

For Appellant : G.Rajkumar

For Respondents : Mr.Ajay Francis Inigo Loyola

JUDGMENT

Appeal Suit is filed against the judgment and Decree in O.S.No.4607 of 2020 dated 30.11.2023 passed by the learned VI Additional Judge, City Civil Court, Chennai.

2. The learned Counsel for the Appellant submitted that the Defendant



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in O.S.No.4607 of 2020 before the learned VI Additional Judge is the Appellant herein. The learned Counsel for the Appellant invited the attention of this Court to the averments in the plaint in O.S.No.4607 of 2020. Also, he invited the attention of this Court to the documents relied by the Plaintiff as Ex.A-1 and Ex.A-2 which are the sale deeds of the Plaintiff and Ex.A-5 which is a pre-suit notice wherein he had claimed that the Defendant had put up construction encroaching on the Plaintiff's land. Prior to the purchase, he mentioned the date but wantonly suppressed those dates in the plaint. Also, the learned Counsel for the Defendant/Appellant invited the attention of this Court to the elaborate written statement giving out details and disputing claim of the Plaintiff wherein the Defendant's father who was working as in-charge in the ICF had purchased the property in the name of the mother of the Defendant. Two items were purchased by sale deed in the year 1974, 1976 prior to the purchase of the property by the Plaintiff. Subsequently, the mother of the Defendant settled the property in favour of the Defendant. The Plaintiff is alleged to have purchased the property from the legal heirs of one of the vendors of the Defendant/Thulasiammal.

3. The learned Counsel for the Appellant (Defendant before the trial Court) submitted that the Plaintiff has no claim over the property in T.S.No.71 whereas he had obtained revenue records in T.S.No.71, he has not claim over



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T.S.No.71. Also, the learned Counsel for the Appellant invited the attention of

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this Court to the sketch relied by the trial Court in which the disputed property is clearly shown. He had not given out details in the schedule of property of the plaint. He had only referred 45 sq.ft is the disputed property.

4. It is the contention of the learned Counsel for the Defendant that the Plaintiff had purchased the property measuring about 1247 sq.ft and subsequently purchased another item measuring about 675 sq.ft on the same date. Both the properties are not in T.S.No.71. But in the course of the plaint as well as in the evidence, they had claimed right over T.S.No.71 which is the property of the Defendant. In short, the Plaintiff had raised dispute in a property in which they do not have any claim in T.S.No.71. The learned VI Additional Judge lost sight of all the facts raised by the Defendant.

5. It is the contention of the learned Counsel for the Defendant in the written statement that the suit is barred by limitation. As per the claim of the Plaintiff, the Plaintiff is aware of such dispute in the year 2009 but he had instituted the suit in the year 2020. The learned Counsel for the Defendant before the trial Court raising the contention that the suit is barred by limitation. The learned VI Additional Judge, City Civil Court had rejected the submission of the learned Counsel for the Defendant stating that the Plaintiff is in continuous possession and the dispute between Plaintiff and Defendant is



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a continuous one and therefore continuous cause of action was raised and decreed the suit for mandatory injunction. The suit was dismissed regarding consequential relief of compensation. Aggrieved by the grant of decree for mandatory injunction, the Defendant had approached this Court by filing this Appeal. In support of his contention, the learned Counsel for the Appellant (Defendant before the trial Court) had relied on the decision of the Hon'ble Supreme Court as well the High Court and the Full Bench Judgment of Lahore High Court that the suit is barred by limitation and also submitted that the Plaintiff approached this Court without clean hands. Therefore, he seeks to set aside the judgment and decree granted by the learned VI Additional Judge, City Civil Court in O.S.No.4607 of 2020 dated 30.07.2023.

6. In support of his contention, the learned Counsel for the Appellant relied on the following reported decision regarding Plaintiff bereft of material facts in the case of ***Kanimozhi Karunanidhi v. A.Santhana Kumar & Others*** reported in ***2023 SCC Online SC 573*** in which it is held as follows:

55. In Harikirat Singh v. Amrinder Singh [(2005) 13 SCC 511] this Court again reiterated the distinction between “material facts” and “material particulars” and observed as under SCC P 527, Para 51 -52)

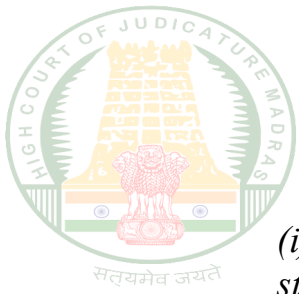
“51. A distinction between ‘material facts’ and ‘particulars’, however, must not be overlooked. ‘Material



facts’ are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. ‘Particulars’, on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. ‘Particulars’ thus ensure conduct of fair trial and would not take the opposite party by surprise.

52. All ‘material facts’ must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.”

“14. The requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure with reference to Sections 81, 83 and 86 of the Act came up for consideration before a three-Judge Bench of this Court in Samant N.Balkrishna v. George Fernandez [(1969) 3 SCC 238]. Speaking for the three-Judge Bench, M. Hidayatullah, C.J., inter alia, laid down that:



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(i) *Section 83 of the Act is mandatory and requires first a concise statement of material facts and then the fullest possible particulars;*

(ii) *omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad;*

(iii) *the function of particulars is to present in full a picture of the cause of action and to make the opposite party understand the case he will have to meet;*

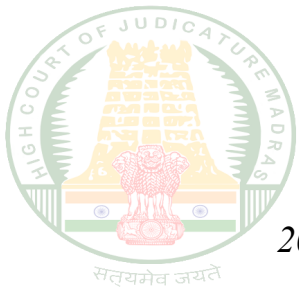
(iv) *material facts and particulars are distinct matters— material facts will mention statements of fact and particulars will set out the names of persons with date, time and place; and*

(v) *in stating the material facts it will not do merely to quote the words of the section because then the efficacy of the material facts will be lost.*

6.1 To support his contention *regarding Revenue Records are not documents of title*, the learned Counsel for the Appellant relied upon the reported decision in the case of ***P.Kishore Kumar v. Vittal K.Patkar*** reported in ***2023 SCC Online SC 1483***.

