



S.A.No.14 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.03.2024
PRONOUNCED ON : 04.04.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.14 of 2013 &
M.P.No.1 of 2013

Ramalingamurthi

... Appellant

-Versus-

1.K.K.Pachiappa (died)

2.K.K.Karthikeyan (died)

3.K.Deivanai

4.K.M.Vijayalakshmi

5.Sathish

6.K.P.Janaki

7.K.P.Nithya

8.K.P.Suganya

9.K.P.Kathirvel

10.K.K.Parvatavarthini

11. K.K.Vipin

... Respondents

(Respondents 6 to 9 brought on
record as Lrs of the deceased R1
vide order dated 10.08.2022 in
CMP.No.12483 of 2022)

(Respondents 10 & 11 brought on
record as Lrs of the deceased R2
vide order dated 08.03.2024 in



S.A.No.14 of 2013

CMP.Nos.3629, 3631, 3633 &
3634)

WEB COPY

Appeal filed under Section 100 of C.P.C. against the judgement and decree dated 19.01.2011 passed by the learned Subordinate Judge, Gobichettipalayam in A.S.No.36 of 2010 confirming the Judgment and Decree dated 05.04.2010 passed by the Learned District Munsif, Gobichettipalayam in O.S.No.74 of 2001.

For Appellant : *Mr.H.Nazirudeen, Senior Counsel,*
Mr.Haribabu

For Respondent 3 : *Mr.P.Rajendran*

For Respondent 4 : *Mr.Easan*

For Respondents : *Mr.K.Myilsamy*
7 to 11

JUDGEMENT

The present second appeal arises out of the judgment and decree of the court of learned Subordinate Judge at Gobichettipalayam in A.S.No.36 of 2010 dated 19.01.2011 in confirming the judgment and decree of the court of learned District Munsif at Gobichettipalayam in O.S.No.74 of 2001 dated 05.04.2010.

2. For the sake of convenience, the parties will be referred to as their ranks in the suit.



S.A.No.14 of 2013

WEB COPY

3. The second defendant is the appellant before me.

4. The plaintiffs presented O.S.No.74 of 2001 before the learned District Munsif at Gobichettipalayam for the relief of mandatory injunction directing the defendants to restore the suit wall to its original condition and remove the encroachments made by them as shown in the plaintiff's plaint as A.A1 portion and for costs of the suit.

5. This is not a first suit between the parties. This is a second round of litigation. Originally the defendants herein were the plaintiffs in O.S.No.167 of 1987. In that suit, the relief that had been sought for was a declaration of title to the present first defendant's property and for injunction restraining the plaintiffs herein from interfering with the defendants' peaceful possession of the property. The property is not a landed property but a wall separating the property of the plaintiff and the defendants. O.S.No.167 of 1987 was decreed by the learned Subordinate Judge at Gobichettipalayam on 16.12.1987. Against the said judgment and decree, an appeal and cross appeal were preferred before



S.A.No.14 of 2013

the learned District Judge at Erode in A.S.No.8 of 1988. Both the appeal and cross appeal were disposed of by a common judgment of the learned District Judge on 20.04.1988. Against the said judgment and decree, a second appeal was preferred before this court in S.A.No.1665 of 1988. The second appeal was also dismissed by this court on 28.08.2000.

6. The result of the previous litigation was that the suit wall was held to be a common wall belonging to the first plaintiff therein, namely the first defendant herein, and the first defendant therein namely the first plaintiff herein. During the pendency of the first suit, the suit wall was demolished by the present defendants and a fresh construction was put up by them. Therefore, the defendants in O.S.No.167 of 1987 as plaintiffs filed O.S.No.74 of 2001. The prayer is rather simple. They want restoration of the wall that has been demolished by the defendants.

