

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.10.2017
PRONOUNCED ON : 30.10.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.722 of 2001

A.Somasundaram Appellant/Defendant

Vs.

Thirulochani Devi ... Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 01.12.2000 made in A.S.No.184/98 on the file of the IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 15.07.97 made in O.S.No.820 of 1991 on the file of the VI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr. T.Ayyasamy

For Respondent : Mr.T.P.Manoharan, Senior Counsel
for M/s. S. Hemalatha

JUDGMENT

In this second appeal the judgment and decree dated 01.12.2000 passed in A.S.No.184/98, on the file of the IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 15.07.97 passed in O.S.No.820 of 1991, on the file of the VI Assistant Judge, City Civil Court, Chennai is impugned.

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

3. Suit for permanent injunction and mandatory injunction.

4. The case of the plaintiff in brief is that she is the sole and absolute owner of the land and the super structure

described in the plaint "A" schedule property, having purchased the same for valuable consideration from Padmavathy Ammal, vide registered sale deed dated 26.02.1975 and the defendant is the owner of the property described in the plaint "B" schedule, he having purchased the same under the same Padmavathy Ammal, as per the registered sale deed dated 14.03.1973 and the property purchased by the plaintiff is facing Vasu street and the property purchased by the defendant is facing Rajarathinam street and in between the properties of the plaintiff and defendant, there is a common wall running from north to south, which divides both the properties and the same to be used in common by both the plaintiff and the defendant and since both the properties of the plaintiff and the defendant were purchased from the common predecessor in title, necessary recitals are incorporated in their sale deeds that the common wall should be kept in good condition and the parties should not do anything to the common wall, which would weaken the same and should also keep the common wall in good condition and thus the common wall between the properties of the parties should be maintained in good condition without indulging in any detrimental acts, which shall weaken the same.

5. While so, the defendant attempted to put up new construction over and above his property, especially, on the side of the common wall and started removing the bricks on the defendant's side from the common wall, thereby weakening the same and also attempted to put up new super structure bearing the load on the common wall, which shall definitely weaken the same and unlawfully removing the bricks from the common wall on his side thereby, the common wall on the side of the plaintiff's property had developed cracks but the defendant cannot be allowed to disturb, dismantle or weaken the common wall in between the properties of the parties and hence, the plaintiff is necessitated to lay the suit for appropriate reliefs.

6. The case of the defendant in brief is that it is true that both the plaintiff and defendant purchased their respective properties from the common owner namely Padmavathy Ammal and it is true that the common wall is situated between the properties of the parties and the defendant is aware of the recitals found in the sale deeds of the parties, as regards the maintenance of the common wall in good condition without doing any acts detrimental to the interest of the parties and the defendant had put up the construction long back and by way of the same, in no way tampering of the common wall. The defendant has no reason to remove the bricks from the common wall and has not removed any. The defendant has avoided any strain on the common wall and the construction in the first floor of the defendant's property is raised on a separate concrete beam resting on the walls running east to west in the defendant's property and the allegation that the common wall on the side of the plaintiff's

properties had developed cracks because of the removal of the bricks on the defendant's side is false. It is false to state that the defendant is attempting to dismantle and meddle with the common wall. The defendant has equal right and interest over the common wall. The defendant has obtained sanction of the plan for his construction and hence, the suit without any cause of action is liable to be dismissed.

7. In the additional written statement, the defendant has also taken a plea that the construction put up in his property is only removal of the tiled roof in the first floor and laying of RCC roof and the defendant has put up a concrete beam resting on the walls running east to west in his property and since, the defendant has terraced the first floor roof, the defendant wanted to raise a parapet wall by raising the common wall and the parapet wall rests on the concrete beam put up by the defendant in his property. On account of the suit laid by the plaintiff, the defendant is unable to complete the construction and the rafters of the plaintiff's asbestos roof are inserted into the common wall for support and if the plaster is withering on the plaintiff's side, it only reflects poor maintenance of the wall on the side of the plaintiff. Hence, the suit is liable to be dismissed.

