

(2001) 08 MAD CK 0060

In the Madras High Court

Case No : Second Appeal No. 969 of 1988 and Cross Objection No. 37 of 1999

Natarajan

APPELLANT

Vs

R. Muthukrishnan

RESPONDENT

Date of Decision : 13-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 7, 9
Evidence Act, 1872 — Section 101

Citation : (2001) 08 MAD CK 0060

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : T.M. Hariharan, for the Appellant; V. Raghavachari, for the Respondent

Final Decision : Allowed

Judgement

1. The unsuccessful defendant before the courts below has filed this second appeal.
2. The respondent/plaintiff-filed cross objection aggrieved only by not granting decree for mandatory injunction.
3. The plaintiff filed a suit in O.S. No. 2220 of 1981 on the file of the District Munsif Court, Tiruchirappalli for declaration of his title to the suit property, for mandatory injunction to remove the pipeline and for permanent injunction restraining the defendant from letting out obnoxious substances through the pipeline into the open drain in front of the suit property.
4. According to the plaintiff he is the absolute owner of "A" schedule property. The defendant is the owner of "B" schedule property. Plaintiff is entitled to 16 ft. east-west which include eastern wall of the plaintiff's house. Defendant is entitled to 12 ft. east-west of his property, and therefore

the western wall does not belong to him. Taking advantage of the absence of the vendors of the plaintiff, defendant, had put up rain pipe abutting

the eastern, wall of the plaintiff towards, northern side and extended the eastern wall of the plaintiff towards north and thereby trespassed into the

North Andar Street. It is also the case of the plaintiff that the defendant has put up construction affecting the plaintiff's eastern wall of plaintiff.

According to plaintiff, the defendant has, put up a pipe to collect obnoxious materials from the flush out latrine and the said pipe is touching the

north southeastern wall of plaintiff. On that basis plaintiff has filed the present suit.

5. According to defendant, for Door No. 117-A, North Andar Street, Tiruchirappalli, he is the owner measuring 15 ft. east to west and 15 ft,

north to south. The walls on the south, north and west belong to the defendant. It is his further case that ever since 1953 and even prior to that the

pipeline has been in existence in the defendant's house. The ground floor was put to use as a shop by the defendant. The land II floors are being

used for residential purpose by the defendant. According to him, the pipeline was in existence for a long time. The defendant never encroached

upon the plaintiff's property. The existence and use of the pipeline will not be a nuisance to anybody much less to the plaintiff.

6. The trial court decreed the suit in part directing the defendant by way of granting mandatory injunction to construct the septic tank within his

house to deposit the filthy and other substance and also directing not to let out any filthy or obnoxious matter like night soil or urine or other

substance except the storm water and waste water through the drain pipe. With respect to other aspects the suit was dismissed. So the defendant

filed appeal in A.S. No. 326 of 1984 on the file of the District Court, Tiruchirappalli. The plaintiff filed cross appeal insofar as it relates to the

dismissal of the suit is concerned. The lower appellate court found that the suit wall is a common wall both to plaintiff and defendant and dismissed

the appeal and the cross appeal. So aggrieved the defendant has filed this second appeal and the plaintiff the cross objection insofar as it relates to

rejection of his prayer for mandatory injunction. I do not find any grounds in the cross objection challenging the findings of the lower appellate

court holding that the suit wall is a common wall of both plaintiff and defendant.

7. The substantial questions of law that arise for consideration in this second appeal are:-

1. Whether the nuisance complained of is actionable and could be abated through decree of Court?

2. Whether the Courts below are justified in granting the reliefs which go beyond the scope of the suit and the reliefs prayed for therein?

8. The plaintiff is the owner of the western side building and the defendant is the owner of the eastern side building, as shown in the

Commissioner's plan. The question to be decided in this case is whether the wall marked as "CG" is the exclusive wall of the defendant or it is a

common wall. Though the plaintiff has come forward with the plea that it is the exclusive wall of the plaintiff, the same has been negated by the

trial court. But, before the lower appellate court, such a plea claiming exclusive right in the wall has been given up and the lower appellate court has

held that it is a common wall of the plaintiff and defendant. Though the plaintiff has filed the cross objection before this Court, the plaintiff has not

challenged that portion of the decree. On the other hand, in the cross objection, the plaintiff has accepted the decree of the lower appellate court

insofar as it relates to the prayer of declaration is concerned. In view of the above, the respondent/plaintiff cannot now come forward with the plea

that it is the exclusive wall of the plaintiff and the lower appellate court is not correct in holding that it is a common wall.

