

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.06.2018

PRONOUNCED ON : 25.06.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1580 of 2004

Krishna Padayachi

...

Appellant

Vs.

Govindarajalu Chettiar

...

Respondent

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 20.04.2004 passed in A.S.No.132 of 2003 on the file of the District Court, Perambalur, reversing the Judgment and Decree dated 14.07.2003 passed in O.S.No.278 of 1999 on the file of the District Munsif Court, Perambalur.

For Appellant

: Mr.R.Narayanan

for Mr.M.V.Krishnan

For Respondent

: Mr.P.Dinesh Kumar

for M/s.Sarvabhauman Associates

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 20.04.2004 passed in A.S.No.132 of 2003 on the file of the District Court, Perambalur, reversing the Judgment and Decree dated 14.07.2003 passed in O.S.No.278 of 1999 on the file of the District Munsif Court, Perambalur.

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

3. Suit for Declaration and Permanent Injunction.

4. The case of the plaintiff, in brief, is that the plaintiff's father had purchased the suit property as well as the property lying to the South of the same by way of a sale deed dated 11.12.1945 and there were two thatched houses in the suit property even at the time of purchase of the same by the plaintiff's father and thereafter, the plaintiff's father Ramasamy Chettiyar and mother Pangajam Ammal jointly executed a Will on 09.07.1984 in respect of the suit property as well as the other properties in favour of their sons viz., the plaintiff and his brother Krishnamoorthy and as per the terms of the Will, the A schedule properties described in the Will had been directed to be enjoyed by the plaintiff and the B schedule properties described in the Will had been directed to be enjoyed by the plaintiff's brother Krishnamoorthy after the demise of the executants of the Will and the plaintiff's father died on 05.03.1988 and the plaintiff's mother had died prior to him and therefore, as per the Will dated 09.07.1984, the plaintiff and his brother had acquired the properties bequeathed to them under the Will and thus, the suit property belongs to the plaintiff and as per the sale deed dated 11.12.1945, the plaintiff's father had acquired the property measuring

east-west 54 human feet, north-south 48 human feet and in the Will dated 09.07.1984, they had described the property in standard feet as measuring east-west 41 feet, north-south 36 feet and accordingly, the plaintiff is entitled to the property from the northern side of the northern wall up to the southern side of the southern Wall of his property and accordingly, as per the rough plan appended to the plaint, the plaintiff and his brother are entitled to 36 feet from F to D as shown in the plaint plan, the plaintiff's house i.e. the suit property has been shown as ABCD in the rough plan and the AB Wall is the common wall to the plaintiff and his brother Krishnamoorthy and accordingly, excluding AB Wall, the plaintiff is entitled to 17' 6" from the points B to D and accordingly, the plaintiff's father had acquired the CD Wall by way of the sale deed dated 11.12.1945 and the CD Wall absolutely belongs to the plaintiff and recently in respect of the CD Wall, the defendant has raised the dispute with the plaintiff and the defendant had purchased the property situated to the north of CD Wall and the thatched houses located in the property belonging to the plaintiff had been put up resting on the CD Wall, while so, the defendant, without informing the plaintiff, on 04.07.1999 demolished the CD Wall and replaced the same by erecting a new Wall and rested his roofing on the said Wall and only thereafter, the plaintiff came to know about the abovesaid acts of the defendant and accordingly, the plaintiff complained to the Panchayatars and the Panchayatars mediated and found that the defendant is entitled to 4" in the CD Wall

and the plaintiff is entitled 1' 3" in the CD Wall and accordingly, they had determined that the plaintiff and the defendant should enjoy the CD Wall in common and though the plaintiff is entitled to the CD Wall absolutely, in order to avoid future dispute, agreed to the Panchayat's decision and accordingly, the defendant had also agreed to execute the agreement in respect of the Panchayat's determination, however, as the defendant, thereafter, refused to come forward to execute the agreement as per the determination of the Panchayat, hence, left with no other alternative, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts and the rough plain filed by the plaintiff along with the plaint is not correct and misleading. The defendant is not admitting the sale deed dated 11.12.1945 and the measurements therein and the same have to be proved by the plaintiff and the plaintiff has to establish his father's possession and enjoyment of the property as claimed in the plaint and the northern Wall of the defendant's house is a common one and the disputed Wall belongs to the defendant exclusively and only permission was given to the plaintiff's predecessor in title to put up the construction adjoining the said Wall and accordingly, while putting up the construction, the defendant simply replacing the old mud Wall had put up a new Wall with the consent of the

