
(2008) 12 MAD CK 0084
In the Madras High Court
Case No : S.A. (MD) No. 623 of 2000

Kadambayan

APPELLANT

Vs

Abdul Razak

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 4
Evidence Act, 1872 — Section 44

Citation : (2008) 12 MAD CK 0084

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : K. Govindarajan, for the Appellant; No Appearance, for the Respondent

Final Decision : Allowed

Judgement

A.C. Arumugaperumal Adityan, J.—The appeal has been directed against the decree and judgment in A.S. No. 135 of 1995, on the file of

Court of Principal District Judge, Pudukottai. The defendant is the appellant herein. The plaintiff has filed a suit for mandatory injunction for

removal of the wall between ""A"" and ""B"" schedule properties to the plaintiff.

2. The averments in the plaint in brief relevant for the purpose of deciding this appeal are as follows:

Both the suit properties are situated in Koppampatty Village. ""A"" schedule property was the subject matter of an earlier suit in O.S. No. 117/78 on

the file of Court of District Munsif, Pudukottai. The said suit was decreed and the plaintiff was given a right to effect repairs to the wall of the shop

by entering on the ""A"" schedule property. It was further held that ""B"" schedule property is to be enjoyed by both the parties without any

interruption, i.e., the plaintiff's right to access to "A" schedule Property through "B" schedule property was upheld and the defendant's right to

drain the rain water through "B" schedule property was also upheld. During the pendency of the said suit, the defendant had unauthorisedly raised a

wall between "A" and "B" schedule properties thus blocking the access of this plaintiff to "A" schedule property. The said act of the defendant was

also condemned by the trial Court as an illegal act. The defendant also blocked the hole in the dividing wall so as to prevent the flow of rain water.

When this was brought to the notice of the Court, the Court was pleased to observe that the matter has to be agitated by the parties separately.

Hence, the defendant filed a suit for mandatory injunction against the plaintiff in O.S. No. 672/85 claiming that blocking of the hole should be

removed. The defendant has no right to raise a wall between "A" and "B" schedule properties and has no right to block the free flow of water.

During the pendency of trial, the plaintiff expected the defendant to rectify the matter by removing the obstruction of the wall. The trial Court in

O.S. No. 672/85 has held that the defendant is entitled to go to "A" schedule property through "B" schedule property and that the plaintiff may

take appropriate action for removal of the wall. So, under such circumstances, on the basis of the said observation, the plaintiff has filed the suit for

mandatory injunction for removal of the blocking wall between "A" and "B" schedule properties.

3. The defendant in his written statement would contend that the defendant as plaintiff, filed a suit in O.S. No. 117/78 on the file of the Court of

District Munsif, Pudukottai. The said suit was filed for declaration of title to the plaint "A" schedule property and for easementary right over the

plaint "B" schedule property. The adjacent owner of "A" schedule property, Ahamed Rowther, raised a compound wall 40 years back. This

defendant put up the wall connecting the compound wall and the main wall of the building situate adjacent to "B" schedule property some 30 years

back. There is a hole in the above wall to drain the water from "A" schedule property through "B" schedule property. There is an observation in the

earlier judgment that the plaintiff has got right to effect the repairs to the northern wall to his building by entering in "A" schedule property. There is

a passage on the eastern side of the building of this defendant, which provides entry to "A" schedule property. The plaintiff has effected repairs to

the northern wall of the building after institution of the suit in O.S. No. 117/78. This defendant has not encroached upon the suit properties and

raised a wall between ""A"" and ""B"" schedule properties during the pendency of the suit in O.S. No. 117/78. The said wall was raised 30 years ago.

This was also noted by the learned Commissioner, who inspected the suit property. Since the said wall is in existence for more than 40 years, the

plaintiff has no right of easement over the suit property. The claim of the plaintiff is against law and the principles of natural justice. The plaintiff

never used the suit site to enter upon the ""A"" schedule property. Since the plaintiff has failed in his attempt to grab ""A"" schedule property, he has

come forward with the present suit. There is no cause of action to file the suit. Hence, the suit is liable to be dismissed. On the above pleadings, the

learned trial Judge has framed three issues for trial.