8. In support of the plaintiff's case PWs 1 and 2 were examined and Exs.A1 to A11 were marked. On the side of the defendant DW1 was examined and Exs.B1 to B5 were marked. Exs.C1 to C3 were also marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the case of the plaintiff and accordingly, granted the reliefs sought for by the plaintiff. Aggrieved over the same, the present second appeal has been preferred by the defendant.

10. The second appeal has been admitted and the following substantial questions of law were formulated for consideration:

1. Whether the Lower Courts are right in granting a vague decree of mandatory injunction without particularising with the specific measurements the portion of the impugned construction to be demolished?

2. Whether the Lower Appellate Court is right in rendering improper and perverse findings by misreading Ex.C1, C2 and C3 and the evidence of Pw-2?

11. The subject matter of the lis is the common wall running north to south between the properties of the plaintiff and the

defendant. It is not is dispute that the plaintiff and the defendant had purchased their respective properties from the common owner namely Padmavathy Ammal and accordingly, it is found that the wall running between their respective properties had been reserved as the common wall by the vendor concerned and accordingly, it is found that necessary recitals had been incorporated in the sale deeds of the plaintiff and defendant, as to the requirement of the maintenance the common wall in good condition without making any attempt to weaken the same.

12. Now, according to the plaintiff, the defendant had put up a new construction in his property and accordingly, it is contended that he has started removing the bricks on his side from the common wall, thereby, weakening the common wall and also attempting to put up new super structure bearing the load on the common wall, which shall definitely weaken the same and on account of the removal of the bricks from the common wall by the defendant, the common wall on the side of the plaintiff's property had developed cracks and thus, according to the plaintiff, the defendant cannot be allowed to weaken and tamper the common wall, as the same would prejudicially affect the plaintiff's property and in such view of the matter, according to the plaintiff, she has been necessitated to lay the suit against the defendant for appropriate reliefs.

13. Per contra, it is the specific case of the defendant that he had put up construction long back in his property and while doing so, he has not made any attempt to tamper or weaken the common wall and there is no reason for the defendant to remove the bricks from the common wall and while putting up construction, the defendant has taken steps to avoid any strain on the common wall and the construction put up by the defendant in the first floor of the property is raised on a separate concrete beam resting on the walls running east to west in the defendant's property and the allegation that the common wall on the side of the plaintiff's properties had developed cracks because of the removal of the bricks by the defendant on his side of the common wall is not true and therefore, it is contended that the plaintiff without any basis or cause of action has instituted the suit against the defendant and hence, the suit is liable to be dismissed.

14. It is found that in the trial Court, a Commissioner was appointed to inspect the common wall and to submit the report and accordingly, it is seen that the Commissioner so appointed suo motu, inspected the common wall and filed his report, which has been marked as Ex.C1. Inasmuch as the Commissioner had, at the first instance, not taken the assistance of the Engineer while inspecting the common wall, it is seen that a warrant had been issued to him, to re-inspect the common wall with the assistance of an Engineer and accordingly, it is found that the

Commissioner had inspected the common wall along with the Engineer and filed his second report and it has marked as Ex.C2 and the report of the Engineer marked as Ex.C3. It is further seen that the Engineer, who had inspected the property has been examined on behalf of the plaintiff as PW2.

15. It is found that the defendant has put forth serious objections to the reports of the Commissioner and the Engineer, which were marked as Ex.C1 to C3, controverting all the allegations putforth therein. It is further found that the Courts below has mainly relied upon the report of the Engineer marked as Ex.C3 and his evidence, who has been examined as PW2, noting that, based on his report, the defendant has laid a beam to a thickness of 1 foot over the common wall only about 3 inches and as the new RCC beam is resting on the common wall, seeing that the Engineer has opined that the common wall has become weakened thereby, upheld the plaintiff's case. As regards the above features noted by the Engineer and stated in his report, serious objections had been putforth by the defendant and in the objections, it has been specifically stated that the beam noted by the Engineer is not visible for measurement nor the area left out on the side of the plaintiff's common wall and further substantial portion of the beam resting on the defendant's wall running east to west, thereby, disputed the conclusion of the Engineer that the common wall has become weak due to the above factors. As noted above, the defendant in his written statement also has pleaded that the construction in the first floor of the property is raised on a separate concrete beam resting on the walls running east to west in the defendant's property. However, the Courts below have accepted the report of the Engineer and it is found that they had thereby, decreed the suit as prayed for by the plaintiff. However, as rightly putforth by the counsel appearing for the defendant, while assessing the facts and circumstances of the case, based upon the materials placed, it is seen that the Courts below had not taken care to note the objections putforth by the defendant to the reports of the Commissioner and the Engineer and has not given any finding to the said objections putforth as not worthy of acceptance and therefore, need not be considered. It is found that no discussion has been made on the objections putforth by the defendant to the reports of the Advocate commissioner and Engineer and it is thus found that the objections put forth by the defendant had neither been considered by the Courts below nor the same had been discarded as such by the Courts below as not worthy acceptance. On the other hand, the Court below had simply accepted the report of the Engineer, as above mentioned without considering the objections to the same by the defendant and thereby decreed the suit as prayed for by the plaintiff.