plaintiff and the documents of title acquired by the defendant and his predecessor in title show the correct measurements and there is no Panchayat as alleged by the plaintiff and the plaintiff is estopped from denying the defendant's exclusive right over the suit Wall and the plaintiff is not entitled to the reliefs prayed for and the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to A5 were marked. On the side of the Defendant, DW1 was examined and Exs.B1 to B4 were marked. Exs.C1 and C2 were also marked.

7. The trial Court, on an appreciation of the materials placed on record, both oral and documentary and the submissions made, was pleased to declare that the disputed suit Wall belongs to the plaintiff and the defendant in common and should be enjoyed by them in common and accordingly, negated the reliefs sought for by the plaintiff in other aspects. Aggrieved over the same, the plaintiff has preferred the first appeal and the first appellate Court, on an appreciation of the materials placed on record, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Impugning the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i). Whether the plaintiff who had given evidence of himself and the Panchayatdars (Pws 2 and 3) that the suit wall CD is to be treated as common wall estopped from claiming it as his exclusive wall?

(ii). Whether the lower appellate court ought to have held that both the plaintiff and defendant are co-owners of the CD wall and the plaintiff cannot have the decree for injunction against the co-owner?"

9. The dispute between the parties is only with reference to the CD Wall as shown in the rough plan. Now, according to the plaintiff, he claims absolute title to the CD Wall. On the other hand, the defendant claims exclusive ownership over the CD Wall. As seen from the materials placed on record, the plaintiff's father had purchased the property measuring east-west 54 human feet and north-south 48 human feet by way of the sale deed dated 11.12.1945, which has come to be marked as Ex.A2. No doubt, on a reading of the same, it is found that under the said sale deed, the plaintiff's father had acquired the property with the

abovesaid measurements inclusive of the Wall on the northern, western and eastern side as well as the southern Wall up to an extent of 20 human feet on the eastern side. Thereafter, it is found that under the Will dated 09.07.1984 marked as Ex.A3, the plaintiff's father and mother had bequeathed the suit property as well as the other properties in favour of the plaintiff and his brother and it is found that according to the plaintiff, he has been allotted the suit property under the said Will, particularly, the disputed Wall in question. In Ex.A3 Will, the property is shown as measuring east-west 41 standard feet and north-south 36 standard feet.

10. Likewise, it is also found that the defendant has marked his title deed and the earliest title deed of the defendant dated 03.10.1934 marked as Ex.A5 and from the recitals contained therein, it is found that Dharmaammal had acquired the property from Periyasamy Chettiyar and thereafter, Dharmaammal had alienated the said property to Syed Abdul Ravoob Sayabu by way of the sale deed dated 10.06.1957 marked as Ex.A4 and further, it could be seen that by way of the sale deed dated 31.07.1969 marked as Ex.B2, Syed Abdul Ravoob Sayabu alienated the property to one Amirtham ammal and thereafter, Amirtham ammal had alienated the property to the defendant by way of the sale deed dated 13.07.1974 marked as Ex.B1. At this juncture, it is pertinent to note that in the description of the property acquired by the plaintiff's father Ramasamy Chettiyar under Ex.A2, the said property is shown to be

located to the south of Dharma ammal property and to the north of Kaboor Sayabu's property, Thus, it is found that the defendant had produced the title deeds starting from Dharma ammal to evidence that he had acquired the property from the lawful owners and it is thus found that the defendant's property is situated to the north of the disputed CD Wall and the plaintiff's property is situated to the south of the disputed CD Wall. Further, it is also noted that though in Exs.A4 and A5, the properties comprised therein are shown in human feet, particularly, the north-south measurement has been shown as 17 human feet, whereas, in the subsequent documents marked as Exs.B2 and B1, the properties had been described as measuring north-south 17 standard feet. Thus it is found that as per the defendant's title deed Ex.B1, he had acquired the property measuring north-south 17 standard feet and his predecessor in title had also acquired the property measuring north-south 17 standard feet. However, in the earlier title deeds the measurements are shown as 17 human feet north-south.