6.2 As the mandatory injunction is barred under Article 113 of the Limitation Act, 1963 but the Plaintiff had approached the Court belatedly in the case. In support of his contention, the learned Counsel for the Appellant relied on the reported decision in the case of ***R. Kumar -vs- G.Jaganmoorthy*** reported in ***2017 SCC Online Mad 33015***, in which it is held as follows:

2. The appellant/plaintiff has filed a suit in O.S.No. 3736 of



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2010 against the respondent/defendant for mandatory injunction to remove the illegal superstructure put up in B schedule property and hand over vacant possession to the plaintiff and permanent injunction restraining the respondent/ defendant from in any manner by constructing permanent building in the B schedule property of encroached portion. According to the appellant/plaintiff, the suit property originally belonged to one Kannan, who settled the same in favour of his son Swamikannu on 22.6.1945. The said Swamikannu died on 9.3.1986 leaving behind his sons Vasanthakumar, Ravikumar and Rajakumar. Thereafter, the appellant/plaintiff purchased the suit property from the said three persons by sale deed, dated 15.12.1997 and he is in possession and enjoyment of the same. The defendant claiming to be the owner of the property comprised in S.No.56, bearing door No.7, old No.40, Varadhapuram, 2nd street, Kottur, i.e. adjacent to the plaintiff's house property has encroached the plaintiff's vacant land to an extent of 201.5 sq.ft. of his southern side of suit B schedule property and also constructed a temporary structure. The defendant's brother one K.Gunasekaran, who is residing on the northern side of the plaintiff's property also encroached the plaintiff's property to an extent of 40.5 sq.ft. The defendant and his brother with the support of each other have encroached the plaintiff's property. The plaintiff caused legal notice on 16.2.2010, but the defendant gave evasive reply on 6.3.2010 for which the plaintiff gave suitable rejoinder on 9.3.2010. The defendant planned to demolish the existing temporary superstructure in the encroached portion and trying to



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construct a building in the encroached portion. Hence the appellant/plaintiff has filed the suit. The sole defendant filed written statement stating that during 1980 itself, defendant's father Gopal had put up a proper building in B schedule land, when the plaintiff's vendor was in occupation of the property. The plaintiff's vendor has put up a building (now existing) in the portion of the schedule land, leaving out the B schedule property. Neither the plaintiff nor his vendor has any right over the B schedule property and it is in continuous possession and enjoyment of the defendant and his forefathers. Ever since the plaintiff became neighbour, is causing trouble and mental agony to the defendant by lodging false complaint. The trial court upon hearing arguments of both sides and upon perusal of the oral and documentary evidence, decreed the suit as prayed for. Challenging by the judgment and decree passed by the trial court, the respondent/defendant has preferred an appeal in A.S.No.215 of 2012 on the ground that the suit is bad without a plea for declaration and the suit is barred by limitation. The Appellate Court though held that the defendant has encroached the property and he has not produced any document to show that he acquired the property by adverse possession, set aside the judgment and decree of the trial court on the ground that the suit is barred by limitation.

11. In S.Sivakumar and another vs. The Assistant Executive Engineer, TWAD Board and another (2009-5 L.W. 315) this court has held as under:



4. *The plaintiffs filed O.S.No.296 of 1995 on the file of District Munsif Court, Nannilam against the defendants for mandatory injunction directing the defendants to remove two pipeline laid in the suit property.*

14. *In the aforesaid case, this Court has held that as there was no continuous breach, the appellant is not entitled to file a suit for mandatory injunction under Article 113 of the Limitation Act. In the facts of the present case, plaintiff issued legal notice on 10.3.2004 to the defendant and also lodged police complaint to remove the encroachment made by the defendant. Therefore, it is clear from the facts that the defendant has already encroached and constructed a temporary structure in the suit property in the year 2004 itself. In view of the above fact, there is no continuous breach or threat to the plaintiff as averred in the plaint. Therefore, the appellant/ plaintiff has not proved his case that the suit filed by him for the relief of mandatory injunction is within a period of three years under Article 113 of the Limitation Act. Therefore, there is no error or illegality in the judgment and decree passed by the appellate Court and the same is confirmed. The substantial question of law raised in the Second appeal is answered accordingly.*

6.3 in the case of ***Krothapalli Satyanarayana v. Koganti Ramaiah & Others*** reported in ***(1984) 2 SCC 439***, in which it is held as follows:



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8. *The sketch Annexure-1 shows the situation of the wall W-1, the house of defendants Nos. 2 and 3 as well as the house of the plaintiff. Plaintiff's house abuts on the passage and it is adjacent and to the south of the house of the plaintiff. This passage appears to be the only access the plaintiff has from his house to the road beyond the point G-1 and G-2 and marked as 'R' in the sketch. The question is whether any case is made out for removal of the wall which appears to have been constructed in 1956 i. e. about 27 years back. If there is an encroachment and if the suit is brought within the period of limitation, ordinarily the relief ought to be granted, save and except where the plaintiff has disentitled himself to a discretionary relief by his conduct. In this case both the appellate Court and High Court have concurrently held that the Plaintiff was guilty of acquiescence in that even though the wall was constructed to his knowledge in 1956, he approached the court in 1965 and even in that year he did not seek the prayer for removal of wall which prayer was for the first time introduced in 1969. In this background, we are not inclined to entertain the submission on behalf of the plaintiff-appellant that defendants 2 and 3 should be directed to remove the wall W W-1 and clear the passage of encroachment. But at any rate, defendants 2 and 3 are not entitled to dumping of Tandu adjacent and to the west of the wall in the name of a support to the wall and thereby further reduce the width of the passage. Therefore, having heard learned Counsel on both sides, we are satisfied that original defendants Nos. 2 and 3 should remove Tandu or any dumping of earth just adjacent and to the west of the wall W W-1*



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and keep the passage of the width between G-1 and W upto W-1 open un-encroached and of the same level for passing and re-passing including the passing of the cart, animals and vehicles. We direct that not an inch of land beyond the wall W W-1 to the west shall be used or enjoyed by defendants 2 and 3 and the whole of the passage of the width between G-1 and W upto W-1 shall be kept open by removal of encroachment including the dumping of Tandu or any earth filling to be used as passage. We grant mandatory injunction to that extent and direct that the defendants shall remove the encroachment within four weeks from today failing which the Court shall get it removed at the cost of the defendants Nos. 2 and 3. A fair copy of the sketch at page 77 of the record (Annexure 1) should be annexed to this judgment and should be treated as part of the judgment. The appeal is allowed to the extent herein indicated with no order as to costs.

