

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.10.2017

PRONOUNCED ON : 23.10.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.68 of 2001

A.Gurusamy Mudaliar	...	Appellant
	Vs.	
E.Zeenath	...	Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 26.10.1999 made in A.S.No.43 of 1999 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 06.04.1999 made in O.S.No.182/1996 on the file of the Additional District Munsif Court, Bhavani.

For Appellant	:	Ms.P.Sharmila
		for Mr.D.Sivakumar
For Respondent	:	Mr.S.Kaithamalai Kumaran

JUDGMENT

The defendant, in this second appeal, has challenged the Judgment and decree dated 26.10.1999 made in A.S.No.43 of 1999 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 06.04.1999 made in O.S.No.182 of 1996 on the file of the Additional District Munsif Court, Bhavani.

2. The parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction and mandatory injunction.

4. In brief, according to the plaintiff's case, the disputed AB Wall is situated on the Southern side of the plaintiff's property and in the disputed Wall, the plaintiff has common $\frac{1}{2}$ share and the plaintiff has purchased her property under the sale deed dated 11.06.1973 and the defendant, taking advantage of the dismissal of Interlocutory application, has demolished the common wall and put up construction in the property. The defendant's property is situated to the South of the common wall and the defendant is not entitled to demolish the common wall and further, the defendant is also attempting to put bore well in his property so as to cause damage to the common wall and in such circumstances, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs i.e. to prevent the defendant from demolishing the common wall by erecting a bore well and also to restore the demolished wall to its original shape.

5. The case of the defendant, in brief, is that it is false to state

that the plaintiff has title to the common wall situated on the Southern side of the plaintiff's property. The defendant has purchased his property by virtue of the sale deed dated 21.09.1973 and only after the disposal of the interlocutory application, the defendant has demolished the wall and put up the terraced house in his property and also erected a bore well and hence, the suit is not maintainable. The defendant has exclusive title to the disputed wall by virtue of his sale deed and the suit laid by the plaintiff without seeking the relief of declaration is not maintainable and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PW1 has been examined and Exs.A1 to 6 were marked. On the side of the defendant, DW1 was examined and Exs.B1 to 4 were marked. Exs.C1 & 2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial court was pleased to grant the relief of mandatory injunction sought for by the plaintiff. In the first appeal preferred by the defendant, the judgment and decree of the trial court was confirmed and resultantly, the first appeal has been

dismissed. Impugning the same, the present second appeal has been preferred by the defendant.

8. At the time of the admission of the second appeal, the following substantial question of law was formulated for consideration;

“ Whether a decree for mandatory injunction should be granted, when the plaintiff can be adequately compensated by award of damages?”

9. The plaintiff claims title to her property by virtue of the sale deed dated 11.06.1973 marked as Ex.A1. The defendant claims title to his property by virtue of the sale deed dated 21.09.1973 marked as Ex.B1. As rightly found by the Courts below, on a perusal of Ex.A1, it is found that under the said document, the plaintiff had purchased common ½ share in the disputed wall situated on the Southern side of her property. The clear recitals, with reference to the same, are reflected in Ex.A1. Similarly, it is found from Ex.B1 that the defendant had also been granted common ½ share in the disputed wall, which is situated to the Northern side of the defendant's property and the recitals in Ex.B1 clearly reflect the above position. That apart, the defendant examined as DW1 has admitted clearly that when he had

purchased the property from Saraswathy, he knew fully well that only common $\frac{1}{2}$ right had been granted in the disputed wall and further, he has also admitted that the other remaining common $\frac{1}{2}$ right in the disputed wall belonged to the plaintiff and while he made attempts to demolish the common wall, the plaintiff laid the suit and also sought for the necessary reliefs. However, after the dismissal of the Interlocutory application preferred by the plaintiff, according to the defendant, he has demolished the common wall and put up terraced house in his property and thereby, it is contended by the defendant that the disputed common wall exclusively belonged to him. However, when it is found that both the plaintiff as well as the defendant had purchased their respective properties only with common $\frac{1}{2}$ right in the disputed wall, the case of the defendant that he has exclusive right to the disputed wall as such cannot be accepted. Similarly, the contention of the defendant that inasmuch as the plaintiff had not been granted the interim relief sought for in the suit, he is entitled to the disputed wall exclusively as such also cannot be countenanced. Similarly, the act of the defendant in demolishing the common wall pending suit i.e. after the disposal of the interlocutory application also cannot be appreciated and accepted, particularly, when it has been admitted clearly by the defendant that the common wall belongs to

both the plaintiff and the defendant. In such view of the matter, it is found that the defendant in clear violation of the law had demolished the common wall pending suit and this act of the defendant cannot at all be accepted in any manner.