11. In the light of the abovesaid materials placed on record, it is found that inasmuch as the plaintiff has come forward with the suit laying exclusive claim to the CD Wall, it is for the plaintiff to establish that he has title to the property inclusive of the CD Wall as putforth by him. As above seen, for the said claim of title, the plaintiff relies only upon Exs.A2 & A3 documents.

12. In this matter, the commissioner had been appointed to note the physical features of the properties involved in the matter and accordingly, the commissioner had visited and inspected the properties, measured the same and filed his report and plan marked as Exs.C1 & C2. The disputed CD Wall measuring 1' 7" has been shown in red colour in Ex.C2. Though the plaintiff has claimed exclusive right in the disputed CD Wall and also prayed for the relief of permanent injunction restraining the defendant from putting up further construction in the CD Wall, it is found that during the pendency of the suit, the defendant had been permitted to proceed with the construction on the CD Wall and accordingly, it is found that the defendant had put up the construction resting his roof on the CD Wall.

13. That apart, as seen from the plaint averments, even prior to the institution of the suit, it is found that the defendant had replaced the CD Wall and put up the new Wall and rested his roof on the said Wall and accordingly, it is found that as on date, as admitted by the parties and noted by the trial Court, the two thatched houses located in the plaintiff's property and the thatched house located in the defendant's property, all have a joint roofing and the same are found to be resting only on the Wall erected by the defendant replacing the existing Wall and it is only in respect of the said existing Wall, the plaintiff claims exclusive title and similarly, the defendant claims exclusive title. However, pending suit, as

abovenoted, the defendant had been allowed to proceed with the construction on the disputed Wall and accordingly, it is seen that the Wall had been raised fully up to the roof level and the three houses abovestated, now rest on the said Wall.

14. Though the plaintiff would complain that the defendant had replaced the old Wall and put up the new Wall during his absence, with reference to the abovesaid plea, no acceptable material is forthcoming on the part of the plaintiff. If really, the plaintiff had any exclusive title to the disputed CD Wall, immediately on coming to know of the destruction of the said Wall by the defendant and the putting up a new Wall in the said place by the defendant, the plaintiff would have approached the civil Court for necessary action. On the other hand, it is found that the plaintiff had approached only the Panchayatars and the materials placed on record, through the evidence of PWs2 and 3, it is found that the Panchayatars viz., PWs2 and 3 had mediated for the parties and accordingly, it is also borne out by the evidence that in the process of mediation, the Panchayatars had come to ascertain that on measuring the properties, the plaintiff is found to be owning some share in the suit Wall and the defendant is also found to be having some right in the suit Wall and accordingly, it is also the case of the plaintiff that the plaintiff as well as the defendant had accepted the Panchayatars' decision that the disputed Wall should be enjoyed in common by both and however, the

grievance of the plaintiff is that inasmuch as the defendant did not come forward to execute further document with reference to the determination of the Panchayatars, he has been necessitated to lay the suit for appropriate reliefs.

15. Accordingly, as seen from the evidence of the Panchayatars examined as PWs 2 & 3, it is found that they had measured the properties of the parties concerned and noted that both have right in the disputed CD Wall and accordingly, it is found that the Panchayatars had determined that the parties should enjoy the disputed Wall in common. When, at one point of time, the plaintiff had acquiesced to the abovesaid Panchayatars' decision, the further case of the plaintiff that he is still entitled to claim exclusive title to the suit property as such cannot be readily accepted.