6.4 For the claim of the Plaintiff, that it is a continuous cause of action was rejected as per reported decision in the case of ***Khair Mohammad Khan and another v. Mst. Jannat and Others*** reported in ***AIR 1940 Lah 359*** in which it is held as follows:

The trial Judge found against the Defendants on both these points and decreed the suit. On appeal, the District Judge affirmed the finding that the chabutra had been constructed on a portion of the courtyard which was the common property of the



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Mohalladars. After an examination of the evidence he came to the conclusion that only a part of the chabutra had been constructed in 1925, that the plaintiffs had extended it to its present dimensions about two years before the institution of the suit, and that this recent extension obstructed the passage of carts and carriages to the courtyard. He held that the suit was governed by Article 120 of the Indian Limitation Act, under which the Plaintiff had six years to sue from the date of the construction. He, therefore, found that the suit was barred by time qua the portion of the chabutra which had been constructed in 1925, but it was within limitation as regards the extension which had been made within six years of the suit. He, accordingly, modified the decree of the trial Court restricting the injunction to the demolition of that portion of the chabutra which had been constructed recently and dismissing the suit as regards the portion which had been in existence since 1925.

6.5 In the case of ***Balakrishna Savalram Pujari Waghmare & Others v. Shree Dhyaneswar Maharaj Sansthan & Others*** reported in 1959 SC 798;

34. On the other hand the decision of the Patna High Court in Choudhury Bibhuti Narayan Singh v. Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur as well as that of the Full Bench of the Punjab High Court in Khair Mohammad Khan v. Mst. Jannat support the respondents' contention that where the s, impugned act amounts to ouster there is no scope for the



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application of Section 23 of the Limitation Act. We are, therefore, satisfied that there is no substance in the appellants' contention that Section 23 helps to save limitation for their suits.

6.6 In the case of ***Ramanathan & Others v. Vallabhai*** in ***S.A.Nos.990 of 1996 and 991 of 1996.***

20. At this juncture, the Court has to make reliance upon the decision reported in AIR 1994 DELHI – 161 (FAQIR CHAND (THROUGH L.Rs.0 vs. LILA RAM (THROUGH L.Rs), wherein it has been held that

“Construction of tin-shed in common passage complete ouster of right of common use. Injury was complete, when tin shed was constructed. Limitation of three years under Article 113 will apply for filing suit for seeking mandatory injunction”

21. The learned Judge has relied upon the decision reported in AIR 1940 LAHORE-359 Full Bench (KHAIR MOHD.KHAN Vs. Mt.JANNAT), wherein it has been held as follows:

“A perpetual injunction was sought requiring the defendant to demolish a chabutra (platform) constructed on a portion of a courtyard which obstructed the passage of carts and other vehicles from the outer thoroughfare into the courtyard and the plaintiff complained that it caused a lot of inconvenience to them and other persons



living in the mohalla. The question which arose for decision was whether it was a continuing wrong so as to give cause of action de die in diem as per Section 23 of the Limitation Act or it was covered by Article 120 of the Limitation Act. Six years period was prescribed under Article 120 of the Old Limitation Act which has been curtailed to three years by similar Article 113 of the New Limitation Act. Where the injury complained of is complete on a certain date there is no continuing wrong even though the damage caused by the injury might continue. In such a case, the cause of action to the person injured arises once for all at the time when the injury is inflicted and the fact that the effects of the injury are felt by aggrieved person on subsequent occasions intermittently or even continuously does not make the injury a continuing wrong so as to give him a fresh cause of action on each such occasion.”

...The facts of the present case are in pari materia with the facts of the case decided by the Lahore High Court.

6.7 In the case of **Chengalvaraya Naidu v. Jagannath** reported in **(1994) 1 Supreme Court Cases 1.**

5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the



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preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6.8 In the case of ***Smriti Debbarma (Dead) through Legal Representative v. Prabha Ranjan Debbarma and Others*** reported in **2023 SCC OnLine 9**, in which it is held as follows:

34. In the above factual background, for the plaintiff to succeed, she has to establish that she has a legal title to the Schedule 'A' property and consequently, is entitled to a decree of possession. The defendants cannot be dispossessed unless the plaintiff has established a better title and rights over the



Schedule 'A' property. A person in possession of land in the assumed character as the owner, and exercising peaceably the ordinary rights of ownership, has a legal right against the entire world except the rightful owner. A decree of possession cannot be passed in favour of the Plaintiff on the ground that defendant Nos.1 to 12 have not been able to fully establish their right, title and interest in the Schedule 'A' property. The Defendants, being in possession, would be entitled to protect and save their possession, unless the person who seeks to dispossess them has a better legal right in the form of ownership or entitlement to possession.

