

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**RESERVED ON : 30.01.2017**

**PRONOUNCED ON : 13.02.2017**

**CORAM**

**THE HONOURABLE MR. JUSTICE T.RAVINDRAN**

**S. A.No.752 of 2011**

**and**

**M.P.No.1 of 2011**

1. Arumuga Reddiar (died)
2. Saradammal (died)
3. N.Paranthaman
4. N.Mani
5. N.Gnanamoorthy
6. D.Ponnammal
7. V.Savithri
8. A.Malligammal
9. A.Bakthavatsalam
- 10.A.Arjunan
- 11.A.Munusamy
- 12.A.Ravichandran
- 13.A.Dharmalingam
- 14.J.Sakunthala

...

Appellants

Vs.

- 1.S.Jayalakshymi
- 2.S.Senthilkumar
- 3.Indira
- 4.Chitra

...

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 26.08.2009 passed in A.S.No.3 of 2008 on the file of the Sub - Court, Ponneri, reversing the judgment and decree dated 29.06.2007 passed in O.S.No.214 of 1998 on the file of the District Munsif Court, Ponneri.

For Appellants : Mrs.T.Jayalakshmi  
for M/s.Paul & Paul

For Respondents : Mr. N.R.Anantharama Krishnan

### **JUDGMENT**

Challenge in this second appeal is made by the plaintiffs against the judgment and decree dated 26.08.2009 passed in A.S.No.3 of 2008 on the file of the Sub Court, Ponneri, reversing the judgment and decree dated 29.06.2007 passed in O.S.No.214 of 1998 on the file of the District Munsif Court, Ponneri.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:-

***" Whether the judgment and decree of the first appellate court in dismissing the suit laid by the plaintiffs are misdirected against the evidence on record and based upon the perverse findings and conclusions?"***

3. The suit has been laid by the plaintiffs for permanent injunction.

4. The plaintiffs claim title to the suit property based upon the sale deed dated 27.05.1965 marked as Ex.A1. As seen from the averments contained in the written statement, the defendants, as such, are not disputing the sale deed marked as Ex.A1. Further, as seen from the contentions between the rival parties, it is found that the party Wall situated to the North of the first item of the suit property is in dispute. Now, according to the plaintiffs, they have ½ share in the above said party Wall and that, the roof of their house structure rests upon the said party Wall. Per contra, according to the defendants, the Wall in dispute absolutely belonged to them and therefore, the plaintiffs cannot claim any right over the same.

5. As seen from the recitals and the description of the properties found in Ex.A1, it could be seen that the plaintiffs had been conveyed ½ share in the northern Wall and absolute right in the southern Wall by their vendor Subramania Iyer. Ex.A1 is found to be a document more than 30 years old, Further, Ex.A1 is found to be a document ***ante litem motam*** and therefore, it cannot be construed that the same would have been created by the plaintiffs for the purpose of this case.

6. As regards the defendants, they claim title to their property under Ex.B1 dated 24.10.1956. It is thus found that the title deed of the defendants, in support of their property, is anterior to the title deed, under which, the plaintiffs claim title to the disputed party Wall. A perusal of Ex.B1 does not disclose that absolute right had been conferred on the party Wall to the defendants under the same. Even it has been admitted by the defendants' counsel that no such recital is found conferring absolute right on the disputed Wall in question under Ex.B1. That apart, as rightly found by the trial court and also admitted by the defendants themselves, it is found that in Ex.B1, the southern boundary is stated to be the house of Subramania Iyer (i.e.) the vendor of the plaintiffs. Therefore, it could be seen that even during the year 1956 and also prior to the same, Subramania Iyer's house had been in existence and thus, it could be seen that inasmuch as the roof of the house belonging to Subramania Iyer had rested on the party Wall in question, accordingly, Subramania Iyer, when conveying the suit property to the plaintiffs under Ex.A1, had also conveyed ½ share in the party Wall in question, as the roof of the house structure conveyed had rested upon the said party Wall. Therefore, it could be seen that the plaintiffs claim ½ share in the party Wall based upon Ex.A1. For the reasons aforementioned, the case of the plaintiffs gets

probalised in the nature of the preponderance of probabilities. Thus it could be seen that the defendants are not entitled to interfere with the plaintiffs' possession and enjoyment of their ½ share in the party Wall in question.

7. Further, with a view to undermine the plaintiffs' case, it is found that the defendants have also let in evidence with reference to certain facts not pleaded by them in the written statement. During the course of evidence, it is found that DW1 has tendered evidence that as far as the plaintiffs' property is concerned, he has got a separate Wall to rest his roof and the plaintiffs have not rested their house roofing on the party Wall in question and on the other hand, they have rested the roof on a separate Wall. If really, the plaintiffs or their predecessor in interest had put up the roofing of their house construction on a separate Wall, there is no need for making a recital in Ex.A1 that the plaintiffs had been conveyed ½ share in the party Wall in question. It is not the case of the defendants that subsequent to Ex.A1, the plaintiffs have put up a new Wall and thereby, rested their roofing on the new Wall. Further, it is also not the case of the defendants that subsequent to Ex.A1, the plaintiffs have, without any authority, rested their house roofing on the party Wall in question by encroaching into

the portion of the defendants' property. As rightly contended by the plaintiffs counsel, if any such event had happened, the defendants would not have been silent spectators to the same and on the other hand, would have proceeded against the plaintiffs in the manner known to law.