16. Be that as it may, as above seen, when the plaintiff has come forward with the suit seeking absolute claim to the disputed CD Wall, it is for him to establish the same. As per the documents of title projected by the plaintiff, he is entitled to only 36 standard feet north-south. Accordingly, when the measurements depicted in the commissioner's report and plan if noted in conjunction with the entitlement of the plaintiff to his property i.e. north-south measuring 36 feet, it is found that excluding the CD Wall, the plaintiff's property measures 34' 11". Equally,

when the north-south measurement, to which, the defendant would be entitled to as per his document of title is considered, it is found that he has acquired 17 standard feet north-south and in the earlier documents of title, the same had been described as 17 human feet and accordingly, it is found that the same would come to 12' 9" in standard feet. However, excluding the CD Wall as per the commissioner's report and plan, it is found that the defendant's property measures 15' 4". Thus it is found that the defendant is in the possession and enjoyment of more extent of property than what had been conveyed under the earlier documents of title i.e. Exs.A5 and A4. However, as above seen, in the subsequent documents of title i.e. Exs.B2 & B1, the defendant and his predecessor in title had acquired north-south 17 standard feet and as rightly determined by the trial Court probably, later on coming to know that the defendant and his predecessor in interest had been enjoying more extent of property than what had been depicted in the earlier title deeds, accordingly, in the latter title deeds, they had described the property in standard feet.

WEB COPY

17. Considering the measurements, to which, the plaintiff and the defendant would be entitled to as per the north-south measurements acquired by them in human feet i.e.36 feet of the plaintiff and 12.9 feet of the defendant, it could be seen that the total measurement of their properties should only measure 48.9 feet. However on ground, it is found

that inclusive of the disputed suit CD Wall, it is found that the properties of the plaintiff and the defendant totally measures 51.10". Further, as rightly noted by the trial Court and as seen from commissioner's report and plan, there is a space available to the south of the defendant's southern Wall and the north of the thatched house belonging to the owner on the southern side. With reference to the abovesaid vacant space, there is no proper explanation on the part of the plaintiff. The plaintiff has not explained as to whether the vacant space also forms part of his property and if the same is taken into account, it could be seen that the plaintiff cannot as such lay any exclusive claim over the disputed CD Wall or for the matter, would also not be entitled to claim any right, whatsoever, in respect of the CD Wall. Be that as it may, leaving the abovesaid vacant space aside, accordingly, when it is seen that the disputed CD Wall measures 1' 7" and the plaintiff's property measures 34' 11" and the defendant would be entitled to 12' 9", if 17 human feet north-south is taken into account, whereas, the defendant's title deeds depict the property measuring in standard feet north-south 17' and also considering the fact that as per the Panchayat's decision, both the parties are entitled to share in the disputed CD Wall and coupled with the fact that the defendant had been allowed to proceed with the construction of the new Wall by replacing the existing Wall and at present, both the houses of the plaintiff and the defendant now rest on the Wall i.e the disputed CD Wall and on the materials placed, when it is found that at the

most, the plaintiff would be entitled to lay a claim of only 1' 1" in the disputed CD Wall and the remaining extent of 6" in the disputed CD Wall would go to the share of the defendant, considering the events and developments, which had occurred prior to the institution of the suit as well as during the pendency of the suit as above discussed and when the plaintiff has failed to establish his claim of exclusive right to the disputed CD Wall as above pointed out and at the most, he could lay a claim of right only in respect of 1' 1" in the disputed CD Wall and the defendant is having ownership to the remaining 6" in the disputed CD Wall, in my considered opinion, the trial Court is justified in holding that the parties viz., the plaintiff and the defendant should enjoy the disputed CD Wall in common and accordingly, it is found that the trial Court had rightly disposed of the plaintiff's suit by declaring that the disputed CD Wall is common to both the plaintiff and the defendant and that they should enjoy the same in common and consequently, negated the other reliefs sought for by the plaintiff in respect of the same.