35. The burden of proof to establish a title in the present case lies plaintiff as this burden lies on the party who asserts the existence of a particular state of things on the basis of which she claims relief. This is mandated in terms of Section 101 of the Evidence Act, which states that burden on proving the fact rests with party who substantially asserts in the affirmative and not on the party which is denying it. This rule may not be universal and has exceptions, but in the factual background of the present case, the general principle is applicable. In terms of Section 102 of the Evidence Act, if both parties fail to adduce evidence, the suit must fail. Onus of proof, no doubt shifts and the shifting is a continuous process in the evaluation of evidence, but this happens when in a suit for title and possession, the plaintiff has been able to create a high degree of probability to shift the onus on the defendant. In the absence of such evidence, the burden of



proof lies on the plaintiff and can be discharged only when he is able to prove title. The weakness of the defence cannot be a justification to decree the suit. The plaintiff could have succeeded in respect of the Schedule 'A' property if she had discharged the burden to prove the title to the Schedule 'A' property which squarely falls on her. This would be the true effect of Sections 101 and 102 of the Evidence Act. Therefore, it follows that the plaintiff should have satisfied and discharged the burden under the provisions of the Evidence Act, failing which the suit would be liable to be dismissed. Thus, the impugned judgment by the High Court had rightly allowed the appeal and set aside the judgment and decree of the trial court. We, therefore, uphold the findings of the High Court that the suit should be dismissed. We clarify that we have not interfered or set aside any observations of the High Court in re the Tripura Land Revenue and Land Reforms Act, or defendants' claim etc. Notably, M/s. Hotel Khosh Mahal Limited is not a party to the present proceedings.

7. The learned Counsel for the Respondent invited the attention of this Court to the contents of the sale deed particularly to the discussion of the property in the sale deed in favour of the Plaintiff (Respondent in the Appeal) dated 03.09.2024. The sketch annexed with the sale deed identifies the property having an area of 1247 sq.ft which is identified as the suit property. Another sale deed executed in favour of the Plaintiff bearing the same date is



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an extent of 675 sq.ft. This portion is identified with separate colour.

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8. The learned Counsel for the Plaintiff also invited the attention of this Court to the Blue-print regarding the house plan for the Plaintiff's property. It is the contention of the learned Counsel for the Plaintiff (Respondent in the Appeal) that the submission of the learned Counsel for the Appellant that the judgment of the learned Additional Judge, City Civil Court in O.S.No.4607 of 2020 by judgment dated 30.11.2023 is perverse does not hold good. The injury caused by the conduct of the Defendant is a continuous injury on the Plaintiff. Therefore, the Plaintiff had sought mandatory injunction against the Defendant to remove the encroachment put up on the property of the Plaintiff by the Defendant.

9. On proper appreciation of evidence, the learned VI Additional Judge, City Civil Court had decreed the suit in O.S.No.4607 of 2020 by judgment dated 30.11.2023. The judgment of the learned VI Additional Judge in paragraph No.25 had specifically stated that the pillars put up by the Defendant caused inconvenience to the Plaintiff and it had to be removed. The Plaintiff is entitled to mandatory injunction and permanent injunction. There is no evidence that the disputed 45 sq.ft is a common pathway. Also, in the same



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judgment, the learned trial Judge had directed both the Plaintiff and Defendant

to approach the Government Surveyor to solve the dispute of encroachment.

The Respondent herein, the Plaintiff before the trial Court had filed W.P.No.20459 of 2024 seeking direction against the Government Surveyor to solve the dispute of encroachment and the Writ Petition is pending. In Paragraph 28 of the judgment, the learned VI Additional Judge had held that the frontage portion belongs to the Plaintiff was proved. The judgment of the learned VI Additional Judge, City Civil Court was on proper appreciation of evidence. The Appellant raised the question that the suit is barred by limitation, it is not so. The encroachment put up by the Defendant cause prejudice and cause injury on the right of the Plaintiff for his enjoyment of the property belonging to him. It is a continuous cause of action. Therefore the claim of the Defendant as Appellant that the suit is barred by Limitation will not hold good and is to be rejected.

9.1 The learned Counsel for the Respondents relied on the reported decision in the cases of:

(i) In the case of *Asian Resurfacing of Road Agency (P) Ltd v. CBI* reported in *(2018) 16 SCC 299, wherein it is held as follows:*

30.Even in civil or tax cases it has been laid down that



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power to grant stay has to be exercised with restraint. Mere prima facie case is not enough. Party seeking stay must be put to terms and stay should not be incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability.

31. Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months.

9.2 The analysis made by the learned Counsel for the Appellant based on the reported decision in the case of ***Asian Resurfacing of Road Agency (P) Ltd v. CBI*** reported in ***(2018) 16 SCC 299*** are as follows:

When the High Court passes an interim order of stay, though the interim order may not expressly say so, the three factors, viz; prima facie case, irreparable loss, and balance of convenience, are always in the back of the judge's mind. Though interim orders of stay of proceedings cannot be routinely passed as a matter of course, it cannot be said that such orders can be passed only in exceptional cases.

High Court's power to vacate or modify interim relief



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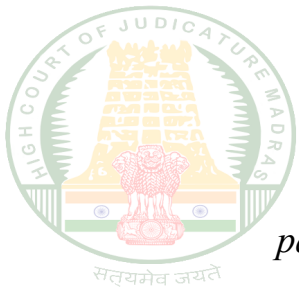
14. When a High Court grants a stay of the proceedings while issuing notice without giving an opportunity of being heard to the contesting parties, it is not an interim order, but it is an ad-interim order of stay. It can be converted into an interim order of stay only after an opportunity of being heard is granted in the prayer for interim relief to all the parties to the proceedings. Ad-Interim orders, by their very nature, should be of a limited duration. Therefore, such orders do not pose any problem.

15. The High Courts are always empowered to vacate or modify an order of interim relief passed after hearing the parties on the following amongst other grounds:

(a) If a litigant, after getting an order of stay, deliberately prolongs the proceedings either by seeking adjournments on unwarranted grounds or by remaining absent when the main case in which interim relief is granted is called out for hearing before the High Court with the object of taking undue advantage of the order of stay;

b) The High Court finds that the order of interim relief is granted as a result of either suppression or misrepresentation of material facts by the party in whose favour the interim order of stay has been made and;

c) The High Courts finds that there is a material change in circumstances requiring interference with the interim order



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passed earlier. In a given case, a long passage of time may bring about a material change in circumstances.

9.3. In the case of ***M.Madhavakrishnan v. S.R.Swami and another*** reported in ***AIR 1995 MAD 318*** where in it is held as follows:

“When no plea of novation is raised, we are of the view, that the Appellant cannot be allowed to raise such a plea at the stage of appeal.