7. The defendants, on service of summons, entered appearance and filed a detailed written statement. According to them, the suit wall is not an exclusive wall of the plaintiffs and it was an old one. Due to natural causes, the wall fell down on its own and it was not demolished by the defendants. They



S.A.No.14 of 2013

pleaded that the plaintiffs have no space on the western side of the compound wall. According to them, they have the right to build the wall and pillar and the suit wall is in existence without any change. They pleaded that the Gobichettipalayam Municipality had sent a notice stating that the wall is in a dilapidated condition and that the wall may fall due to natural causes because it was constructed with mud. The defendants further pleaded that they left out ½ feet - ¾ feet and raised 9 pillars in the area.

8. The second defendant filed a written statement during the course of pendency and pleaded that the wall is not eight feet in height and the old wall was only 4 ½ feet, as stated by the Advocate Commissioner in the report filed in O.S.No.167 of 1987. He would plead that the suit is barred by limitation and is also hit by estoppel by conduct and therefore, the suit has to be dismissed.

9. On the basis of these pleadings, the learned trial judge framed the following issues:

- “1. வாதிிகள் தாவாவில் கோரியபடி செயலுறுத்துக்கட்டளைப் பரிகாரம் கோர தகுதி பெற்றவரா?
2. வாதிக்கு வேறு ஏதேனும் பரிகாரம் பெற தகுதி பெற்றவரா?



S.A.No.14 of 2013

10. On the side of the plaintiffs, the second plaintiff/K.K.Pachaiappan entered the witness box as PW1 and Ex.A1 to Ex.A6 were marked. The second defendant deposed on behalf of the defendants as DW1 and marked Ex.B1 and Ex.B2. Pending the suit, an Advocate Commissioner visited the suit property and he submitted a report and plan. These were marked as Ex.C1 to Ex.C3.

11. Pending the suit, the first defendant viz., Vedhambal @ Kaliasammal passed away and therefore, the third defendant who is her daughter K.M.Vijayalakshmi was impleaded as a party to the suit, pursuant to an order of the court dated 20.02.2008 in I.A.No.1260 of 2007. On a detailed analysis of the evidence let in before the court, the learned trial judge decreed the suit as prayed for.

12. Aggrieved by the same, the second defendant preferred A.S.No.36 of 2010. The appeal was preferred only by the 2nd defendant before the learned District Judge as stated above. The learned District Judge concurred with the findings of the court below and came to the conclusion that the wall being a common wall and the defendants having demolished it are bound to reconstruct the same. Consequently, she confirmed the decree of mandatory injunction.



S.A.No.14 of 2013

Having come to the said conclusion, the learned District Judge dismissed the appeal. Against the concurrent findings, the present second appeal has been presented before this court.

13. This appeal was admitted on the following substantial questions of law on 01.02.2013:

“ 1. Whether the courts below have committed an error in granting the relief of mandatory injunction when the alleged demolition of the wall took place in the year 1987 and the suit was not filed within three years thereafter?

2. Whether the courts below have committed an error in holding that the suit is not barred by res judicata?

3. Whether the lower appellate court has committed an error in excluding the period of pendency of O.S.No.167/1987 up to the disposal of the second appeal arising therefrom for holding that the present suit was filed in time?”

14. On service of summons, Mr.P.Rajendran entered appearance on behalf of the respondent 3, Mr.Easan entered appearance on behalf of the respondent 4 and Mr.K.Myilsamy entered appearance on behalf of the



S.A.No.14 of 2013

respondents 7 to 11.

WEB COPY

15. I have heard Mr. H.Nazirudeen learned senior counsel for Mr.Haribabu for the Appellant and Mr.K.Myilsamy for the respondents 7 to 11.

16. Mr.H.Nazirudeen would submit that the courts below erred in granting a mandatory injunction because the first defendant had demolished the wall as early as 1987 and the suit came to be filed in the year 2000. According to him, by virtue of the judgment and decree in O.S.No.167 of 1987, the present suit is barred by principle of *res judicata*. He would plead that the judgment in O.S.No.74 of 2001 being contrary to law requires to be set aside and interfered with.