18. In such view of the matter, it is found that the first appellate Court had failed to appreciate the failure of the plaintiff to establish his entitlement in exclusive to the disputed CD Wall and when as per the documents of title projected by the plaintiff, he would be entitled to only 36' north-south and on that basis, if calculated with the commissioner's report and plan, the plaintiff at the most would be entitled to seek right

only in respect of 1' 1" in the disputed CD Wall and the remaining 6" in the disputed CD Wall would have to be declared to be owned by the defendant, accordingly, the first appellate Court having failed to consider the abovesaid aspects of the matter, is found to have erred in upholding the exclusive claim of title of the plaintiff in respect of the disputed CD Wall. In the light of the abovesaid discussions, it is found that the plaintiff himself at one stage of the matter having accepted that both he and the defendant would be entitled to the disputed CD Wall in common and agreed for the common enjoyment of the same, it has to be held that the plaintiff would be estopped from claiming exclusive right to the CD Wall as it is found that on the basis of the abovesaid acquiescence on the part of the plaintiff, the defendant had been allowed to proceed with the construction and accordingly, the defendant had put up the new Wall in the place, where, the existing Wall had been erected and accordingly, the first appellate Court should have held that both the plaintiff and the defendant are the common owners in respect of the disputed CD Wall and therefore, on that basis, should have declined the reliefs of declaration and permanent injunction sought for by the plaintiff. In such view of the matter, the judgement and decree of the first appellate Court cannot be allowed to stay further and the substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendant and against the plaintiff.

For the reasons aforesaid, the the Judgement and Decree dated 20.04.2004 passed in A.S.No.132 of 2003 on the file of the District Court, Perambalur are set aside and the Judgment and Decree dated 14.07.2003 passed in O.S.No.278 of 1999 on the file of the District Munsif Court, Perambalur are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No
Internet : Yes / No
sms

25.06.2018

To

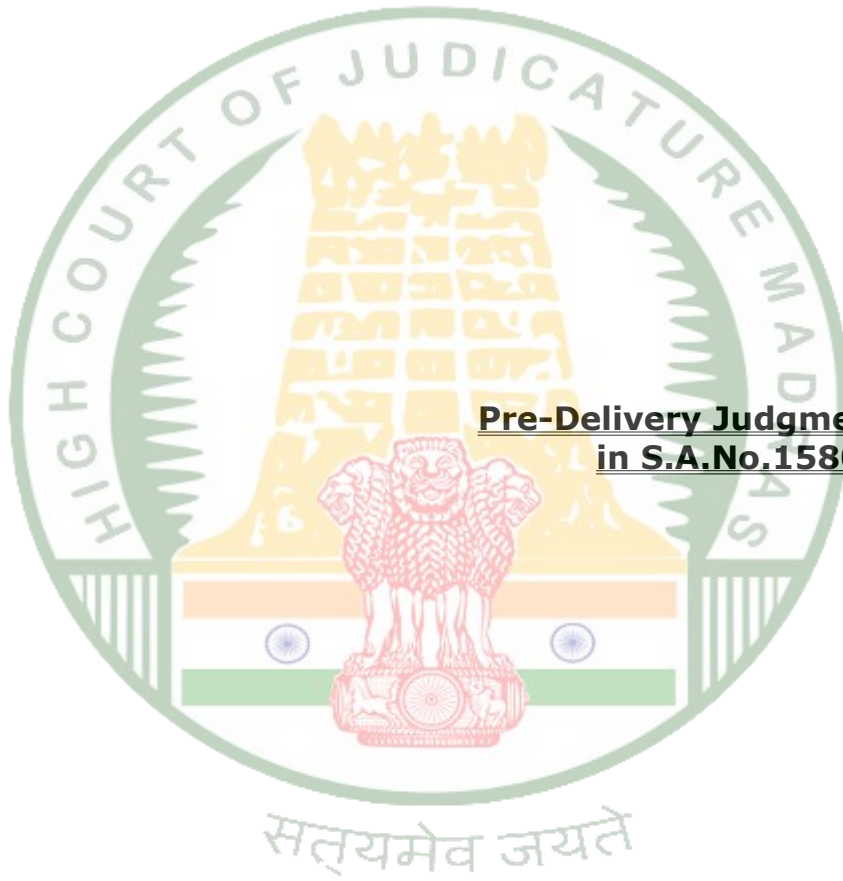
1. The District Court, Perambalur.
2. The District Munsif Court, Perambalur.
3. The Section Officer, V.R.Section, High Court, Madras.

सत्यमेव जयते

WEB COPY

T.RAVINDRAN, J.

sms



**Pre-Delivery Judgment made
in S.A.No.1580 of 2004**

WEB COPY **25.06.2018**