

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.10.2018

PRONOUNCED ON : 13.11.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S. A.No.314 of 2015

H.Ashraf Ali

Reb.by Power Agent Shajahan

...Appellant/Plaintiff

Vs.

1. Chitra

2. Malarkodi

...Respondents/Defendants

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.12.2012 passed in A.S.No.39 of 2011 on the file of the Subordinate Judge, Mannargudi, confirming the judgment and decree dated 28.06.2010 in O.S.No.61 of 2007 passed by the Principal District Munsif, Valangaiman at Kumbakonam.

For Appellant : Mr.S.Parthasarathy, Senior Counsel
for M/s.K.A.Vimal Kumar

For Respondents : No appearance. Set exparte
vide order dated 24.10.2018

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 21.12.2012 passed in A.S.No.39 of 2011 on the file of the Subordinate court, Mannargudi, confirming the judgment and decree dated 28.06.2010 passed in O.S.No.61 of 2007 on the file of the Principal District Munsif Court, Valangaiman.

2. The second appeal has been admitted on the following substantial questions of law.

"a) Whether the courts below are correct in law in brushing aside the Exs.A2 and A3 material documents which clearly and

categorically establish the right and title of the appellant / plaintiff over the suit property?

b) Whether the lower appellate court is correct in law in deciding the appeal without advertting to I.A.No.39 of 2012 filed by the appellant to receive the judgment and decree in O.S.No.29 of 2007 on the file of the Principal District Munsif's Court, Valangaiman as additional evidence in the appeal? "

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the plaintiff has laid the suit against the defendants for the relief of permanent injunction at the first instance and thereafter has amended the plaint and also included the relief of mandatory injunction as against the second defendant. The relief of permanent injunction is sought for against the defendants from interfering with his peaceful possession and enjoyment of the suit property as described in the plaint. The relief of mandatory injunction is sought for against the second defendant for removing the readymade compound wall put up by her in the portion of the suit property to a length of east to west 3 feet and 75 feet north to south within the time fixed by the court and restore the suit property to its original position as per the commissioner's report and surveyor's report and on the failure of the second defendant in complying with the same and in removing the abovesaid obstruction, removal and restoration to its original position through the court process.

5. It is seen that the defendants 1 and 2 had filed the written statement opposing the reliefs sought for by the plaintiff. Furthermore, as could be seen from the written pleas projected by the defendants, the dispute involved between the parties seems to be only concerning the walls adjacent to the suit property and according to the defendants, they have not challenged or interfered with the plaintiff's possession and enjoyment of the house property as described in the plaint schedule and according to them, the walls in question do not belong to the plaintiff and therefore, the plaintiff in the guise of the suit cannot seek any legal right in respect of the walls in dispute as if the same falls within the property to which he seeks title, interest and right by way of the partition deed dated 29.09.2005 and on the other hand, according to the defendants the walls in dispute belong to them as forming part of their properties and accordingly disputing the entitlement of

the plaintiff to the walls in question, sought for the dismissal of the plaintiff's suit.

6. On a reading of the plaint as well as the evidence adduced by the plaintiff, it is seen that the plaintiff traces his title to the suit property mainly upon the partition deed dated 29.09.2005 said to have been executed amongst the legal heirs of Hameed Sultan and according to the plaintiff, in the abovesaid partition deed, the suit property had been allotted to him as per the 'D' schedule described therein and thereby it is his case that he has become absolute owner of the suit property and the same is in his possession and enjoyment and that he had been exercising the ownership in respect of the suit property by paying the house tax, electricity charges, etc., and according to the plaintiff, when he attempted to demolish the old tiled house lying in the suit property and made arrangements to construct a new house therein, it is his case that on 11.03.2007, the defendants without any entitlement or right, alongwith their men attempted to interfere with the plaintiff's possession and enjoyment of the suit property and accordingly it is his case that he has been necessitated to lay the suit for the relief of permanent injunction. As regards the relief of mandatory injunction is concerned, which had been sought for after the institution of the lis, according to the plaintiff, the second defendant had put up the offending construction of the readymade wall of a length of 3 feet east to west and 75 feet north to south in the suit property without any entitlement, after the suit, during the month of July 2009 and therefore it is his case that he had been necessitated to seek the relief of mandatory injunction as regards the same.