4. Before the trial Court, P.W.1 and P.W.2 were examined and Exs.A1 to A6 were marked on the side of the plaintiff. The defendant has

examined himself as D.W.1 besides examining one Marimuthu as D.W.2 and exhibited Exs.B1 and B2. A Commissioner was appointed to note-

down the physical features of the suit properties. The learned Advocate Commissioner, after visiting the suit properties, has filed Ex.C1, report,

and Ex.C2, plan.

5. After meticulously going through the evidence both oral and documentary, the learned trial Judge has come to a conclusion that the plaintiff is not

entitled to any relief asked for in the plaint, has dismissed the suit, but without costs. Aggrieved by the findings of the learned trial Judge, the plaintiff

has preferred an appeal in A.S. No. 135/1995 on the file of the Court of Principal District Judge, Pudukottai. After giving due deliberation to the

submissions made by the learned Counsel on both sides and after scanning the evidence both oral and documentary, the learned first appellate

Judge held that there is material to interfere with the findings of the learned trial Judge, has allowed the appeal, thereby setting aside the decree and

judgment of the learned trial Judge in O.S. No. 344 of 1990 on the file of the Court of District Munsif, Pudukottai, giving two months" time to

remove the disputed wall between ""A"" and ""B"" schedule properties to the plaint, which necessitated the defendant to approach this Court by way

of this Second Appeal.

6. The following substantial question of law is involved in this Second Appeal:

Whether the lower appellate Court is correct in law in granting the relief of mandatory injunction which had been time barred?

7. Substantial Question of Law:

Ex.A3 is the judgment in A.S. No. 80/1984, which had arisen out of a decree and judgment in O.S. No. 117/78 filed by the present defendant,

Kadambayan Chettiar, against the present plaintiff, Abdul Razak Rowther. O.S. No. 117/78 was filed by the present defendant, as the plaintiff,

against the present plaintiff, for declaration and for permanent injunction in respect of a wall between ""A"" and ""B"" schedule properties to the plaintiff.

The said suit was decreed with an observation that without making any hindrance to the rights of the present defendant in respect of the said wall,

the present defendant, as the plaintiff in the said suit was given declaration as to have access to the plaintiff ""B"" schedule property. The learned trial

Judge has also directed both the parties not to encroach upon the same but enjoy in common. In appeal, the first appellate Court, under Ex.A3,

has confirmed the decree and judgment of the learned trial Judge, thereby, dismissing the appeal preferred by the defendant in that suit, who is the

plaintiff in the present suit. Thereafter, the plaintiff in this suit has filed O.S. No. 672/85, claiming that blocking of the hole in the wall between ""A

and ""B"" schedule properties is to be removed. Ex.A5 is the judgment in O.S. No. 672/85. The said suit was decreed, directing the defendant in

that suit, who is the plaintiff in this suit, to remove the obstruction of the hole in the wall between ""A"" and ""B"" schedule properties. As far as the wall

in eastern ""A"" and ""B"" schedule properties is concerned, the title has been declared in favour of the defendant herein, who was the plaintiff in O.S.

No. 117/78. On the basis of an observation in O.S. No. 672/85, the plaintiff has filed the present suit. The observation, on which reliance was

placed by the plaintiff herein, who is the defendant in O.S. No. 672/85 (Ex.A5, suit) is that the defendant in O.S. No. 672/85 (Plaintiff in the suit)

has no right to block the passage of water in the wall between ""A"" and ""B"" schedule properties and if he has got any grievance, he ought to have

filed a separate suit for removal of the said wall itself. The learned Counsel appearing for the appellant would contend that on the basis of the said

observation in O.S. No. 672/85 (Ex.A5 suit), the plaintiff has no cause of action

