
(1999) 01 MAD CK 0080
In the Madras High Court

P. Selvaraj and Another

APPELLANT

Vs

P. Swamy Nadar and Others

RESPONDENT

Date of Decision : 28-01-1999

Acts Referred:

Citation : (1999) 2 MLJ 159

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Division Bench

Judgement

K.P. Sivasubramaniam, J.—This second appeal is directed against the Judgment and decree of the learned Subordinate Judge, Nagercoil, dated 29.7.1986 in A.S.No. 2 of 1986 in partly, allowing the judgment of the learned Principal District Munsif, Nagercoil in O.S.No. 1041 of 1982. The defendants in the suit are the appellants in the second appeal.

2. The suit is filed for permanent injunction restraining the defendants from encroaching upon or making any construction over the south eastern border of the plaint schedule property and also from blocking the pathway shown in blue colour shade in the plan annexed to the plaint. According to the plaintiff the property originally belonged to one Vethanayagam along with a larger extent. The said properties were hypothecated to one Madaswamy Nadar, who is the predecessor-in-interest of the plaintiffs. As the hypothecatee failed to discharge the amount due under the hypothecation deed O.S.No. 522 of 1106 M.E. was filed before the Additional District Munsif's Court, Nagercoil against the abovesaid three sons of Vethanayagam, and the suit was decreed giving a charge over the entire property covered by the hypothecation deed. In order to avoid the entire property covered by the hypothecation deed being sold in court auction, the three sons of the hypothecatee executed a sale deed dated 21.10.1106 M.E. in favour of the plaintiffs predecessor in interest and Conveyed to the vendee the entire plaint schedule property. While excuting the said sale deed, a portion of the property was reserved with the vendors, predecessors of the defendants. Therefore, according to the plaintiffs, a portion of the hyptheca

was saved from being sold. The sale, deed clearly provided for pathway for access to the property conveyed from the public pathway on the south. The plaintiffs and their predecessors have been using the said pathway to get access to the property from the date of the sale deed. Therefore according to the plaintiffs, from the date of the said sale deed, the defendants' predecessors have completely lost their title and possession over the property. The defendants have no right to encroach upon any portion of the said property or to block the pathway to the plaintiffs to get access to the property. But since 3.12.1982, the defendants were attempting to encroach upon the south eastern border. They also attempted to encroach the portion which was shown in the plan with dotted lines. They were also trying to close the pathway, leading to the plaintiff schedule property; Pursuances to the defendant to desist from such wrongful acts were of no avail and hence the suit.

3. The said claims were opposed by the defendants and it is not necessary to go into the merits of the mutual claims, having regard to the ultimate decision remand this appeal for enabling the plaintiffs to amend the plaint as required under the following circumstances.

4. Both the courts have concurrently found that the plaintiffs are entitled to their claim for permanent injunction. The courts below have recorded the said finding in favour of the plaintiff after detailed analysis of the facts and circumstances of the case and the plaintiff having been found to be in possession of the property. The said finding being a pure question of fact, this Court, is not inclined to interfere with the said finding and the consequential decree for injunction.

5. However, as pointed out by the learned Counsel for the appellants, the lower appellate court has granted a decree for mandatory injunction also and that the lower appellate court is not justified in having done so in the absence of a specific prayer for mandatory injunction. In this context, it is pointed out that the trial court has rightly held that even though the plaintiffs have established their claim for permanent injunction, since they have not prayed for mandatory injunction for the removal of the obstruction, they were not entitled to such a relief and that they are entitled to file a separate suit for the said prayer.

6. However, the lower appellate court referred to a judgment of the Supreme Court reported in *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, , and held that the courts were entitled to grant a consequential relief in the absence of separate prayer by the plaintiff. He has relied on the observation of the Supreme Court that if a particular fact arising after the filing of the suit has come to the notice of the court and if the change of circumstances has a fundamental impact on the right to grant relief or the manner of moulding it is demand necessary the tribunal; the court cannot close its eyes and refuse to taken into account the subsequent events. The lower appellate court also relied on the observation that equity would justify bending of the rules of procedure. On the basis of such observations, the lower appellate court held that as a result of upholding the right of the plaintiffs to have access to the property, the relief of

mandatory injunction was also incidental and with the result the lower appellate court granted the relief to remove the obstruction which is said to have been put up by the defendants after the filing of the suit.