17. Mr.K.Myilsamy would submit that the scope of O.S.No.167 of 1987 and that of the present suit are totally different. He would state that the defendants herein as plaintiffs in that suit had claimed that the wall absolutely belonged to them and the issue decided by the courts was whether the wall is an exclusive one or a common wall. The courts till the high court, held that it was a common wall. He would state that in the present case, the issue that has



S.A.No.14 of 2013

to be decided is whether the common wall that was demolished by the defendants has to be restored and therefore, he would submit that the principle of *res judicata* would not apply. He would also draw the attention of this court to the deposition of the first defendant as first plaintiff in O.S.No.167 of 1987 in order to press forth that the plaintiffs in that suit had demolished the wall and it was not a fault of the plaintiffs herein and he suffered due to the demolition. He adds that this court should not interfere with the second appeal and it deserves to be dismissed.

18. I have carefully considered the arguments on both sides and I have gone through the records.

19. The issue that I have to decide is whether when one co-owner demolished a common wall, the court can issue a mandatory injunction to restore the same.

20. It is not in dispute that the plaintiffs and the defendants have litigated over the wall for over 15 years which finally wound up before this court. O.S.No.167 of 1987 was the suit for declaration and injunction filed by the defendants herein claiming that the wall absolutely belonged to them. The



S.A.No.14 of 2013

learned Subordinate Judge, Gobichettipalayam decreed that the wall is a common wall and the plaintiffs herein have a right over 5 feet to the West of the common wall.

21. Aggrieved over this declaration, the plaintiffs herein preferred an appeal before the appellate court in A.S.No.8 of 1988. The Learned District Judge at Erode also confirmed the judgment and decree and dismissed the appeal and cross appeal. Aggrieved by the concurrent findings of the courts below, S.A.No.1665 of 1988 had been preferred before this Court. The said second appeal was also dismissed.

22. These facts are not in dispute and borne out by records filed by the plaintiffs in this case. According to the plaintiffs herein, sometime in 1987, the defendants deliberately demolished a portion of the compound wall and put up a construction therein. The defendants have pleaded that they never demolished the wall nor have they encroached upon it. According to him, the suit is barred by limitation since the cause of action arose in 1987 and the suit was filed in the year 2000.



S.A.No.14 of 2013

23. In order to substantiate their case, the defendants herein marked Ex.B1 namely the notice that has been issued to the defendants by the Gobichettipalayam Municipality and also the report of the Advocate Commissioner under Ex.B2. None of these documents would support the plea of the second defendant that the wall had fallen down due to natural causes.

24. Once this plea fails, I have to decide whether the defendants had demolished the wall or whether it collapsed on its own. It is here, the deposition of the first defendant as the first plaintiff in O.S.No.167 of 1987, which has also been filed in this case as Ex.A5, becomes relevant. The relevant portion of the cross examination, has been extracted by the courts below, throws a lot of light about how the wall had come down and a new wall had come up. It reads as follows:

“ தாவா காம்பவண்ட் சுவரை இடித்து ஒரு வருடம் கழித்துத்தான் கட்டிடம் கட்ட அனுமதி வந்தது. பிறகு தான் சிமெண்ட் தூண்களின் ஊடே தென் வடலாக சுவர் இன்னும் எழுப்பவில்லை. ஆனால், காம்பவண்ட் சுவரை இடித்து விட்டுத்தான் கட்டிடம் கட்ட ஆரம்பித்தோம். காம்பவண்ட் சுவரை நான் இடித்தபோது 1ம் பிரதிவாதி இருந்தார். ஆனால் அவர் ஆட்சேபணை செய்யவில்லை அவர் கூகலூரில் குடியிருக்கிறார். பின்னர் 1வது பிரதிவாதி கட்டிடம் கட்ட ஆரம்பித்து 10 மாதத்திற்கு முன்பு ஆட்சேபணை செய்ததால் நாங்கள் கட்டிடம் கட்டுவதை நிறுத்திவிட்டோம். காம்பவண்ட் சுவர் இடித்தபோது 1ம் பிரதிவாதி ஆட்சேபணை செய்யவில்லை. கட்டிடம் கட்டி முன்று மாதம் கழித்து தான் ஆட்சேபணை செய்தார். ”



S.A.No.14 of 2013

WEB COP

25. When the first defendant herself has admitted that she had demolished the wall, it does not lie in her mouth to plead that the wall had fallen due to natural causes or that she had nothing to do with its demolition. This aspect has been correctly appreciated by the trial court as well as the lower appellate court.

