

(2017) 03 MAD CK 0126

MADRAS HIGH COURT

Case No: 149 of 2006

Mr.Kothandan(Deceased), & Ors.

APPELLANT

Vs

Mangal Lakshmi, & Ors.

RESPONDENT

Date of Decision: March 1, 2017

Acts Referred:

- Limitation Act, 1963, Section 22 - Continuing breaches and torts

Hon'ble Judges: G.Jayachandran

Bench: SINGLE BENCH

Advocate: G.Jayachandran

Final Decision: Dismissed

Judgement

1. The suit is filed for declaration, declaring that the "D" schedule property is a portion of public street known as "Anna Street" in new Perungulathur Village, Saidapet Taluk and for declaration that the plaintiff is entitled to right of way over the "D" schedule property and mandatory injunction directing the defendants to remove all the obstructions and constructions put up on the "D" schedule property. The Trial Court after considering the evidence placed before it held that the defendant has encroached upon the "D" scheduled property in S.No.152/1 and allowed the suit and decree was passed as prayed for in the plaint. On appeal by the first defendant, the Appellate Court confirmed the Trial Court decree. Aggrieved by that, the first defendant has preferred this Second Appeal raising the following substantial question of law:

"Whether the Judgment and Decree for declaration of the "D" schedule and for mandatory injunction for removal of the alleged encroachments can be sustained in the light of the evidence of D.W.5 and Ex.X3 and X4?"

2. The facts leading to this Second Appeal is that, the plaintiff is the owner of the house and ground bearing Door No.2D, Anna Street, New Perungalathur Village. The said property is morefully described in the "A" schedule property of the plaint. This property is situated on the West of Anna Street. While the Southern half of the Anna Street is broad, the situated segment of the street, where the first defendant's land and building is narrowed due to the encroachment of the first defendant upon the portion of the street. The alleged encroached portion is described as "D" schedule in the plaint. As a result of the representation made to the fifth defendant, direction was given by him to the executive officer of the Panchayat, who is arrayed as second defendant to remove of the encroachment, if any. Since the fifth defendant has not taken any action, suit filed for the relief mentioned above.

3. The first defendant contended that he has not encroached any portion of the road as alleged in the plaint. He purchased property bearing Door No.2C, Anna Street and he is in peaceful possession and enjoyment of the property since his date of purchase on 05.01.1983. As per the sale deed, he is in possession of the "D" scheduled property, but no encroachment made by him. Revenue authorities have measured the property and has duly issued patta in his favour. The property in his possession is inconsonance with the sale deed prior to his purchase executed on 27.07.1970 and 17.09.1973. The averment of the plaintiff that the breadth of Anna Street is 20 feet itself is a false claim without any evidence. The street is used by the residents of Anna Street and as an individual, the plaintiff cannot maintain a suit in respect of "D" scheduled property. Further the defendant have an alternate way on the northern side, which is called as Lal Bhadhur Shastri Street, which is broad enough for extensive use of the said street residents. The suit is filed with an ulterior motive with incorrect facts. Hence, liable to be dismissed.

4. The point canvassed by the counsel for the appellant is that since the purchase of his predecessor in title under Ex.B1 in the year 1970, the extent of the property includes the "D" schedule portion. The present suit filed in the year 1993 is barred by limitation and any mandatory injunction relief can be granted only if it is sought within a period of three years, while the plaintiff has not mentioned the exact date of encroachment, no mandatory relief can be granted. The Courts below without any substantial evidence before it to prove Jayarama Reddiar and Mangaithayammal@ Lakshmiammal has set apart land for formation of Anna Street with the specific width, has come to the wrong conclusion that the first defendant has encroached upon "D" schedule property. The evidence of D.W.5, who is a staff under second defendant has clearly deposed that survey stones were found in the disputed "D" schedule portion and no material to show there was a encroachment by the first defendant. When there is a specific evidence from D.W.5 that the measurement of Anna Street is only 3.75 meters (16 feet), the prayer of the plaintiff

that Anna Street is about 22 feet wide is devoid of merit and therefore, the Courts below ought not to have held that the appellant has encroached into Anna Street.