to file the present suit, because the suit wall between ""A"" and ""B schedule properties is in existence for more than 30 years i.e., even on the date of filing of O.S. No. 117/78 and the suit filed in the year 1990 (O.S. No. 344/90) to remove a wall in existence even in the year 1978 is barred under Clause 113 of the Limitation Act, 1963, and this was escaped the notice of the learned first appellate Judge in A.S. No. 135/95 on the file of the Court of District Judge, Pudukkottai. In support of his contention, the learned Counsel for the appellant would rely on Faqir Chand (through L.Rs.) Vs. Laila Ram (through L.Rs.), . The facts of the said ratio is that the dispute is in respect of the property bearing Municipal No. 1152 (Old No. 272) situated in Gali Samosan, Farash Khana, Delhi, which was by Bhola Ram, father of the appellant, Lila Ram - respondent and one Krishan Lal. In the year 1921, one of the brothers viz., Kishan Lal brought a suit for partition and a share of Kishan Lal allotted in the said partition suit. Subsequently, the said share was purchased by the other brother viz., Lila Ram and the parties have also registered the same. The portion which fell to the share of Bhola Ram is shown in light blue colour in the plan and the portion which fell to the share of Lila Ram is shown in dark blue colour. A portion in red colour is shown as joint passage for the parties and beyond the joint passage shown in red colour, there exists a courtyard which is located in front of the constructed portion, which fell to the share of Bhola Ram. It was contended by the appellant that the said courtyard or compound, which is marked as ""A B E and D"" in the plan Ex.P1, filed along with the plaint, in accordance with the partition deed and the map partitioning the property which was duly registered, fell to the share of appellant's father and the respondent has started bringing drums in the said open courtyard for storing the same in the brown portion of the property and he had no right to use the courtyard at all and thus, a perpetual injunction was sought restraining the respondent from in any manner using the courtyard. It was further contended by the plaintiff that tinshed and the said roof had been constructed about 32 months prior to the institution of the suit. The suit was instituted on December 12, 1970. The 32 months would take up back to about March-April, 1968. The respondent contested the suit pleadings that the said courtyard was kept for common use of both the parties and has been since used commonly

and according to him, the tin-shed had been constructed in a portion of the property which had fallen to his share and had not been constructed in

any joint passage but he remained silent with respect to the covering the common passage. The learned trial Judge had decreed the suit and

granted the relief of mandatory and perpetual injunction. On appeal, the learned Additional District Judge held that the relief of mandatory

injunction claimed by the plaintiff is barred by limitation. Hence, the appeal before the High Court, Delhi, wherein the ratio decidendi is as follows:

14. In *Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others*, , the facts, in brief, were that the defendant in that case had constructed a wall

in the passage used as a lane for passing and repassing by the plaintiff and also by dumping some earth in the passage he obstructed the plaintiff

from passing and repassing with cattle and carts from the lane. The plaintiff in that case had approached the court for grant of mandatory injunction

after about 9 years of such construction. The trial court in that suit refused to grant relief of mandatory injunction for removal of the wall on the

ground of laches but had granted the relief of injunction requiring the defendant to stop spreading of tandu in portion of lane to the west of the wall

which was an encroachment on the right of way of the plaintiff. In the appeal the High Court also did not grant the discretionary relief of mandatory

injunction for removal of the wall as the plaintiff was held to have acquiesced in the construction of the said wall. The Supreme Court also

endorsed the judgment of the High Court on this point.

15. The learned Sub-Judge in the present case has also declined to grant this relief of mandatory injunction on the ground that this tin-shed had

been constructed more than three years before the filing of the suit without any objection from the plaintiff appellant and he has relied upon *Ata*

Muhammad v. Nur Ahmad AIR 1925 Lahore 642, where also the relief of mandatory injunction for demolishing the construction over a common

wall was refused as the court had been approached by the plaintiff belatedly after 8 years of such construction.

The learned Counsel appearing for the appellant would further contend that the observation in the earlier suit as to ""the proper remedy would be to

file a suit for declaration"" will not give any cause of action to the present plaintiff to file a suit after a period of limitation. The learned Counsel in

support of his contention would rely on the observation of the learned Judge of this Court in the above said ratio in 1998 3 L.W.736 (K.N.

