

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.12.2016

PRONOUNCED ON : 12.01.2017

CORAM :

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.499 of 2011

&

M.P.No.1 of 2011

M.Sadasivam ... Appellant/Respondent/Plaintiff

Vs.

Soundammal ... Respondent/Appellant/Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 21.11.2002 passed in A.S.No.74 of 2002 on the file of the Additional District Court/Fast Track Court No.IV, Coimbatore at Tiruppur reversing the judgment and decree dated 20.08.1999 passed in O.S.No.182 of 1995 on the file of the District Munsif Court, Avanashi.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.V.P.Senguttuvel

J U D G M E N T

The plaintiff in this second appeal has impugned the judgment and decree dated 21.11.2002 passed in A.S.No.74 of 2002 on the file of the Additional District Court/Fast Track Court No.IV, Coimbatore at Tiruppur reversing the judgment and decree dated 20.08.1999 passed in O.S.No.182 of 1995 on the file of the District Munsif Court, Avinashi.

2.The suit has been laid by the plaintiff for declaration, permanent injunction and mandatory injunction.

3.The wall situated between the plaintiff's property and the defendant's property is the subject matter of the suit. According to the plaintiff, the suit wall is the common wall of the plaintiff and the defendant. On the other hand, according to the defendant, the suit wall is the exclusive wall of the defendant and the plaintiff has no right or title whatsoever over the same. The trial Court has accepted the case of the plaintiff. However, the lower Appellate Court has

rejected the plaintiff's case. The plaintiff claims title to the suit wall under Ex.A1 and the parent title deed has been marked as Ex.A2. As rightly found by the lower Appellate Court, the property comprised therein is only a vacant site and there is no reference about the suit wall situated to the west of the defendant's property. If really the suit wall is the common wall of the plaintiff and his predecessor-in-interest and the defendant and her predecessor-in-interest, reference about the same would have been incorporated in Exs.A2 and A1 respectively. However, there is no reference about the suit wall as a common wall in the above said documents.

4. One of the vendors of the defendant namely Krishna Chettiar has been examined as PW2. The plaintiff basing upon the evidence of PW2, would contend that there was a common wall to the eastern side of his property, at the time of the execution of Ex.B1, the title deed of the defendant. However, when there is no reference about the common wall both in Exs.A2 and A1 as rightly found by the lower appellate Court, the evidence of PW2 being contrary to the recitals found in Ex.A2 and Ex.A1, no safe credence could be attached to the testimony of PW2. Therefore, the lower appellate court has rightly refused to place acceptance on the evidence of PW2.

5. Further, the lower appellate court has also found based upon the Commissioner's report and plan that the door fitted in the wall situated to the west of the defendant's property is an old door fitted long back and it is not of new origin. Therefore, the case of the plaintiff that during his absence, the defendant without any authority has put up a new door in the common wall and thereby attempting to interfere with his possession and enjoyment of the common wall and as such the defendant is liable to remove the door fitted to the common wall did not find favour with the lower appellate court. Further, to buttress the report and plan of the Advocate Commissioner, the witness examined on the side of DW2 has also deposed that the defendant has fitted the door in the wall about 35 years ago and therefore, from his evidence also it could be seen that the door is not of a new origin and put up a long back. In such view of the matter, the lower appellate court has also disbelieved the evidence of PW2 that the door fitted in the wall is of a new origin. The lower appellate court has rightly found that the trial court has proceeded to accept the case of the plaintiff on the footing that the original owner of the properties situated abutting the wall is one and the same. However, it is not the case of the plaintiff himself that the original owner of the properties abutting the wall is one and the same. It could be seen that the approach of the trial court in accepting the plaintiff's case on a ground not raised by the plaintiff himself is erroneous and unacceptable.