10. That apart, as rightly found by the Courts below, it is found that while the commissioner had inspected the property at the first instance, the disputed Wall was in existence. Subsequently, when the commissioner again revisited the property, it is found that the disputed wall is not present and had been demolished. This could be clearly found from Exs.B3 & 4 and Exs.C1 and 2 and the Courts below have also noted the above aspect. It is thus found by the Courts below that pending suit the defendant has demolished the common wall knowing fully well he has no exclusive right to the same and also that, the plaintiff has common $\frac{1}{2}$ right in the said wall.

11. In the light of the above position, it is found that the defendant having demolished the common wall pending suit, despite his knowledge about the joint ownership of the plaintiff in the disputed wall, the Courts below have, therefore rightly, held that the plaintiff is entitled to seek the restoration of the demolished wall by the

defendant and accordingly, granted the relief of mandatory injunction sought for by the plaintiff.

12. In this second appeal, it is mainly contended by the defendant's counsel that in the suit, the plaintiff having failed to seek relief of declaration, her lis should be discountenanced. However, considering the nature of the right of the parties to the disputed wall and when the plaintiff claims title to the disputed wall on the basis of her title deed and particularly, when the defendant has also not disputed the common right of the plaintiff in the disputed common wall, it is found that there is no need for plaintiff to seek for the relief of declaration in respect of her common right in the disputed wall. In such view of the matter, the decision relied upon by the defendant's counsel reported in **2016-5-L.W.211 (Sekar Vs. Ganesan represented by his Power Agent, Thiruvengadam)** would not be applicable to the facts and circumstance of the present case.

13. As adverted above, the defendant has failed to establish that he has exclusive right to the suit wall and also admitted that the plaintiff has common $\frac{1}{2}$ right in the disputed Wall. The evidence disclose that pending suit the defendant has demolished the common wall and put up the terraced house in the property. In such view of

the matter, when the plaintiff has equal right to the common wall, it is seen that the plaintiff would be entitled to seek the restoration of the common wall from the defendant by way of mandatory injunction. In such view of the matter, the question whether the plaintiff could be satisfied by adequate compensation for the illegal acts committed by the defendant does not arise. In such view of the matter, it is found that the substantial questions of law formulated in this second appeal has to be answered only in favour of the plaintiff and against the defendant.

14. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

23.10.2017

Index : Yes/No

Internet :Yes/No

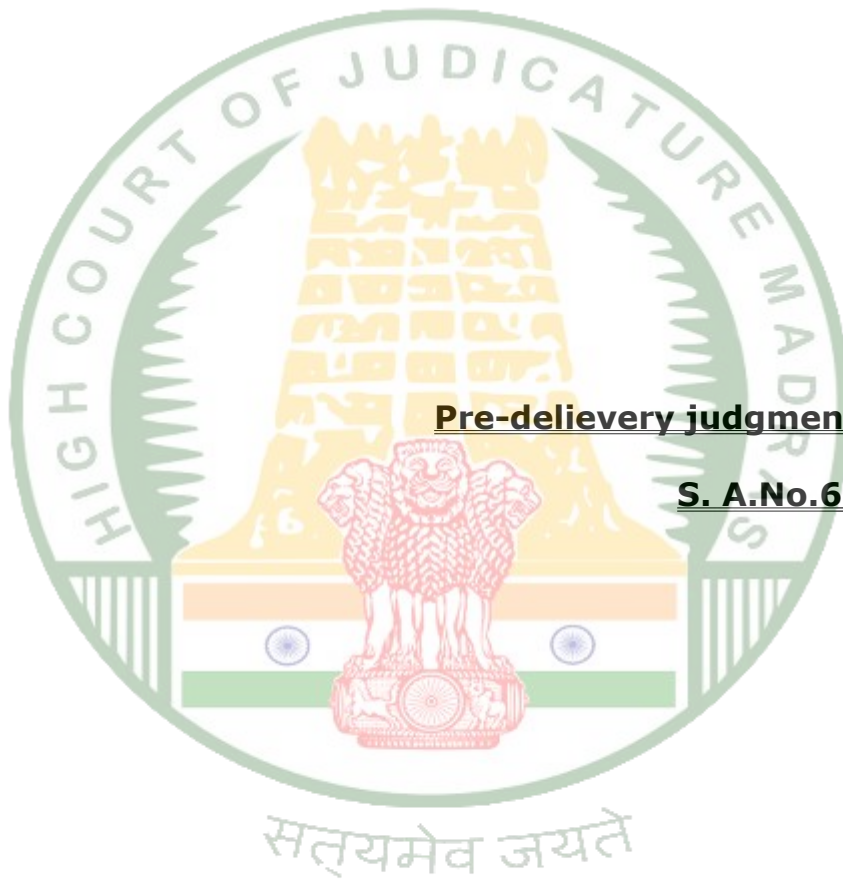
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To

1. The Sub Court, Bhavani.
2. The Additional District Munsif Court, Bhavani.

T.RAVINDRAN,J.

Sms



Pre-delievery judgment made in

S. A.No.68 of 2001

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