7. Though in the plaint, the plaintiff would aver that the suit property originally belonged to Krishnaswamy Iyengar and that the same had been purchased by G.Sivarama Iyer on 03.05.1928 and from the legal heirs of Sivarama Iyer, Hameed Sultan had acquired the same by way of a sale deed 16.12.1982, it is the specific case of the plaintiff that only by way of the partition deed dated 29.09.2005, he had been allotted the suit property as described in the plaint schedule and it is his case that the property allotted to him has been described as the 'D' schedule in the abovesaid partition deed. The original duplicate copy of the partition deed dated 29.09.2005 has been marked as Ex.A4. The plaintiff, as above noted, has sought for the relief of permanent injunction against the defendants at the first instance alleging that they are attempting to interfere with his possession and enjoyment of the suit property as described in the plaint schedule. On a reading of the plaint schedule, it is seen that the suit property is stated to be located in the suit village Valingiman, Nadu Agraharam, in R.S.No.709/9 (Nilvari Thitta R.S.No.709/16) bearing door No. New No.25 and old No.13

and the site measuring east to west 24 feet and north to south 75 feet, totally measuring 1800 sq. ft., and the building lying therein measuring about 600 feet and the nature of the building is described as old tiled house along with site and along with both parent walls and the abovesaid property is stated to be situated within the four boundaries as described in the plaint schedule, in particular, is stated to be situated to the east of the house and backyard of Ponnammal Vahayarah. As above noted, the defendants have resisted the plaintiff's suit contending that the dispute between the parties is only as regards the walls adjoining the suit property and not with reference to the other portion of the suit property and therefore it is seen that the parties are at issue only with regard to the parent walls shown in the description of the plaint schedule property and not in other aspects of the plaint schedule property. This position could also be seen from the admission of the plaintiff during the course of his evidence. In this connection, as rightly found by the courts below, the power agent of the plaintiff examined as PW1, has admitted during the course of cross examination that there is no dispute as regards the house portion and the dispute is only in respect of the walls and the first defendant has been contending that the wall belongs to her ancestrally and that the same had been alienated in her favour and accordingly while demolishing the house, she had claimed share in the walls and thereby obstructed him and also denied the suggestion that the disputed wall does not belong to the plaintiff Ashraf Ali. The plaintiff, Ashraf Ali has been examined as PW2 in this matter and he has also clearly admitted that only by way of the partition deed, he had been allotted the suit property and the suit property had been described as 'D' schedule in the partition deed and while his father had purchased the property, on either side, the land was vacant and would also state that his father had walls on both sides and he has entitlement only to the extent of the property east to west 24 feet and the wall in question had been their only within the abovesaid extent and during the course of cross examination he has clearly admitted that in the partition deed marked as Ex.A4, while allotting him the 'D' schedule property therein, in the said property described in the 'D' schedule, there is no reference about the parent walls and in Ex.A4 partition deed, there is no reference also about the Ponnammal's house and the property has been described only as situated to the east of the house of Ponnammal vahayarah. In the light of the abovesaid position, it is seen that as rightly discussed and analysed by the courts below, the dispute between the parties is only as regards the walls and not with reference to the other portion of the suit property. It is thus found that as rightly determined by the courts below the plaintiff had cleverly included the parent walls as forming part of his property in the description of the plaint schedule property without averring anything as

regards the dispute with reference to the said parent walls. On a reading of the plaint, there is nothing pointed out therein in specific as regards the dispute between the parties qua the parent walls, on the other hand, the plaintiff would only project his case as if that the defendants are in toto disturbing his possession and enjoyment of the entire suit property as described in the plaint. However, on an analysis of the pleas projected by the respective parties and the materials placed on record, it is seen that the dispute between the parties is only as regards the parent walls described in the plaint schedule.