9. So, we have to decide now whether the suit wall is a common wall as held by the lower appellate court or it is the exclusive wall of the

defendant as held by the trial court.

10. The learned counsel appearing for the appellant/defendant relying on the decision in Arunachalam Pillai Vs. Ram Mudaliar (died) and three

others, , has submitted that the lower appellate court should have confirmed the finding of the trial court, and is not correct in holding that the suit

wall is a common wall as the respondent/plaintiff has filed the suit claiming only absolute right in the property and if he is not able to establish the

same, the suit has to be dismissed, and the common right to the suit wall cannot be granted.

11. In the decision in Arunachalam Pillai Vs. Ram Mudaliar (died) and three others, , no doubt, as submitted by the learned counsel for the

appellant, the plaintiff filed a suit for declaration that the land marked in the plan therein belongs to him absolutely and for injunction. The trial court

dismissed the suit. But the lower appellate court allowed the appeal partly holding that neither the plaintiff nor the 1st defendant had established

their exclusive right to the suit land and so the land had to be kept in common for convenient enjoyment of the plaintiff as well as the 1st defendant.

At the instance of the 1st defendant in the said case, the learned Judge in the said decision has held as follows:-

14. It is clear from the above decisions, that the jurisdiction of the Court to grant a relief must be based on pleadings or at least the opposite party

must have admitted the right of the plaintiff in respect of the portion of the same. In this case, both the plaintiff and the 1st defendant claimed

exclusive title. There is no alternative case for either of the parties. The 1st defendant has also not filed any counter claim and he has filed only

written statement denying the right of the plaintiff. He claims exclusive right only as a defence to the plaintiff's claim and what he prayed for is only

the dismissal of the suit. The question whether the plaintiff and defendant are entitled to equal right over the suit lane was not a matter in issue nor

evidence let in that regard. Only because the suit lane lies in between the properties of the plaintiff and the 1st defendant, the Lower Appellate

Court thought that it has been commonly enjoyed by both of them. When the parties are not at issue and the relief granted by the Lower Appellate

Court is neither incidental to the main relief, following the decisions cited supra, I think that the relief granted was in excess of its jurisdiction. The

relief does not flow either from the plaintiff's claim or on the basis of any admission of the defendants. In such cases, the Court cannot grant a relief, as

has been granted by the lower Appellate Court. Consequently, the first substantial question of law raised in the second appeal has to be found in

favour of the appellant. The lower Appellate Court has no jurisdiction to grant a declaration that the plaintiff's lane is a common lane. On question

No. 2, it has to be held that when there is a finding that the plaintiff has failed to establish his case, it can only dismiss the suit and cannot grant a

decree as has been done in this case. On question No. 3, I hold that such question does not arise for consideration, since the suit has only to be

dismissed.

Though the learned Judge has relied on the decision in *Sambayya and Anr. v. Gopalakrishnamma*, I.L.R.15 Mad. 439, the Division Bench

judgment of this Court, was not relevant to be relied on to decide the issue raised before the learned Judge.

12. With respect, I am not able to accept the view taken by the learned Judge in the abovesaid decision, in view of the decision of the Apex Court

in the decision in *B.R. Ramabhadriah Vs. Secretary, Food and Agriculture Department, Andhra Pradesh and others*, . While dealing with the

power of the court to grant smaller relief that may be found to be entitled in law, it has been held therein as follows:

5. It is true that the writ petition contained a prayer for the quashing of the gradation list in so far as it related to the inter se ranking of the

petitioner vis-a-vis respondents Nos. 3 to 8 and the petitioner (appellant) had also sought the issuance of a writ of mandamus directing

respondents Nos. 1 and 2 to forbear from implementing or acting upon the said gradation list. But, subsequent to the institution of the writ petition,

the Central Government had re-fixed the ranks of respondents Nos. 1, 4, 5, 7 and 8 (Telengana Officers) and placed them below the appellant

thereby redressing the grievance of the appellant in so far as it pertained to the ranking of the aforesaid respondents. It therefore became

unnecessary for the appellant to pursue his claim for relief with respect to the ranks assigned to those five respondents. It was under those

circumstances, that the appellant submitted before the learned single Judge of the High Court, at the time of final hearing of the writ petition, that he

was pressing the writ petition only in so far as it related to his claim for seniority over the 6th respondent. We fail to see how the fact that the

appellant had sought in the writ petition the issuance of a writ of mandamus directing respondents 1 and 2 to forbear from implementing or acting

upon the provisional gradation list will operate to preclude him from seeking a lesser relief, namely, the quashing of the list only in so far as it