16. As rightly putforth, the Courts below should have endeavoured to consider the objections putforth by the defendant to the reports of the Advocate Commissioner and Engineer and decided one way or other that the objections raised are not worthy of acceptance and only the reports of the Engineer and the Advocate Commissioner would sustain. It is thus found that the approach of the Courts below as regards the issue involved in the matter is found to be perfunctory and without any proper reasonings and consideration. As regards the observations noted by the Advocate Commissioner and the Engineer regarding certain cracks having been developed on the common wall, on the side of the plaintiff property, it is found that the same had not been the serious consideration of the Courts below for accepting the plaintiff's case and the defendant has also putforth the objections with reference to the same and has stated that the cracks had developed on the side of the plaintiff's property of the common wall, only due to the improper maintenance of the common wall by the plaintiff on her side. It is to be noted at this juncture, that neither the Advocate Commissioner nor the Engineer has specifically stated that due to the construction put up by the defendant in his property the cracks had developed in the common wall on the plaintiff's side.

17. Aggrieved over the judgment and decree of the Courts below, it is seen that the defendant has preferred this second appeal. It is further seen that along with the second appeal the defendant has preferred CMP No. 7544 of 2001, seeking for the appointment of an Advocate commissioner to note down the present physical features of the suit wall, the subject matter of the suit, to assess its strength with the help of a qualified Engineer for seeking appropriate reliefs. It is seen that the defendant inter-alia has stated that the respondent/plaintiff has demolished the old house purchased by her and put up a three storeyed building and the concrete slab in the ground floor is inserted by her in the common wall and further, the respondent has raised the height of the compound wall in her portion and put up construction of other floors on the common wall and therefore, it was contended that the respondent by inserting the roof of the new building into the common wall and putting up construction over the same, falsified her case that the respondent had weakened and damaged the common wall by changing the roof of his property.

18. Further according to the defendant, he has stated in the above said petition that the common wall has stood the test of time and even after 10 years of the changing of roof in his property had remain intact and strong as to it was before and the entire weight of the beam put up by him is borne by the four east west walls of the building and not by the common wall and the beam was inserted to a depth of 3 inches only to the common

wall for the sake of competition and not for the load bearing and therefore, has prayed the High Court that the physical features of the suit wall as it existed, on date should be observed and noted by the appointment of an Advocate commissioner with reference to the same, so that the strength of the common wall which is in dispute could be determined by the Court while disposing of the second appeal. It is found that as per the records, the above request of the defendant found acceptance by this Court at the time of the admission of the second appeal and accordingly, it is noted that this court by order dated 30.08.2001 had appointed Mr.A.Dhiraviyanathan, as Advocate commissioner, to note down the physical feature of the suit wall and assess the strength with the help of a qualified engineer, after giving notice to the parties concerned and their counsel. Accordingly, it is further found that the Advocate commissioner along with the engineer had inspected the suit wall in question and submitted his report along with the report of the Engineer. Further it is also noted that subsequently, as the report of the Advocate commissioner was found not available in the records, as per the orders of this Court, the Advocate commissioner had filed a memo along with the copy of the Engineer's report and it is further seen that the counsel for the plaintiff had also preferred his objections to the report of the Engineer and this Court by order dated 06.03.2015 had directed that the memo filed by the Advocate commissioner along with the copy of the Engineer's report be marked as Ex.X1 and the objections preferred by the plaintiff's counsel to the same be marked as Ex.X2 in the proceedings. Accordingly, it is found that now Exs.X1 and X2 have also become part of the records for determining this lis in the right perspective.