6. The wall situated to the west of the defendant's property is not stated to be a common wall in the plaintiff's

title deeds, it could therefore be seen that only on the permission of the defendant, the plaintiff was allowed to rest his roof on the wall in question. In this connection, DW2 has also tendered evidence. It could therefore, be seen taking advantage of the permission granted by the defendant to rest his roof on the wall, the plaintiff has falsely laid a claim on the wall in question claiming that it is a common wall. Therefore, the findings and the conclusions of the lower Appellate Court that the plaintiff has miserably failed to establish that he has right over the wall in question and the door fitted in the wall is of a new origin and accordingly, rightly rejecting the plaintiff's case, no exception could be taken to the above findings and conclusions of the lower appellate court for rejecting the plaintiff's case.

7.The plaintiff's counsel relied upon the decisions reported in CDJ 1959 Kar HC 012(Balvant Yadneshwar Vs. Srinivas Appaji Kulkarni), CDJ 1960 MPHC 004(Gulabchand Gappalal Sarawgi Vs. Manikchand Gulabchand Sarawgi), in support of his case. However, as rightly argued by the defendant's counsel, the above decisions only explain about the principles of law to be attached when the wall in question is determined to be a common wall. Insofar as this case is concerned, when the plaintiff has miserably failed to establish that the wall in question is a common wall and that he has any right or claim over the same. It could be seen that the above decisions would not be applicable to the facts and circumstances of the case at hand.

8.The second appeal sans any substantial question of law being involved in the same is not entitled for acceptance and therefore, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge,
(Fast Track Court No.IV),
Coimbatore,
Tiruppur.

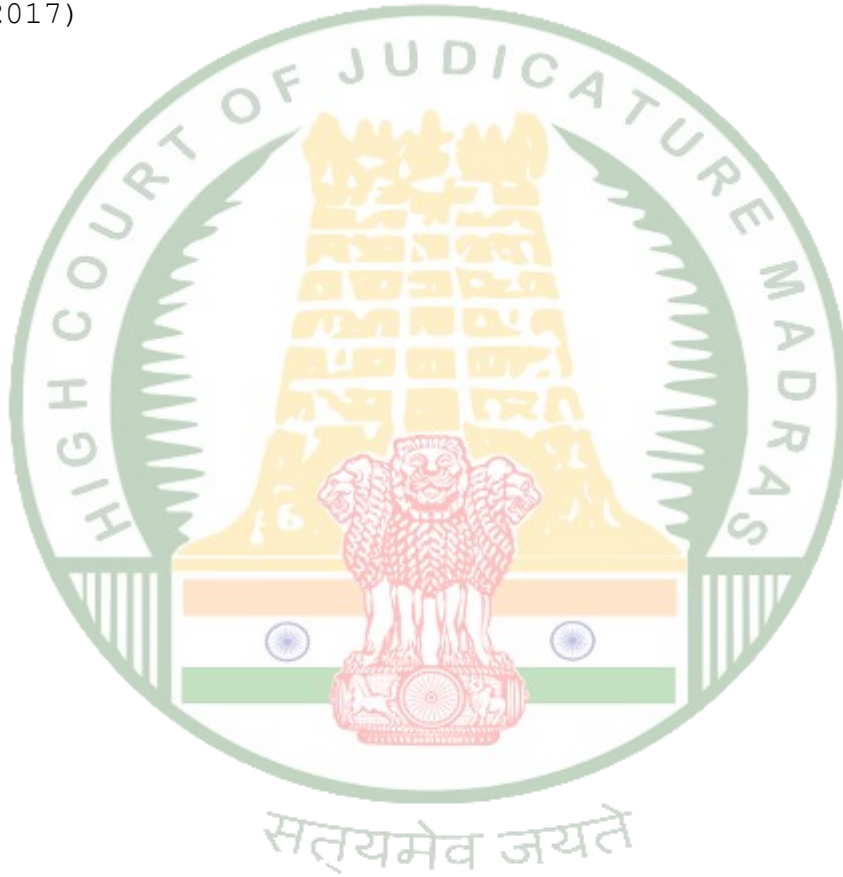
2.The District Munsif,
Avanashi.

3.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.3131
+1cc to Mr.V.P.Senguttuvel, Advocate, S.R.No.2984

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EV(CO)
CA(08/02/2017)



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