

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2017

CORAM

THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.382 of 2017
and C.M.P.No.8930 of 2017

1. D.C.Arunagiri
2. K.Malathi
3. A.Malarkodi

... Appellants/Appellants/Plaintiffs
..vs..

K.Kuppusamy (died)

1. K.Sivakumar
2. K.Balaji
3. K.Vijayakumar
4. The Junior Engineer (Urban)
Tamilnadu Electricity Board,
Gudiyattam

5. The Divisional Engineer,
Tamil Nadu Electricity Board,
Gudiyattam

6. Gaja @ Gajalakshmi ... Respondents/Respondents 2 to 7/
Defendants 2 to 7

Second Appeal filed under Section 100 C.P.C. against the Judgment and decree dated 08.03.2017 made in A.S.No.11 of 2013 on the file of the Sub Court, Gudiyattam, confirming the judgment and decree dated 14.02.2013 made in O.S.No.126 of 2001 on the file of the District Munsif Court, Gudiyattam.

For Appellant : Mr.N.Manokaran

J U D G M E N T

The unsuccessful plaintiffs, aggrieved by the unanimous decisions of the Courts Below, have preferred the above Second Appeal.

2. The subject matter in the suit revolves around a Wall. The plaintiffs claimed that they are the legal heirs of one Janaki Ammal, who owned house bearing Door No.47/A. After her death, the legal heirs, namely, the plaintiffs succeeded to her estate. The defendants are the adjoining owners of house

bearing Door No.48, which is lying on the South of the plaintiffs' property. Both the houses are divided by a Wall, which is marked as Ex.ABCD in the plan filed along with plaint. It is stated that the said Wall is the joint wall of two houses. The plaintiffs had recently re-constructed their house by converting the tiled one into a terraced house. They raised a Wall adjoining the said 'ABCD' Wall to a width of 4 1/2 inches. The Wall is marked as 'ABCD'. It is further stated in the plaint that the 'ABCD' Wall is in the place of the defendants and it is their exclusive Wall. Since it divides both the houses, it will be a party wall of both the houses. No one can claim the exclusive right over the same. The defendants now pulled down their structures and wanted to annex the 'ABCD' Wall to their property by putting pillars. Their action is illegal and unlawful. As the defendants have got no right to remove the Wall and put up a pillar, the suit is filed for grant of mandatory injunction directing the defendants to restore the Wall 'ABCD' and for permanent injunction restraining the defendants from putting up the pillars in the place where 'ABCD' Wall stood.

3. The suit was resisted by the defendants contending that the suit property is a portion of the defendants' property bearing Door No.48, which originally belonged to the first defendant's father Kandasamy Mudaliar. He sold the same on 09.05.1951 to one Kamatchi Ammal and the said Kamatchi Ammal sold the same to one Ulaganatha Mudaliar and Kokilammal on 10.07.1961. They, in turn, had sold the property on 18.01.1963 to the first defendant's mother Salammal. The defendants are the absolute owners of the suit property. As the plaintiffs' Wall has been in existence for long, the plaintiffs cannot have any right over the same. Hence, prayed for dismissal of the suit.

4. Before the Trial Court, on the side of the plaintiffs, the first plaintiff examined himself as PW-1 and three more witnesses were examined as P.W.2 to P.W.4 and marked Exs-A1 to A27. On the side of the defendants, one K.Udayakumar was examined as D.W.1 and Exs.B1 to B7 were marked.

5. After appreciating both the oral and documentary evidence, both the Courts below have concurrently held that the plaintiffs have no right in the suit property and dismissed the suit. Being aggrieved by the same, the above Second Appeal has been filed by the plaintiffs.

6. Heard the learned counsel for the appellants and perused the materials available on record.

7. The question that arises for determination in this Second Appeal is as to whether the suit property has a common

Wall and whether the plaintiffs are entitled to the relief sought for?

7. The plaintiffs have not actually given the boundary description of the suit property with respect to bearing Door No.47/A. The Southern side boundary is mentioned only as Door No.48, besides in paragraph 3 of the plaint, it is specifically stated that the suit Wall ABCD is in the place of defendants and it is their exclusive Wall. Later, it is stated in the plaint that since it is a dividing Wall between the Houses, it becomes a party Wall and nobody can claim the exclusive right over the same.

8. A party Wall is the one which belongs to one of the parties, but it is a joint Wall in between the neighbours. consequently, the neighbour is only entitled to rest his roof or staircase or attach anything in the Wall, as a lateral support, but cannot claim any exclusive right in the Wall, as if it belongs to him. The plaintiffs have not specifically pleaded where the 'ABCD' Wall is their exclusive Wall or it is a Wall dividing the plaintiffs' and defendants' property or whether it belongs to the defendants 1 to 4 exclusively. It is stated that as the defendants demolished their old house and put up a new structure by putting up the the pillars, the question of mandatory injunction does not arise. The plaintiffs also have not taken any steps to appoint a Commissioner to find out whether there was an encroachment or the parties are in possession of their respective houses as per the measurements in the documents. P.W.2, who is the Gudiyatham Municipal Town Surveyor, has deposed that he has not seen the properties situated in Door No.47/A and Door No.48. However, he has spoken about the measurements of the suit property. As the Surveyor without even measuring the property had deposed that the measurements were only based on the measurements mentioned in the documents, the Courts below have rightly rejected the evidence of P.W.2. Unless measurements of the properties and the possession of the respective parties are ascertained, it will be difficult to decide whether the suit Wall belongs to the plaintiffs' exclusively. In the absence of any efforts taken by the plaintiffs to measure the suit property by appointing a Commissioner, the Courts below have rightly dismissed their claim. As the plaintiffs have failed to discharge their burden by proving the possession and enjoyment of the Wall, they are not entitled to the suit claim. The defendants' have categorically denied the exclusive right of the plaintiffs over the Wall even in the written statement. But, the plaintiffs have not sought for amendment of the plaint within the period of Limitation for declaration of title over the suit property. The amendment filed later though is allowed to take effect from the date of the suit, it is also found to be barred by time. The

plaintiffs having miserably failed to prove that the suit property Wall exclusively belonged to them and also having accepted in the plaint itself that it belonged only to the defendants, they cannot ask for mandatory injunction. Even presuming for a moment, the common Wall belonged to both the parties jointly, it does not mean that they are the owners of the said Wall to the extent of their 1/2 share. Only if it is found to be the common Wall, any one owner desirous of adding or otherwise materially interfering with the common property, the consent of the other side should be obtained. In the absence of proof of exclusive ownership over the suit property, the Courts below have rightly non-suited the plaintiffs and dismissed the suit. In such circumstances when there is no substantial question of law arising for consideration, there is no justifiable reason to interfere with the concurrent findings of the Courts below.

9. In the light of the above, the Second Appeal is dismissed and the judgment and decree of the Courts below is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-vi)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Gudiyattam

2. The District Munsif, Gudiyattam

3. The Section Officer, V.R. Section,
High Court, Madras (2 copies)

+1cc to Mr.N.MANOKARAN, Advocate, S.R.No. 86700

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EV (CO)

TR(22/01/2018)

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