8. Now according to the defendants, the plaintiff has no entitlement to the walls as described in the plaint schedule and that the walls in question do not lie within the property allotted to the plaintiff under the partition deed. On a perusal of Ex.A4 partition deed, particularly, the 'D' schedule, as rightly determined by the courts below inter alia the suit property is stated to be lying to the east of the house and backyard of Ponnammal Vahayarah and the site is shown to be measuring east to west 24 feet and north to south 75 feet, totally measuring 1800 sq. ft., consisting of a tiled house in or about 600 sq. ft., almost in a dilapidated condition bearing new No.25 and old No.13, this is what has been described in the description of the property shown in the 'D' schedule. Therefore, as rightly pointed out by the defendants, as well as clearly admitted by the plaintiff himself, there is no reference at all about any parent walls attached to the above said property and in such view of the matter, it does not stand to reason as to how the plaintiff would seek entitlement to the parent walls as if the same also form part of the property allotted to him under the partition deed Ex.A4. As rightly determined by the courts below, even in the annexure 1A to the partition deed as regards the 'D' schedule property, there is no reference at all about the parent walls therein other than stating that the house is located in or about 600 sq. ft. of the total extent of the site measuring 1800 sq. ft. When according to the plaintiff, he claims title to the suit property only based on Ex.A4 partition deed and when admittedly as per Ex.A4 partition deed, the plaintiff has not been granted the property inclusive of the parent walls as projected in the plaint schedule, it does not stand to reason as to how the plaintiff would be entitled to seek the relief of permanent injunction in respect of the suit property inclusive of the parent walls as described in the plaint schedule. It is thus found that, as determined by the courts below, the plaintiff should have come forward with the suit with clear and true particulars as regards his entitlement of the property in the pleas put forth by him. When admittedly, the property allotted to the plaintiff in Ex.A4 partition does not include the parent walls as such, as to where

from the plaintiff had derived the right to the parent walls has not been properly explained. However, with reference to the same, it is contended by the plaintiff's counsel that in the anterior title deeds of the plaintiff marked as Exs.A3 and A2, there is a reference about the parent walls and therefore by way of the same, the plaintiff would be deemed to be the owner of the parent walls in question. No doubt, on a perusal of the sale deed dated 16.12.1982, by way of which the plaintiff's father had acquired the property and the prior title deed dated 03.05.1928 through which Sivarama Iyer had acquired the title to the property, there is a reference about the walls, but, when the property had changed hands to several persons and when even according to the plaintiff Hameed Sultan had been survived by various legal heirs and accordingly the properties belonging to Hameed Sultan have come to be divided amongst his family members by way of Ex.A4 partition deed and when only through Ex.A4 partition deed, the plaintiff seeks title to the suit property as such and as above discussed, when there is nothing in Ex.A4 to indicate that the plaintiff had been allotted the suit property inclusive of the parent walls and furthermore when there is no material placed on record worth acceptance that the plaintiff's father Hameed Sultan or his predecessors in interest had also been in the possession and enjoyment of the suit property inclusive of the parent walls, de hors reference about the parent walls in Exs.A2 and A3 and more in particular, when in the present case, there is no material placed by the plaintiff to show clearly that the parent walls or the walls in dispute lie within the measurement of the suit property as described in the plaint schedule, in such view of the matter, when the title deed, through which the plaintiff claims title to the suit property does not refer to at all about the parent walls in any manner, the plaintiff cannot be allowed to place reliance upon the anterior title deeds for tracing the title to the suit property. It has not been made clear as to under what circumstances and under what arrangement, the parties to the partition deed Ex.A4 had not included the parent walls while allotting the suit property to the plaintiff. Therefore, when there is no material placed on record that the plaintiff's predecessors in interest had been all along enjoying the parent walls said to have been existing on the two sides as forming part of the property acquired by them, accordingly, it is seen that inasmuch as Hameed Sultan for the matter, and thereafter, his legal representatives including the plaintiff, had not been in the possession and enjoyment of the parent walls in question, it is seen that admitting the abovesaid position, the plaintiff had chosen to take the suit property as allotted to him under the partition deed Ex.A4 and when the facts remains as above, it is found that as rightly determined by the courts below, the plaintiff cannot be allowed to seek the entitlement to the parent walls or the walls in dispute based on the commissioner's

report and plan, in particular, when his title deed does not point out his entitlement to the same.