5. The learned counsel appearing for the respondent submitted that the Courts below after considering the matter placed before it has come to right conclusion that there is an encroachment upon the public street by the appellant herein and therefore the encroached portion is liable to be removed. Furthermore, pending appeal, the appellant failed to serve notice to R4-the Tahsildar, Saidapet Taluk, who is the person to carry out mandatory injunction. Therefore, in view of the dismissal of the appeal against R4 , the second appeal ought to be dismissed.

6. It is pertinent to point out that at the time of selling the plots by the common vendor, the lay out was not approved lay out and admittedly the portion alleged to have been earmarked for street were not dedicated to Panchayat by way of any conveyance. It is from the sale deeds of the respective parties, which is marked as Ex.A1, A2, A3 and A4, the Court is able to infer the actual width of the street named as Anna Street. It is admitted by D.W.5 that the public street was not settled in favour of Panchayat as required in the Town and Country Planning Act. The Ex.A1, which is the document through which the appellant gets title is of the year 1970. It is the sale deed executed in favour of one Mr.Selvaraj, who is the first defendant's vendor. The recital in Ex.B1 indicates that 8 feet land is set apart for road on the Western side of the property.

7. The case of the plaintiff is that, one Jayarama Reddiar has left 14 feet through Ex.A1 on the East of that land. The 8 feet land left for road on the Western side of defendants property and the 14 feet land left by Mangaithayammal @ Lakshmiammal on the Eastern side of Anna street put together is 22 feet and converting 100 links found in Ex.A2 is equivalent to 66 feet, the Trial Court had arrived at a conclusion that the measurement of the property purchased by the first defendant from Ganesan vide sale deed dated 05.01.1983 is 58 feet on the Northern side , 75 feet on the Southern side, 43 feet on the Western side and 36 feet on the Eastern side and concluded that defendants vendor's vendor i.e. Selvaraj has sold more than what he purchased from Mangaithayammal on the southern side through Ex.B2. Thus, the Trial Court has held that while Ex.B1 dated 21.03.1970 showing lesser extent, subsequent sale deed Ex.B2 and B3 executed by Selvaraj in favour of Ganesan and Ganesan in favour of Kothandan (appellant) shows larger extent. With these findings and observations, the Trial Court has found that the defendant has encroached upon "D" schedule property and decreed the suit.

8. The First Apellate Court after re-appreciating the evidence and relying the Advocate Commissioner's report that "D" schedule property is part of Anna Street and the first defendant has encroached upon it. The case of the first defendant that "D" schedule property is part of "C" schedule property, which he has purchased

from Ganesan in the year 1983 is found to be incorrect based on the parent document of Ganesan. The Court have rightly observed that Ganesan has alienated a property more than what he purchased from Selvaraj. Since the larger extent has been sold to the first defendant without right of title over the property, the excess extent described in "D" schedule property is liable to recover and any superstructure put upon which is liable to be removed.

9. This Court finds no error in the application of law in the given facts and circumstances of the case. Though the counsel for the appellant strenuously argued that evidence of DW5 and Ex.3 and 4 were not given due consideration, these documents will not enhance the case of the appellant while there is inherent defect in his title deed and on the physical inspection of the suit property, a clear encroachment is found. There is no reason to infer the concurrent finding of the Courts below.

10. The counsel for the appellant contended that the suit for mandatory injunction has to be filed within a period of three years since the suit is filed beyond a period of three years no mandatory relief can be granted. To counter the said statement, the counsel for the respondent relied upon a case reported in 2011(3) CTC 769, Hari Ram V. Jyoti Prasad, wherein the Hon'ble Supreme Court has held as follows:

"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."

11. Under Section 22 of the Limitation Act, 1963, in case of a continuing breach of contract or in case of 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. In *Sankar Dastidar v. Shrimati Banjula Dastidar and Anr*, reported in 2007(2)CTC 570 : AIR 2007 SC 514, Supreme court has held that when a right of way is claimed whether public or private over a certain land over which the tort-feasor has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply.

12. In the light of the facts discussed above and citations of the Hon"ble Supreme Court, this Court finds that there is no merit in this appeal and hence liable to be dismissed.

13. In the result, Second Appeal is dismissed. There shall be no order as to costs.