7. Learned Counsel for the appellants strenuously contends that such a relief could not have been granted in the absence of a specific prayer and the trial court has also not framed any separate issue for decision pertaining to the claim of mandatory injunction.

8. I have carefully considered the submissions of both sides. The decision relied on by the lower appellate court reported in *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, pertains to a case where the subsequent events disabled the landlord from seeking eviction. Therefore, in such a case the very cause of action having failed to subsist as a result of the subsequent events, the Supreme Court had observed that the court was bound to consider the subsequent events. The said decision cannot be relied on for the purpose of the facts of the present case. The very submission of the learned Counsel for the respondent is that the obstruction was put up only subsequent to the filing of the suit. Therefore, on the very basis of the said submission, it would give rise to a different cause of action and the decision of the Supreme Court cited above cannot apply to the facts of the present case.

9. Mr. Selvaraj the learned Counsel for the respondent also referred to a judgment of the Supreme Court in *Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others*, . The learned Counsel relied on the observation of the court in paragraph 29 of the judgment. That was a case in which subsequent events were held justified in order to substantiate the plea for amendment of the pleadings.

10. Reference was also made to Sarkar's Law of Civil Procedure (eighth edition). Reliance was placed on the observations contained at page 637 that it is a fixed principle of law that a suit must be tried on the original cause of action and that to the said proposition there were few exceptions. Sometimes it may happen that the original relief claimed becomes inappropriate or infructuous and in such circumstances, the court may allow the amendment of pleadings taking note of the changed circumstances, some times the changed circumstances may shorten litigation and then to avoid multiplicity of action the court shall allow the amendment.

11. The judgment of the Supreme Court, reported in *Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others*, and the observations contained in Sarkar's Law of Civil Procedure are with reference to the right of the party to have the pleadings amended as a result of the changes caused by subsequent events. This is not a case where the plaintiffs have come forward seeking an amendment of plaint. The trial court had in fact rightly held that the plaintiffs were entitled to file a separate suit if they were so advised to pray for mandatory injunction. However, for the reasons known to the plaintiffs, they sought to file

an appeal instead of filing a separate suit or to seek for permission to amend the plaint before the trial court itself.

12. It is needless to point out that in a suit for mandatory injunction, the court has to exercise its discretion and such a relief cannot be granted merely on the basis of certain facts. The court has to consider as to whether the parties seeking mandatory injunction were guilty of laches or as to whether there was any acquiescence on the part of the plaintiff. The further question to be considered before the relief of mandatory injunction is granted is also as to whether the damages caused to the plaintiff could be compensated in terms of money. Only after consideration of all the said issues, a court of equity can exercise its discretion to grant mandatory injunction or not. Admittedly, in the present suit, there has been no prayer for mandatory injunction and no occasion arose for the trial court to frame or consider the said issue.

13. Therefore, it follows that in the absence of specific prayer for mandatory injunction and the need for such a relief arose even according to the plaintiff only as a result of subsequent events, the lower appellate court was not justified in granting the relief of mandatory injunction.

14. The learned Counsel for the respondent however pleads that the plaintiffs need not be on suited only on the ground that a formal prayer had not been pleaded in the plaint and that the plaintiffs, had not sought for an amendment and that even now it was open to the court to permit the plaintiffs to amend the plaint accordingly.

15. I have considered the submissions of the learned Counsel for the respondent, I am inclined to hold the no prejudice would be caused in permitting the plaintiffs to seek for suitable amendment praying for mandatory injunction and also at the same time permit the defendants to raise all grounds which are available to them to resist the claim for mandatory injunction. Both parties will be entitled to let in evidence in support of their mutual claims and therefore no prejudice will be caused in permitting the plaintiff to amend the plaint in the manner as he may be advised to do so.

16. In the result, the second appeal is partly allowed. The findings with reference to grant of the decree for permanent injunction in favour of the plaintiffs are confirmed. But so far as the grant of mandatory injunction granted in favour of the plaintiffs, the decree of the first appellate court is set aside. The suit is remanded to the trial court giving liberty to the plaintiffs to amend the plaint claiming the relief of mandatory injunction and the defendants are entitled to file additional written statement in the said context. Both parties are entitled to adduce documentary and oral evidence in support of their mutual pleadings.

17. In the result, the second appeal is partly allowed and the suit is remanded to the trial court. The trial court is directed to dispose of the suit within three months from the date of the receipt of the records and a copy of this judgment. The parties are directed to appear before the trial court on 26.2.1999. No costs.