9. Even the commissioner's report and plan projected in the matter do not advance the plaintiff's case as such. As rightly determined by the trial court, the commissioner has not clearly pointed out in his reports and plans that the compound wall seen by him is lying within the property belonging to the plaintiff as allotted to him under Ex.A4 partition deed. On the other hand considering the physical features obtained in the wall in question, as rightly determined by the trial court, the presence of madam and window on the western side of the wall in question, throw a serious doubt as regards the exclusive entitlement to the same as projected by the plaintiff. Insofar as this is concerned, the plaintiff claims exclusive title to the wall in question. In such view of the matter, when the abovesaid claim of the plaintiff is being seriously disputed by the defendants, it is for the plaintiff to establish his claim of title to the same by projecting acceptable and reliable materials. To buttress the same, the plaintiff has mainly relied upon Ex.A4, however, when Ex.A4 does not advance his claim of entitlement to the parent walls in dispute and on the other hand, the same is conspicuously not referring to the parent walls in any manner and there is no material placed by the plaintiff as to whether his predecessors in interest, had, at all, enjoyed the parent walls in dispute, in the light of the abovesaid position, it is seen that as rightly determined by the courts below, the house tax receipts, electricity bills, etc., projected by the plaintiff, would not, in any manner, be useful to sustain his claim of entitlement to the disputed parent walls. As above noted, the mere reference about the walls in Exs.A2 and A3, by itself, would not be the factor for upholding the plaintiff's claim of title to the disputed walls and if that be so, it is for the plaintiff to explain as to why, while allotting the suit property to him in Ex.A4, there is no reference about the walls in question under the said document. This would only go to establish or lead to the conclusion that inasmuch as, the plaintiff's predecessors in interest had never sought any claim of right to the walls in dispute at any point of time, particularly, exclusive right, accordingly, it is seen that while describing the property in Ex.A4 partition deed, nothing has been referred to about the same and in such view of the matter, the plaintiff cannot be allowed to take the assistance of Exs.A2 and A3 for sustaining his claim of title to the parent walls in question.

10. According to the plaintiff, the defendants attempted to interfere with the possession and enjoyment of the property on 11.03.2007 when he attempted to demolish the old structure lying therein and put up a new building in the property. Even as

regards the abovesaid cause of action, as rightly determined by the courts below, there is no proper material placed on the part of the plaintiff. The plaintiff has given the power deed in favour of his agent on 12.03.2007, which document has come to be marked as Ex.A1. It is thus found that only after the alleged cause of action, which is stated to have taken place on 11.03.2007, the plaintiff has given the said power to his agent. Now, according to PW1, the power agent, while he was attempting to demolish the wall in question, the first defendant and her mother made a claim to the same as if they also have a share in respect of the same and thereby obstructed the demolition and they had not picked up any quarrel with the plaintiff on 11.03.2007 and they picked up quarrel only with him on that day and according to him on 11.03.2007, the plaintiff was not at all in the village. Quite inconsistent to the same, the plaintiff examined as PW2 would claim that the defendants together had picked up quarrel with him as well as with the power agent on 11.03.2007 as regards the wall in question. Therefore, even as regards the alleged cause of action, there is no clear cut evidence on the part of the plaintiff and it is seen that the materials placed on record go to show that the complaint had been given with reference to the alleged obstruction caused by the defendants and the same is only directed against the first defendant and not against the second defendant. As to why the complaint had not been directed against the second defendant, there is no proper explanation. Further on a reading of the abovesaid evidence adduced by the plaintiff and his power agent, it is seen that the dispute has been centering around the parties only with reference to the wall in question and not to the other portion of the suit property. Further, as above pointed out, in the plaint nothing has been averred by the plaintiff in the plaint as regards the alleged quarrel picked up by the defendants with reference to the wall in question. Therefore, it is seen that the plaintiff had not come to the court with clean hands and on the other hand, he had suppressed the real dispute between the parties and projected the case as if the dispute between the parties is as regards the entire suit property and not confining to the wall in question. However, the reality is that the parties are at tussle only as regards the wall in question and not in other aspects.