19. Now on a perusal of the Engineer's report filed in this Court and marked as Ex.X1, it is found that as stated by the defendant, it is seen that the roof slab of the newly constructed building of the plaintiff had been joined with the common wall and the surface of the entire common wall has been neatly plastered, white washed and maintained in good condition. The eastern wall running north south of the new building lies 3 1/2 feet away from the common wall and further, the first floor of the plaintiff's new building is joined with the common wall at north east corner of the building to a length of 5 feet only and the remaining balance portion of the common wall for the length of 25 1/2 feet is no way connected with the eastern wall running north south of the first floor of the new building of the plaintiff, which is four feet away from the common wall and it is further seen that in the first floor also the surface of the common wall has been plastered and neatly maintained in good condition and the second and third floors have been newly constructed. It is thus found that as per the report of the Engineer now available on record marked as Ex.X1, the plaintiff while putting up new construction in her property had joined the

roof slab of the building with the common wall as regards the ground floor and even in the first floor shown as joined the new building at the north corner of the building to a length of 5 feet. It is thus seen that the plaintiff has also caused certain load bearing on the common wall while putting up the new storeyed building in the property as noted by the Engineer. No doubt, in the objections filed to the same by the plaintiff marked as Ex.X2, according to the plaintiff, the above said report of the engineer is per-se incorrect and misleading and thereby, the same has been disputed by the plaintiff in her objections.

20. As regards the property of the defendant, the engineer in his report marked as Ex.X1, filed in this court has also noted that there are cupboards fitted in the common wall and further has also noted in the first floor at roof level a beam is running from north to south direction and the same is mainly resting on the four cross walls of the defendant running east to west direction and the load from the beam is transferred to the four cross wall of the defendant and the building of the defendant is structurally sound.

21. Thus, it is found that as per the report of the Engineer marked as Ex.X1, the beam that had been raised by the defendant while putting up his construction at roof level is mainly resting on the four cross walls of the property running in the east west direction as claimed by him in the written statement and the load from the above said beam is only transferred to the above said four cross walls of the defendant and not on the common wall which is also the defence projected by the defendant in his written statement. It is thus found that the present Engineer's report marked as Ex.X1, fully supports the case of the defendant as put forth in the written statement. Finally, the Engineer in his report marked as EX.X1 has concluded that the strength and stability of the common wall running north to south is in a very good and sound condition and both parties are maintaining it very well and it is in good condition.

22. No doubt, as adverted above, the plaintiff has put forth her objections to the above said report of the Engineer marked as Ex.X2 and as seen above, the plaintiff has disputed the claim of the Engineer that she has joined her roof slab of the ground floor building with the common wall and that she has joined the first floor building also with the common wall upto a length of 5 feet. Further, the plaintiff in her objections has also contended that the report of the Engineer as such cannot be accepted straight away and relied upon, to determine the issues involved in the matter and unless the report of the Engineer is corroborated by his statement on oath, by directing him to adduce evidence with reference to his report and providing an opportunity to the plaintiff to cross examine him as regards the

observations, statement and opinion given in his report with reference to the common wall, it is contended that the correctness and reliability of the report should not be accepted in any manner. Further, the plaintiff in her objections has also disputed the statement of the Engineer that the beam raised by the defendant at roof level is not resting on the common wall as noted by the Engineer during the course of the proceedings in the Courts below and marked as Ex.C3 and also disputed the report of the Engineer as Ex.X1 that the beam put up by the defendant is mainly resting on the four cross walls of the defendant running east to west direction and the said four cross walls is bearing the entire load of the beam and the same is not resting on the common wall. As regards the above observation of the commissioner in his report marked as Ex.X1, the plaintiff has contended in her objections that the same could not be accepted straight away without providing an opportunity to her to test the same by examining the commissioner in the Court, in the manner known to law.