9.4 In the case of ***Kumar Dubey & Others v. Ramesh Chandra Goyal*** reported in ***AIR 2015 Supreme Court 1135***;

9.5 In the case of ***State of Maharashtra v. Ramdas Shrinivas Nayak & Another*** reported in ***1982 AIR 1249*** in which it is held as follows:

*If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (2) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate (I) Per Lord Atkinson in *Somasundaran v. Subramanian*, A.I.R 1926 P.C. 136.*

9.6 In the case of ***Hari Ram v. Jyoti Prasad and another*** reported in



2011 SUPREME COURT 952 in which it is held as follows:

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18. Any act of encroachment is a wrong committed by the doer. Such an encroachment when made to a public property like encroachment to public road would be a graver wrong, as such wrong prejudicially affects a number of people and therefore is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source of wrong and injury, cause of action is created as long as such injury continues and as long as the doer is responsible for causing such injury.

19. 19. At this stage it would be apposite to refer to and rely upon Section 22 of the Limitation Act, 1963, which reads as follows:

"In case of a continuing breach of contract or in case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."

This court had the occasion to deal with Section 22 of the Limitation Act, 1963, in the case of Sankar Dastidar v. Shrimati Banjula Dastidar and Another reported in AIR 2007 SC 514, in which the Supreme Court held that when a right of way is claimed whether public or private over a certain land over which the tort-feaser has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, in our considered



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opinion the plea that the suit is barred by limitation has no merit at all.

9.7 In the case of ***M/s.S.K.L Co. v. Chief Commercial Officer and Others*** reported in ***AIR 2016 Supreme Court 193*** in which it is held as follows:

13 Instead of complying with the directions a futile effort has been made by the Respondents to dilute them, nay render nugatory by a side wind in terms of the additional affidavit dated 3.9.2015 a perusal of which makes it abundantly clear that it should have assailed the directions in the impugned Judgment.

9.8 In the case of ***Banarasi and Others v. Ram Phal*** reported in ***AIR 2003 Supreme Court Cases 1989***;

9.9 In the case of ***Ganga Bai v. Vijay Kumar and Others*** reported in ***1974 Supreme Court 1126*** wherein it is held as follows:

It is thus clear that the appeal filed by defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against mere finding recorded by the trial court that the partition was not genuine. The main controversy before us centers round the question whether that appeal was maintainable on this question the position seems to us well-



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established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court.

Thus, the appeal filed by defendants 2 and 3 being directed against a mere finding given by the trial court was not maintainable;

“it may be taken to be the view of courts in India generally, that a party to the suit adversely affected by a finding contained in a judgment, on which a decree, is based, may appeal; and the test applied in some of the, cases for the purpose of determining



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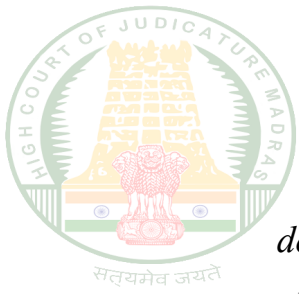
whether a party has been aggrieved or not was whether the finding would be res judicata in other proceedings". The High Court, however, upheld the preliminary objection on the ground that the issue regarding validity of the sale which was decided against defendants 1 to 3 would not operate as res judicata in any subsequent proceeding and therefore the appeal which was solely directed against the finding on that issue was not maintainable.

9.10 In the case of ***Dr.Mahesh Chand Sharma v. Smt. Raj Kumari Sharma and Others*** reported in ***AIR 1996 Supreme Court 869*** wherein it is held as follows:

"A party who abandons a particular plea at a particular stage cannot be allowed to re-agitate in appeal.

9.11 In the case of ***Mahadev Missir and Others v. Basudev Missir and Others*** reported in ***AIR 1981 CALCUTTA 9*** wherein it is held as follows:

6. In the case of Lala Kalyan Das reported in 22 Cal WN 866 at pages 870 and 871: (AIR 1918 PC 53), Lord Sumner has stated that when a point was not pressed in the lower court, in the absence of evidence that the judgment was erroneous on the point, the appellants must accept that position and cannot raise the same in appeal before the Judicial Committee against the



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decision of the High Court because that is a point which they elected not to advance in the High Court. There is nothing to show that the decision of the trial court in this regard is erroneous. Hence, this submission cannot be accepted.

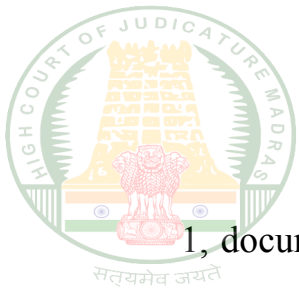
9.12 In the case of ***Baldev Singh v. Surinder Mohan Sharma & Others*** reported in ***AIR 2003 Supreme Court 225*** where it is held as follows:

“There is no dispute that as against a decree, an appeal would be maintainable in terms of section 96 of the Code of Civil Procedure. Such an appeal, however, would be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree.

Point for consideration

Whether the judgment of the learned VI Additional Judge in O.S.No.4607 of 2020 granting decree in favour of the Plaintiff is perverse warranting interference by this Court.

10. Heard the learned Counsel for the Appellant, Mr. G.Rajkumar and the learned Counsel for the Respondents, Mr.Ajay Francis Inigo Loyola. Perused the evidence of the Plaintiff and perused the judgment of the learned VI Additional Judge, City Civil Court in O.S.No.4607 of 2020 dated 30.11.2023. The deposition of the witness, third Plaintiff Anton Joyal as P.W-



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1, documents marked on the side of the Plaintiff under Ex.A-1 to Ex.A-6 and the documents marked by the Court as Ex.C-1 to Ex.C-4. The deposition of the Defendant, Manivannan as D.W-1, documents marked on the side of the Defendant as Ex.B-1 to Ex.B-10.