11. Though the defendants had independently filed the written pleas in the matter. later, it is found that the second defendant had remained exparte. Merely because the second defendant had remained exparte and furthermore, merely because the first defendant has not placed any proof to show that she has exclusive title to the wall in question, when the plaintiff has come forward with the lis claiming that the parent walls under dispute exclusively belong to him and the same had been, from the inception, resisted by the defendants, who are

admittedly the neighbours and when the plaintiff's title deed does not confer him any title to the parent walls and there is also no material to evidence that the plaintiff's predecessors in interest had been in the possession and enjoyment of the parent walls other than the reference about the same in Exs.A2 and A3 sale deeds and when the commissioner's report and plan is not clear and pinpointing that the wall in question lies within the property belonging to the plaintiff as allotted to him under Ex.A4 partition deed, in such view of the matter, the courts below are justified wholly in refusing the relief of permanent injunction sought for by the plaintiff.

12. As regards the relief of mandatory injunction prayed for, now according to the plaintiff, during July 2009, the second defendant had put up the unauthorised ready-made wall of a length of east to west 3 feet and north to south 75 feet in the portion of the suit property. However, as rightly pointed out by the courts below, there is no clear cut evidence as to the alleged construction of the wall in question by the second defendant within the measurements projected in the plaint. As rightly found by the courts below, in the plaint, the plaintiff would state that the second defendant had put up the wall measuring 3 feet in breadth and during the course of chief examination, he would state that she had put up the wall of the width 2½ feet and during the course of cross examination, he would restrict the same as measuring 2 feet in width. Therefore, there is no clear evidence on the part of the plaintiff as to the alleged raising of the compound wall by the second defendant and furthermore, the plaintiff has not given the clear picture as to when the alleged construction had been put up by the second defendant. As could be seen from the evidence adduced by the plaintiff's power agent PW1, he would state that even prior to his tendering evidence, the second defendant had put up the wall in question and that they had prayed for the recovery of possession of the property after the removal of the compound wall. But, no such relief had been sought for by the plaintiff as claimed and the plaint had been only subsequently amended for the relief of mandatory injunction alleging as if the second defendant had put up the offending construction during July 2009. It is thus found that there is no clear cut evidence on the part of the plaintiff as to when at all the second defendant had put up the offending construction. Furthermore, as above noted, when the plaintiff has given inconsistent measurements of the offending construction and when the plaintiff has failed to establish that the offending construction falls within the property to which he is entitled to as per Ex.A4 partition deed and furthermore, when the plaintiff has failed to establish or bring home the clear description of the offending construction in respect of which he seeks the relief of mandatory injunction, accordingly, as rightly determined by the court below, when

there is no description of the property for which the mandatory injunction is sought for by giving a separate schedule, particularly, when as above noted, inconsistent measurements had been given by the plaintiff as regards the offending construction and even as regards when the same had been put up, it is seen that in the light of the decision reported in 2006 (3) 680 TLNJ (civil) (Palaniammal v. Nanjunda Gounder), the relief of mandatory injunction cannot be granted in favour of the plaintiff in the absence of the description of the property for which it is sought for as without any proper description of the same, the same cannot be effectively enforced. The position of law on the abovesaid point has been pointed out in the abovesaid decision as follows:

Injunction - Mandatory injunction - suit for - not maintainable in the absence of description of property for which mandatory injunction is sought for - if a decree is to be passed for mandatory injunction, which should be executed effectively, without any problem, for that the property, which is sought to be removed, whether it is pipeline or superstructure, as the case may be should be described separately with measurement. Therefore, mandatory injunction, in the absence of description of property for which it is sought for, cannot be effectively granted. It is not the case of the plaintiff that all over the suit property, defendant has laid underground pipelines and therefore, all the pipelines should be removed irrespective of the linear measurement, breadth etc. In this view, the suit for mandatory injunction must fail.