23. The facts and circumstances of the case as discussed above is now at the position i.e., we are now faced with the two Engineers report regarding the common wall, one supporting the case of the plaintiff and the other supporting the case of the defendant and it is found that as far as the report of the Engineer marked as Ex.X2, as rightly putforth by the plaintiff's counsel, without an opportunity being given to the parties concerned, to test the veracity of the report by examining the Engineer in the manner known to law, we cannot straight away accept the same for deciding the issues one way or the other. As above mentioned, the Courts below while accepting the plaintiff's case mainly relied upon the Engineer's report and his evidence as the basis, who has been examined as PW2. However, relying upon the above said factors, as pointed out, the Courts below have not cared to consider the objections putforth by the defendant to the same and when in the said objections the defendant has clearly mentioned that the beam structure put up by him is not resting on the common wall and it is resting only on the walls running east to west of his property and the load of the beam is not on the common wall and only on the cross walls and when the said version of the defendant is now amply corroborated by the Engineer's report marked as Ex.X1 in this second appeal, it is found that the matter has to be re-examined further, in the light of the new evidence projected in this matter, namely, Ex.X1 and X2.

24. If as determined by the Courts below, if this Court straight away accepts the Engineer's report marked as Ex.X1, without taking into consideration the objections put forth by the plaintiff to the same, marked as Ex.A2, it is found that it would seriously affect the plaintiff's case. However, as rightly put forth by the defendant's counsel, the objections put

forth by the plaintiff's cannot be also accepted per-se when as per the report of the Engineer marked as Ex.X1, it is seen that the plaintiff has also rested her new construction on the common wall, which would only go to establish, inasmuch as the common wall is very strong and structurally stable, it is found that the plaintiff herself while putting up the new storeyed construction in her property has rested the construction on the common wall. However, the above observation of the engineer has been controverted by the plaintiff in her objections. It is further seen that as per the report, marked as Ex.X1 the defendant's beam at roof level is not resting on the common wall and resting on the four cross walls and therefore, it is seen that the defendant by way of construction has not made anything to weaken or detrimental to the common wall in any manner. However, since the case of the respective parties are being disputed by either, it is found that considering the additional evidence now available in this case, namely, X1 and X2 and in the light of the above discussions, particularly the Courts below not proper in not directing and considering the objections putforth by the defendant to Ex.C1 to C3, in the right perspective, it is seen that the matter has to be remitted back so as to enable the parties to adduce further evidence in this matter, as may deem fit for establishing their respective cases in the light of the new evidence projected in this matter.

25. In the light of the above discussions and in my considered opinion, the matter has to be remitted back to the trial Court with a direction to the defendant to examine the Engineer, who has submitted the report, marked as Ex.X1 and other witnesses if any, in support of his case so as to enable the plaintiff to cross examine the said witnesses with reference to her version and it is further found that the plaintiff should also be provided an opportunity to adduce further evidence if necessary, in support of her case and in the light of the above discussions, it is seen that considering the improper approach of the Courts below in accepting the plaintiff's case, solely on the basis of the report of the Engineer marked as Ex.C3, without considering the objections putforth by the defendant, it is found that the reasonings and conclusions of the Courts below for accepting the plaintiff's case, as rightly putforth by the defendant's counsel are found to be not in accordance with law and also perverse and unacceptable and in such view of the matter, it is seen that the judgment and decree of the Courts below pronounced for upholding the plaintiff's case cannot be sustained and hence they are set-aside. Inasmuch as this Court has decided to remit the matter back to the trial Court for fresh hearing as discussed above, it is unnecessary to refer to the decisions relied upon by the respective counsel in support of their contentions, as regards the merits of the case.

26. In conclusion, for the reasons aforestated, the judgment

and decree of the Courts below are set-aside and the matter is remitted back to the trial Court with a direction to the trial Court to re-hear the matter by providing an opportunity to both parties to examine further necessary witnesses and adduce further proof in support of their case, as above adverted to and after duly hearing them and dispose of the matter, in accordance with law, as expeditiously as possible.

27. The parties are directed to appear before the trial Court on 20.11.2017 for further proceedings.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The IV Additional Judge, City Civil Court, Chennai,
2. The VI Assistant Judge, City Civil Court, Chennai.

Copy to:
The Section Officer,
VR Section, High Court, Madras.

Judgment in
S. A.No.722 of 2001

ss(30/10/2017)

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