11. The contention of the Appellant is that the Plaintiff does not have any claim or right in Town Survey No.71. The Plaintiff had stated that the dispute is related to 45 Sq.ft only. The Plaintiff had purchased the property under two sale deeds on the same date on 03.09.2024 from the very same Vendor. The two properties under one sale deed for 1247 sq.ft and under the next sale deed for 675 sq.ft were purchased. Both the properties were not in Town Survey No.71. In the evidence, the Plaintiff claimed right over Town Survey No.71 which is the property of the Defendant. It is the contention of the Defendant as Appellant (Defendant before the trial Court) that the Plaintiff had no right or claim in Town Survey No.71. The Plaintiff had raised the dispute in the property in which they do not have any right or claim. While so, when there is clearly a dispute between Plaintiff and Defendant regarding claim over the property. The claim of the Plaintiff seeking removal of a pillar put up in the Plaintiff's property which is disputed by Defendant. Under those circumstances, the Plaintiff ought to have sought declaration of



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title to the disputed property. The Plaintiff had cleverly not sought declaration of title. It is an accepted principle of Jurisprudence that when there are disputes to claim of title, the Plaintiff ought to have sought declaration of title. Here, the Plaintiff claims that the Defendant had put up construction in the land belonging to the Plaintiff.

12. The Plaintiff had not proved that the land in which dispute between Plaintiff and Defendant arose belong to the Plaintiff. Therefore, under those circumstances, it is the duty of the Plaintiff to seek declaration of title and subsequently seek the relief of mandatory injunction against the Defendant and consequential permanent injunction. The contention of the learned Counsel for the Respondent (Plaintiff before the Trial Court) that the injury caused on the Plaintiff is a continuous dispute. Therefore, the Plaintiff need not to seek declaration regarding title. The Court is within its power to grant mandatory injunction. The said submission of the learned Counsel for the Respondent is found not acceptable under the provisions of CPC, Specific Relief Act. When the Plaintiff claims that there is dispute between Plaintiff and Defendant, and Plaintiff claims that the Defendant had encroached the portion of the land/ house site belonging to the Plaintiff prior to the purchase by Plaintiff. Thus, Plaintiff is entitled to seek declaration of title to the property. Here, for reasons



best known to the Plaintiff, the Plaintiff had not sought declaration of title to the suit property that the suit property belongs to the Plaintiff.

13. Learned Counsel for the Appellant (Defendant before the trial Court) submitted that the Defendant had put up construction long time prior to the purchase of the property by the Plaintiff. The property was purchased by the father of the Defendant. After purchase, the property in the name of the mother of the Defendant. The mother of the Defendant executed settlement deed in favour of the Defendant. Therefore, the Defendant is in enjoyment of the property from the year 1974 continuously. While so, the Plaintiff who is the subsequent Purchaser claims that the Defendant had encroached on the portion of the property belonging to the Plaintiff prior to his purchase. If that be so, before ever purchasing the property, he should have been diligent to get it cleared from the vendor of the Plaintiff. The vendor of the Plaintiff also in the sale deed, generally as an indemnity clause undertaking that for any defect in the sale deed, the vendor of the Purchaser is duty bound to clear the sale. Under those circumstances, the claim of the Plaintiff seeking mandatory injunction without seeking declaration of title is found unacceptable under Section 39 and 41(i) of Specific Relief Act-

"39. Mandatory injunctions-When, to prevent the breach of an obligation, it is necessary to compel the performance of



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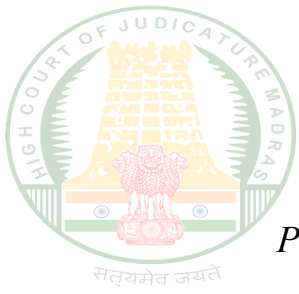
certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

*Mandatory injunction, when may be granted - Two elements have to be taken into consideration for granting a mandatory injunction under Section 39 of the Specific Relief Act. In the first place, the Court has to determine what acts are necessary in order to prevent a breach of obligation; in the second place the requisite acts must be such as the Court is capable of enforcing. Caution is required in the grant of preventive relief. The exercise of power to grant mandatory injunction must be attended with the greatest possible caution and is strictly confined to cases where the remedy of damage is inadequate for the purposes of justice and the restoring of things to their former condition is the only remedy which will meet the requirements of the case. The Court will not interfere except in cases where there are extreme serious damage caused which cannot be compensated: **C.Kumhammad vs. C.H.ahamad Haji AIR 2001 Ker.101"***

"41 (i) When the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court";

*Scope.- Mere making out a prima facie case would not entitle the Plaintiff to get the temporary injunction unless the questions of balance of convenience and inconvenience and the irreparable injury merit the grant of temporary injunction. It should also be borne in mind that injunction is an equitable relief and it should be granted even for a temporary period after due consideration of the parties' convenience and inconvenience: **Sailen Seth v. Steel Authority of India Ltd AIR 1988 Cal.312.***

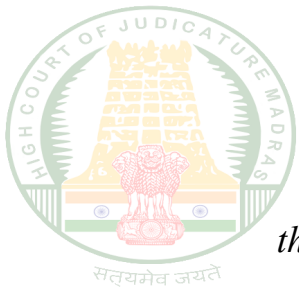
*Even where the three well known concurrent conditions (prima facie case, balance of convenience and irreparable injury) requisite for grant of the relief exist, the Court, on the facts and in the circumstances of the case, in exercising its discretion judicially, may still refuse the relief as where there has been delay and the party applying for the relief has not come with clean hands; **National Authority vs. Vijaydutt AIR 1990 Madh,***

*Pra.326*

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14. In this case, the Plaintiff had taken up Advocate Commissioner to find out the encroachment. The Advocate Commissioner has filed his report. Based on the report, the learned VI Additional Judge, City Civil Court had granted Mandatory injunction. The granting of mandatory injunction based on the evidence of the Plaintiff itself unacceptable. When the Defendant had in the written statement, specifically claimed that the Plaintiff has no claim or right over the Town Survey No.71, then it is for the Plaintiff to prove that his claim is with regard to T.S.No.71. If that be so, to establish his right seeking declaration of title. Until such time, the dispute is not clear before the Court, Whether the dispute is with regard to Town Survey No.71 or not, the Court is forbidden from issuing mandatory injunction. When the Plaintiff had sought appointment of an Advocate Commissioner, the Defendant had objected stating that the claim of the Plaintiff itself is without any basis as the claim is based on Town Survey No.71, which belong to the Defendant and which had been in possession of the Defendant from 1976 onwards. In the interim injunction application in I.A.No.2 of 2020 filed by the Plaintiff in O.S.No.4607 of 2020 as per order dated 22.02.2021, the then learned VI Additional Judge, had observed that

.. with the available document it will not be safe to conclude that



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the respondent encroached upon the petitioner's property or the petitioners encroached upon the respondent's property. The parties are advised to take up commission to inspect the property and to find out what is the extent of property available on the earth.