26. From the evidence, it is clear that the appellant had demolished the common compound wall and put up a construction. This construction was absent, when the advocate commissioner had visited the suit property pursuant to the warrant issued to him O.S.No.167 of 1987. The evidence of the first defendant herein as first plaintiff in O.S.No.167 of 1987 has also been filed in this case as Ex.A5. When the commissioner visited the site, he found that there was only a foundation, subsequently the new wall has come up over the suit area. Hence, it is easy to conclude that the existing compound wall had been demolished by the 1st defendant and they have put up a new construction. Therefore, the compound wall having been demolished by the defendants, it is their duty to restore the same to its original position as per the declaration of the court in O.S.No.167 of 1983.



S.A.No.14 of 2013

WEB COPY

27. The first defendant rushed to the court claiming right over the property. The court came to her rescue but unfortunately she had taken the law into her own hands and demolished the wall for which the plaintiffs came to the court. One co-owner having acted in detriment to the interests of the other co-owner, the former must construct the wall as it stood before such a demolition.

28. Insofar as the period of limitation is concerned, the matter was decided by this Court on 28.08.2000, when the second appeal was dismissed. The issue whether the plaintiffs or the defendants are the real owners of the wall came to a conclusion only on 28.08.2000 holding that the defendants and the plaintiffs are co-owners. Had the suit in O.S.No.167 of 1987 been decreed as prayed for, the first defendant herein could take a stand that as the absolute owner of the wall, she is entitled to demolish and reconstruct the same. Fortunately for the trial court, the appellate court as well as this court, in the previous round of litigation, the courts had given a finding that the wall is one in common. The previous round of litigation having attained finality on 28.08.2000, immediately this suit had been filed on 08.12.2000. Therefore, I am not able to see any latches on the part of the plaintiffs.



S.A.No.14 of 2013

WEB COP

29. The right and possession of the parties having been concluded in August 2000, the plaintiffs have come forward with the present case in December 2002 to enforce their rights granted under the decree in O.S.No.167 of 1987. This shows that there has been no laches or acquiescence on the part of the plaintiffs. Despite the decree of the courts, the plaintiffs had kept quiet over the long period, then Mr.Haja Nazurudeen is certainly right to argue that the plaintiffs are not entitled to any relief as they had kept quiet, when their right was being interfered with by another. However, when the issue itself came to a conclusion only in the August 2000 and the suit having been filed immediately, I am not able to find any fault with the plaintiffs. These issues had been correctly answered by the trial court as well as by the lower appellate court.

30. I do not find any perversity or illegality in the judgment for me to interfere under section 100 of Code of Civil Procedure. Consequently the substantial questions of law framed are answered against the appellant.



S.A.No.14 of 2013

31. In fine, the second appeal is dismissed. The judgment and decree of the court of Subordinate Judge Gobichettipalaym in A.S.No.36 of 2010 dated 19.01.2011 in confirming the judgment and decree of the court of District Munsif at Gobichettipalayam in O.S.No.74 of 2001 dated 05.04.2010 stands confirmed. As the parties are close relatives, I am not imposing any costs on them. Consequently, connected miscellaneous petition is closed.

04.04.2024

nl

Index : yes / no

Neutral Citation : yes / no

Speaking / Non Speaking Order



WEB COPY



S.A.No.14 of 2013

To

- 1.The Subordinate Judge, Gobichettipalayam
- 2.The District Munsif, Gobichettipalayam



WEB COPY



S.A.No.14 of 2013

V.LAKSHMINARAYANAN, J.
nl

Pre-delivery order in
S.A.No.14 of 2013

04.04.2024