8. Therefore, it could be seen that even prior to Ex.A1 and also after Ex.A1, the roofing of the plaintiffs' house had been resting on the disputed northern Wall i.e. party Wall and thus, the plaintiffs are entitled to have ½ share in the said party Wall.

9. Now according to the plaintiffs, inasmuch as the defendants have attempted to interfere with the plaintiffs' possession and enjoyment of the suit property, they had been necessitated to lay the suit for permanent injunction. As adverted to above, as regards the purchase of the suit property under Ex.A1, the defendants have not seriously disputed the same. The only issue between the parties is with reference to the party Wall. However, now taking advantage of the reports and plan of the advocate commissioner marked as Exs.C3 & C4, the contention was put forth by the defendants that as per Ex.C4, it is only the plaintiffs, who had encroached into their property

and not the defendants. However, in the report and plan marked as Exs.C3 & 4, though averment had been made thereunder that an area about 0.5 metre width had been included in item 1 of the suit property shown in Red colour by the advocate commissioner, when it has not been pleaded and established by the defendants that at what point of time, the plaintiffs had made such an encroachment and what steps had been taken by the defendants with reference to the same, it cannot be held, as rightly found by the trial court, that the plaintiffs have encroached into the said portion. It is therefore obvious that the plaintiffs are enjoying the property conveyed to them under Ex.A1 as such and inasmuch as they had not intruded into the property of the defendants in any manner, the defendants have also not contemplated any action as such against the plaintiffs.

10. Now, it has to be seen whether the defendants are attempting to interfere with the possession and enjoyment of the plaintiffs in respect of the suit property, so as to enable the plaintiffs to have a cause of action for laying the present suit. As seen from the commissioner's report and plan, it is found that there is a digging of the foundation in the property of the plaintiffs, as seen by the advocate commissioner and with reference to the same, when DW1

had been examined, he would state that inasmuch as necessity arose for laying the foundation and in order to identify as to where the boundary stone is located, he had dug the said portions and when it is also found that the commissioner's report and plan marked as Exs.C1 & 2 have not been challenged by the defendants, as such, it could be seen that as rightly found by the trial Court, the digging of the portions in items 1 & 2 of the suit schedule property admittedly belonging to the plaintiffs would only go to show that the defendants, as pleaded by the plaintiffs, made an attempt to encroach into the suit property belonging to the plaintiffs. Accordingly, it could be seen that the plaintiffs had a cause of action to lay the suit against the defendants for permanent injunction.

11. Inasmuch as the defendants have not disputed the title of the plaintiffs in respect of the suit property, as such, conveyed under Ex.A1 in their written statement and the only issue with reference to the party Wall, as rightly put forth, there is no need for the plaintiffs to seek the relief of declaration in respect of the suit property and therefore, their suit, for bare injunction, would lie. In view of the above position, the decisions relied on by the defendants' counsel reported in **2007 (4) CTC 70 (Chinna Nachiappan and another**



***Vs. PL.Lakshmanan), 2009 (3) CTC 59 (M.B.Subramaniam Vs. A.Ramasamy Gounder and four others)*** and ***AIR 1962 Kant 17, (T.Krishnaswami Rao and Ors Vs. Dundappa and Ors)*** are found to be not applicable to the facts and circumstances of the case as contended by the plaintiffs' counsel. Be that as it may, the principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

12. The defendants' counsel contended that other than Ex.A1, the plaintiffs have not placed any anterior title deed to establish that their predecessor in title had  $\frac{1}{2}$  share in the part Wall and therefore, the non production of the anterior document to Ex.A1 should be held against the plaintiffs. However, it is found that there is no such anterior document referred to in Ex.A1. That apart, when Subramania Iyer's house has been found to be in existence even prior to the prior purchase of the property by the defendants under Ex.B1 and when Subramania Iyer's house roofing is not shown to be resting on a separate Wall and on the other hand, found to be resting on the party Wall in question, accordingly, while conveying the property under Ex.A1, Subramania Iyer had also conveyed the  $\frac{1}{2}$  share in the party

Wall to the plaintiffs under Ex.A1. Therefore, the above aspect of the defence raised by the defendants cannot be countenanced.

13. In view of the above, it is found that the first appellate Court has proceeded to dismiss the suit laid by the plaintiffs based upon the perverse findings and conclusions and also misdirected itself against the evidence on record and in such view of the matter, the substantial question of law formulated for consideration in this second appeal is answered against the defendants and in favour of the plaintiffs.

14. In conclusion, the judgment and decree dated 26.08.2009 passed in A.S.No.3 of 2008 on the file of the Sub Court, Ponneri, are set aside and the judgment and decree dated 29.06.2007 passed in O.S.No.214 of 1998 on the file of the District Munsif Court, Ponneri are confirmed.

Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Index : Yes/No  
Internet: Yes/No  
sms

13.02.2017

To

1. The Sub Court, Ponneri.
2. The District Munsif Court, Ponneri.

**T.RAVINDRAN,J.**

sms

**Pre-delivery Judgment in**  
**S. A.No.752 of 2011**  
**and**  
**M.P.No.1 of 2011**

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**<http://www.judis.nic.in>**