11. Therefore, with the available documents it cannot be concluded that the respondent encroached upon the property. Till the properties inspected by advocate commissioner the property is to be lie as it is.

15. Subsequently, the Plaintiff in O.S.No.4607 of 2020 filed I.A.No.3 of 2021 seeking appointment of an Advocate Commissioner. Accordingly Advocate Commissioner was appointed and to be assisted by V.A.O and the local Surveyor. Advocate Pratheeban was appointed as Advocate Commissioner in I.A.No.3 of 2021 in O.S.No.4607 of 2020.

16. It is the contention of the learned Counsel for the Plaintiff that prior to the filing of the suit, the Plaintiff had caused notice under Ex.A-5 in which it was stated that the Defendant had put up construction encroaching on the property of the Plaintiff. Prior to the suit, he had also mentioned the date, but wantonly suppressed those dates in the plaint. The Defendant had disputed the claim of the Plaintiff by giving out the details of the purchase of the property by the mother of the Defendant in the year 1974 prior to the purchase by the



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Plaintiff and subsequently the mother of the Defendant having executed settlement in favour of the Defendant and he had been in continuous possession and enjoyment from the year 1974. The claim of the Plaintiff is with regard to Town Survey No.71 where the Plaintiff does not have any claim. Under such circumstances, the Plaintiff ought to have sought declaration of title to his property. The claim that the Defendant encroached 45 sq.ft of land has to be proved through documentary evidence. Which part of the 45 sqft that was not done. In the course of the appreciation of evidence, in the judgment, the learned VI Additional Judge had observed that both parties had not filed the original CMDA plan for putting up construction. Therefore if both parties had not furnished CMDA plan that means, the Plaintiff had something to hide from the Court. The said Plaintiff, in such case, shall not be granted discretionary relief of injunction whether permanent injunction or mandatory injunction. The Plaintiff has to seek relief based on his or her evidence, based on his or her documents. The Plaintiff is entitled to seek relief under Specific Relief Act only on the strength of his or her both documentary evidence and oral evidence. Here, the learned Judge had observed that both parties had not furnished approved building plan before the Court. If the Plaintiff had not marked Building Plan, the Court has to draw adverse inference under Section 114 of the Indian Evidence Act that the Plaintiff is



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suppressing something or avoiding to mark something before the Court. If and when, the said document is produced, the Plaintiff is apprehensive that his case will be lost. That is why the Plaintiff had not marked Approved Building Plan. Under those circumstances, the claim of the Defendant that the Plaintiff is claiming right over T.S.No.71 for which he does not have any right has to be disproved and the claim of the Plaintiff for T. S.No.71 for 45 sq.ft alleged to have been encroached by the Defendant has to be proved by the Plaintiff and not by the Defendant. Until such contention is proved, on the side of the Plaintiff, the Plaintiff is not entitled to mandatory injunction without seeking declaration of title. Therefore the finding of the learned VI Additional Judge, City Civil Court granting mandatory injunction based on photograph marked on the side of the Plaintiff and based on the Advocate Commissioner's report cannot at all be accepted. The Advocate Commissioner's Report does not indicate the title to the disputed property. Under those circumstances, based on Advocate Commissioner's Report, the relief cannot be granted to the Plaintiff, it amounts granting relief based on Commissioner's Report which was an exercise in collecting evidence.

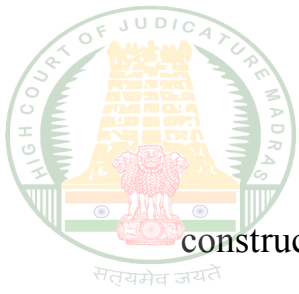
17. In the light of the reported decisions, the claim of the Plaintiff before the trial Court, the Respondent in this Appeal has no merit as he himself had



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suppressed the fact by not producing the approved Building Plan as per the observation made by the learned VI Additional Judge, City Civil Court. If the Plaintiff had not produced the approved building plan, it amounts to suppression of fact or playing fraud on the Court or abuse of the process of the Court. From the evidence it is found that the Plaintiff is a purchaser of the property long after the purchase by the Defendant. The Defendant's mother purchased the property in the year 1974 and she had settled the property in favour of the Defendant. Whereas the Plaintiff had purchased the property vide sale deed dated 03.09.2004 and the suit was instituted in the year 2020 claiming that the Defendant had encroached on a portion of the Plaintiff's property. As per the claim of the Defendant, the Plaintiff has no claim over Town Survey No.71/1. It is for the Plaintiff to establish that he has title, but he has not established the same. Both the sale deeds are with reference to Town Survey No.72, whereas the Plaintiff had marked documents. The observation of the learned VI Additional Judge in paragraph 25, it is an admitted fact that the Plaintiff let the property to rent for running a Church prayer House and it is the case of the Defendant that it causes much nuisance. There is no sufficient proof to hold that the Defendant is entitled to 45 sqft in the said place and as per the sale deed, the Defendant constructed a house and enjoying the same. The Commissioner's Report is silent. Whether the Defendant