On a reading of Section 39 of the Specific Relief Act 1963, for the grant of the relief of mandatory injunction, the party who seeks the same, has to satisfy two elements. In the first place, he has to satisfy as to on the basis of which act he seeks the said relief and in the second place, the requisite acts must be such that the court is capable of enforcing. Insofar as this case is concerned, when the plaintiff has not made a clear picture as to when the offending construction had been put up by the second defendant and the alleged offending construction is also not shown to be established with clear cut materials as lying within the property allotted to the plaintiff under Ex.A4 and when the plaintiff has failed to establish his claim of title to the alleged parent walls in question, particularly, when his title deed does not advance his case and when the plaintiff has not given a clear description of the offending construction for the grant of the relief of mandatory injunction and as rightly determined by the courts below, without the same, the relief, even if granted, cannot be

enforced effectively. Assuming that the plaintiff is entitled to the same and when it is not the case of the plaintiff that the alleged offending construction is put up in the entire suit property, more particularly, when the plaintiff has failed to establish that the offending construction falls within the property to which he is legally entitled to, in such view of the matter, the courts below are justified in refusing the relief of mandatory injunction also in favour of the plaintiff. As rightly determined by the courts below, merely because the second defendant had remained *exparte*, that by itself, would not enable the plaintiff to obtain the relief of mandatory injunction as prayed for. Merely because the second defendant has been set *exparte*, the burden of proving the plaintiff's case, would not get lightened and on the other hand, *dehors* the same, the plaintiff would be required to adduce acceptable and reliable materials to sustain his claim of entitlement to the reliefs prayed for and in the light of the abovesaid factors, when the plaintiff has failed to establish that the offending construction had been put up in his property and also not described the offending construction clearly and as the commissioner's report and plan also do not clearly point out the offending construction as to whether the same forms part of the property belonging to the plaintiff and the plaintiff having not taken any steps to measure the offending construction and prove the extent of encroachment by seeking the relief with reference to the same in specific, in all, it is found that the courts below are justified in non suiting the plaintiff.

13. It is found that the plaintiff had preferred an application for the reception of additional evidence for the purpose of marking the judgment and decree passed in O.S.No.29 of 2007, which had been refused by the appellate court. However, when the plaintiff has not taken appropriate steps to mark the abovesaid documents during the course of trial and when it is not the case of the plaintiff that the abovesaid documents are not within his knowledge during the pendency of the suit and furthermore, when the abovesaid documents are themselves found to be not useful to sustain the plaintiff's claim of title to the disputed walls, particularly, when his title deed does not confer any such right to him, qua, the parent walls, it is seen that the first appellate court is justified in refusing to receive the additional documents projected by the plaintiff.

14. Considering the pleas projected by the parties in the lis, it is seen that the parties are at logger heads only as regards the parent walls. The defendants have claimed the parent walls as belonging to them. On the other hand, the plaintiff has claimed exclusive title to the same even though his title deed does not point to the same. As rightly determined by the courts below, merely because the defendants

had failed to establish their exclusive claim of title to the disputed walls, that by itself, would not entitle the plaintiff to lay a claim of absolute right to the same. Furthermore, when the parties are at serious tussle as regards the claim of right to the disputed walls and accordingly the defendants having raised the clout of title in respect of the disputed walls on the part of the plaintiff as sought to be made out by him and more particularly, admittedly, when Ex.A4 partition deed, does not confer any such right to the plaintiff, in my considered opinion, the plaintiff at the foremost, should have sought for the declaration of title to the disputed walls in question by praying for the necessary relief of declaration as to the exclusive entitlement of the disputed walls or the common ownership of the disputed walls. The plaintiff having not sought for the relief of declaration with reference to the same and when his title deed does not convey any right to him, qua, the disputed walls, on the above ground also, the suit laid by the plaintiff is found to be not legally sustainable.

15. For the reasons aforesaid, the substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff.

16. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

bga

To

1. The Subordinate Judge, Mannargudi,
2. Principal District Munsif, Valangaiman at Kumbakonam.
3. The Section Officer, V.R. Section,
High Court, Madras. (2 Copies)

S.A.No.314 of 2015

SV(CO)
CS/28/03/2019