Rathakrishnan v. P.M.M. Rajammal and 6 Ors.), which runs as follows:

15. In Bharathi Amma and Others Vs. Kumaran Peethambaran and Another, , a learned judge of Kerala High Court held that bar of res judicata is

mandatory. When it is applicable, it could be avoided only on grounds available u/s 44 of the Evidence Act. Res judicata is not concerned with the

question whether the previous decision is right or wrong.

16. Mulla On CPC - Fifteenth Edition - Vol.1-1995, at pages 180 & 181, the learned author said thus:

(9) Liberty To Bring A Fresh Suit:- Where a former suit between the same parties in the same Court and for the same relief results in a decree of

dismissal, but the judgment leaves it open to the plaintiff to bring fresh suit and leaves ""open untouched and undecided all matters"" affecting the right

of the parties, the decree does not constitute res judicata, as such matters cannot be said to have been ""heard and finally decided"" within the

meaning of this section. But if the Court has in the particular circumstances of a case no power to reserve liberty to a party to bring a fresh suit the

subsequent suit may be barred as res judicata notwithstanding the liberty to bring a fresh suit. Thus, in ""Watson v. Collector of Rajshahye, the

former suit was dismissed for the plaintiff's failure to produce evidence, but a direction was given that the plaintiff could institute a fresh proceeding

as if no suit had been brought. Nevertheless the Privy Council held that the subsequent suit was barred by res judicata for the reservation was of

no effect. Again, Fateh Singh v. Jagamath Bakhsh, is a case directly on this point. In that case the plaintiffs brought a suit to set aside a gift made by

a Hindu widow out of her husband's estate: they alleged that they were presumptive heirs. The widow died pending the suit. After her death the

plaintiffs applied to amend the plaint by setting up a family custom of inheritance. Upon that application failing and the plaintiffs admitting that part

from the alleged custom they could not succeed, the trial Court dismissed the suit, but gave them liberty to file a fresh suit for possession.

Subsequently, the plaintiffs brought another suit to recover from parties to the former suit a share in the property basing their claim upon family

custom. It was held that the suit was barred by res judicata since the custom

was a matter which might and ought to have been set up in the former suit, and further, that the trial Court having dismissed the suit, it had no power under Order 23 Rule (1), to give liberty to bring a fresh suit.

The learned Counsel appearing for the appellant also placed reliance in Shiv Kumar Sharma Vs. Santosh Kumari, and would contend that the

observation in earlier suit by the trial Judge (Ex.A5 suit) the present suit filed by the plaintiff/the respondent herein, will not save limitation under

Clasue 113 of the Limitation Act, because, the disputed wall is in existence for more than 12 years between ""A"" and ""B"" schedule properties. The

relevant observation in the above said ratio at paragraph No. 29, runs as follows:

29. We therefore, are of the opinion that the High Court was not correct in framing the additional issues of its own which did not arise for

consideration in the suit or in the appeal. Even otherwise, the High Court should have formulated the points for its consideration in terms of Order

41 Rule 31 of the Code. On the pleadings of the parties and in view of the submissions made, no such question arose for its consideration. In any

event, if a second suit was maintainable in terms of Order 2 Rule 4 of the Code, as was submitted by Ms Luthra, no leave was required to be

granted therefor. A civil Court does not grant leave to file another suit. If the law permits, the plaintiff may file another suit but not on the basis of

observations made by a superior court.

Under such circumstances, the suit filed by the plaintiff on the basis of observation in Ex.A5, suit, will not save limitation. The suit is clearly barred

under Clasue 113 of the Limitation Act, 1963, since the disputed wall between ""A"" and ""B"" schedule properties to the plaint is in existence for

more than 12 years. The mandatory injunction sought for the removal of the said wall after a long lapse of 12 years will not save the suit from

limitation. Substantial Question of Law is answered accordingly.

8. In fine, the appeal is allowed and the judgment and decree in A.S. No. 135/1995 on the file of Court of Principal District Judge, Pudukottai, is

set aside and the suit in O.S. No. 344 of 1990 on the file of Court of the Additional District Munsif, Pudukkottai, is dismissed. No costs.