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constructed his building within his sale deed area or left any space on the frontage portion of the Plaintiff. The Plaintiff also silent by not marking CMDA approved plan. Under such circumstances, the contention of the Plaintiff that the Defendant encroached 45 sq.ft is unacceptable without any “concrete Evidence”. Under such circumstances, the learned Judge had observed even though the admitted frontage portion belongs to the Plaintiff, if the Plaintiffs are permitted to install a gate, it is not possible for the Defendant to make any kind of repairs in the wall. It is also not clear whether the Defendant left any space in the said area. Such being the facts and circumstances, the contention of the Defendant that he is entitled to 45 sqft based on the sale deed is unacceptable since the erection of pillar causes inconvenience in entering into the premises of the Plaintiff, it has to be removed at once. At the same time, the parties having failed to file CMDA Approved plan so as to ascertain whether they had constructed the building as per plan. Under such circumstances, the Plaintiff is entitled for mandatory injunction, permanent injunction, which is found contrary with the earlier observation. When both parties had suppressed by not furnishing CMDA Approved plans, in such circumstances, it is the Plaintiff who had knocked the door of the Court seeking the relief of mandatory injunction. It is the specific case of the Defendant that the Defendant had been in enjoyment of the



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property right from 1974, whereas the Plaintiff had purchased the property only in the year 2003. Whether the persons who sold the property had valid title to the disputed property, 45 sq.ft is the question to be decided based on title deeds for which it is the duty of the Plaintiff to seek the relief of declaration of title. Until the title is cleared, the Plaintiff cannot seek mere mandatory injunction. The Defendant had already marking documents as Ex.B-2 and Ex.B-4.

18. The learned Counsel for the Respondent relied on the reported decision in the case of ***Hari ram -vs Jothi Prasad and another*** reported in ***AIR 2011 SC 952*** in support of his contention which will not hold the case of the Respondents in the Appeal, as he was the Plaintiff before the trial Court. It is the Plaintiff who had knocked the door of the Court seeking relief. Therefore, he is duty bound to place all the materials fairly before the Court. He had not filed the CMDA approved plan. Both the Plaintiffs as well as the Defendant had not filed the CMDA Approved plan regarding their respective properties. That is the observation made by the learned VI Additional Judge in paragraph 25. Under those circumstances, when the Defendant had been in enjoyment of the property from 1974, the Plaintiff had purchased the property in the year 2004, particularly to Town Survey No.72 has to establish his right regarding Town Survey No.71 without which he cannot seek mere mandatory



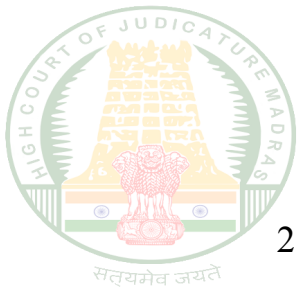
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injunction, he has to establish his title for the Town Survey No.71, until it is cleared by evidence of the Plaintiff, the Plaintiff is not entitled to mandatory injunction. The claim of the Plaintiff that the nuisance or injury caused on the Plaintiff is continuous tort. Therefore, he is within his right to have approached the Court in the year 2020, that the Defendant had encroached his part of the property long before Plaintiff purchased the property, Defendant had been in possession and enjoyment of the property right from 1974. Therefore the claim is found to attract Section 113 of the Limitation Act that denotes he had acquiesced as per the reported ruling, Kail Mohammed Khan

19. Above all, the attempt of the Plaintiff is nothing but abuse of the process of Court for not furnishing the relevant materials and keeping it out from the sight of the Court by preventing the Court from considering the materials fairly. Therefore the Plaintiff is not entitled to the relief sought by him.

20. In the light of the above discussion, on the re-assessment of the very same evidence, the Court is unable to accept the finding of the learned VI Additional Judge, City Civil Court who had observed that both the parties had not filed their respective approved building plan as approved by CMDA.

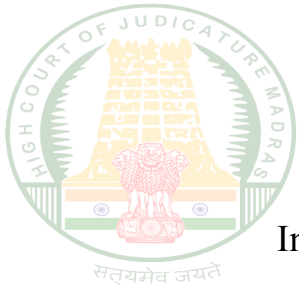


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21. In that circumstances, it is not the Defendant who had knocked the door of the Court, it is the Plaintiff who had knocked the door of the Court. It is the specific case of the Defendant in the written statement that the Plaintiff has no claim of right or title in Town Survey No.71/1 whereas the document marked as Ex.A-6 wherein he had shown that he has right under Town Survey No.71/1. Only in the building plan, it is shown that he has right under Town Survey No.71/1. How he acquired title to Town Survey No.71/1 is to be proved by the Plaintiff. The sale deeds under Ex.A-1 and Ex.A-2 does not grant any title to the Plaintiff for T.S.No.71/1. Under those circumstances, granting of mandatory injunction against the Defendant by pricking holes in the evidence of the Defendant is against the accepted principle regarding granting of relief under Specific Relief Act to the litigant who had approached the Court. The Plaintiff is not expected to seek decree by pricking holes in the evidence of the Defendant. Under those circumstances, the granting of mandatory injunction when the title itself is disputed and the Plaintiff having failed to establish the title of the Town Survey No.71/1 is found not acceptable as per the reported decision cited on the side of the Defendant as Appellant.

22. In the light of the above discussion, **Point for consideration is answered against the Plaintiff** and in favour of the Defendant.



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In the result, **the Appeal suit is allowed**. The Judgment and decree passed by the learned VI Additional Judge, City Civil Court in O.S.No.4607 of 2020 dated 30.11.2023 granting mandatory injunction, when the Plaintiff was unable to prove and establish title to Town Survey No.71/1 and seeking mandatory injunction and granting of mandatory injunction is perverse, the same is set aside. No costs.

03.06.2025

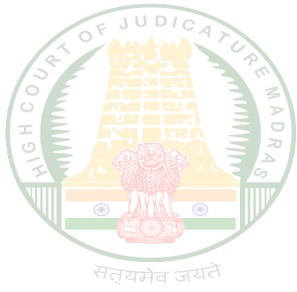
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Index : Yes/No

Speaking/Non-speaking order

To:

1. The VI Additional Judge,
City Civil Court, Chennai.
2. The Section Officer,
V.R.Section,
High Court of Madras.



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SATHI KUMAR SUKUMARA KURUP, J.,

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Judgment in
A.S.No.78 of 2024

03.06.2025