pertains to the fixation of the inter se seniority between himself and the 6th respondent. The material facts and circumstances had undergone a

substantial change subsequent to the filing of the original petition and it was in consequence thereof that it had become unnecessary for the

petitioner to pursue his original prayer for the grant of a larger relief. Besides ignoring this crucial aspect, the Division Bench of the High Court has

also lost sight of the well established principle that in an action where a party has prayed for a larger relief it is always open to the court to grant him any smaller relief that he may be found to be entitled in law and thereby render substantial justice. The Court can undoubtedly take note of changed circumstances and suitably hold the relief to be granted to the party concerned in order to mete out justice in the case. As far as possible the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow procedural grounds. We do not, therefore, find it possible to uphold the view expressed by the Division Bench of the High Court that since the writ petition was not pressed in so far as it related to the officers belonging to the Telengana region the question of inter se seniority between the writ petitioner and the 8th respondent should not have been considered by the single Judge and the writ petition should have been dismissed.

6. Accordingly, we set aside the judgment of the Division Bench and remand the writ appeal to the High Court for fresh disposal in accordance with law. The parties will bear the irrespective costs in this appeal.

13. While considering the scope of Order 7, Rule 7 of Civil Procedure Code, 1908, the Apex Court in the decision in Hindalco Industries Ltd. Vs.

Union of India (UOI) and Others, , has held as follows;-

6. It is seen that the appellant sought for declaratory relief that the rates being charged are "wholly unjust and unreasonable" and for a direction to

the railways to charge "reasonable rates" on the basis of actual distance of 568 km together with other consequential relief. It is to be remembered

that the relief otherwise cognisable by Civil Court of competent jurisdiction u/s 9 of the CPC has been, statutorily conferred on the Tribunal with

powers of a Civil Court to decide the claims under the Act. Order 7, Rule 7, CPC provides that every plaint shall state specifically the relief which

the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the

Court may "think just" to the same extent as if it had been asked for, and the same rule shall apply to any relief claimed by the defendant in his

written statement. Order 2, Rule 2 enjoins to claim the relief in respect of a cause of action and under Clause 3 of Order 2, Rule 2, if he omits to

seek the relief, except with the leave of the court, he shall be precluded thereafter for any relief so omitted.

14. So, under Order 7, Rule 7 of the Code, an equitable relief has to be granted, in such cases, to the parties concerned. It is only to avoid

unnecessary multiplicity of suits in case where relief can be granted in the facts and circumstances of particular case even if not so restrictly pleaded

or a relief sought for on such facts. The objection now raised by the learned counsel appearing for the appellant is that the lower appellate court

could not have declared that the suit wall is a common wall as the plaintiff is claiming only absolute right. When the Court is able to come to such a

conclusion on the basis of the evidence available on record, the Court should not drive the plaintiff to file any other suit without deciding the same in

the present suit. In view of the abovesaid fact, the submission of the learned counsel appearing for the appellant that the conclusion of the lower

appellate court that the lower appellate court has no jurisdiction to come to the conclusion that the suit wall is a common wall cannot be sustained.

15. The learned counsel appearing for the appellant referring to the findings of the trial court in para 7, in support of his submission, has stated that

the trial court has elaborately dealt with the evidence available on record and rightly come to the conclusion that the suit wall belongs to the

defendant exclusively. He has also submitted that the lower appellate court, without deciding the issue, by appreciating the plaintiff's evidence,

modified the decree only on the basis that the defendant has not established his exclusive right. On that basis the learned counsel has further

submitted that the lower appellate court has not decided the issue on the basis of the evidence adduced by the plaintiff who has to establish his

case. I find some force in the said argument. The lower appellate court has also modified the decree and held that the suit wall is a common wall,

only on the basis that the defendant has not established his case. Such an approach, cannot be sustained.

16. For all the reasons stated above, without going into the merits of the case, I am setting aside the judgment and decree of the lower appellate

court and remand the matter to the lower appellate court, for fresh disposal in accordance with law, and, while dealing with the case the lower

appellate court have to keep in mind the followings points :-

(1) The plaintiff is entitled to 15 ft. 6 inches east-west on the northern side. This finding of the lower appellate court is not under challenge before this Court. So, the same has become final.

(2) The plaintiff cannot claim any exclusive right in the wall in view of the fact that the plaintiff has not challenged the findings of the lower appellate court in this regard. So, the lower appellate court has to decide on merits, whether the suit wall is the exclusive wall of the defendant or a common wall of the plaintiff and defendant.

17. With the above observations, this second appeal is allowed and remanded. The cross objection is dismissed in view of remand, of the appeal.

No costs.