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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2019

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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.3 of 2013
and
M.P.No.1 of 2013 &
CMP.No.13656 of 2018

1. Bhavani
2. Vedhamurthy
3. Swaminathan

... Appellants/Defendants

Vs.

1. Arunachalam
2. Gandhi

... Respondents/Plaintiffs

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 04.07.2012 passed in A.S.No.72 of 2011 on the file of the Court of Additional Sub-Ordinate Judge, Mayiladuthurai in reversing the Judgment and Decree passed in O.S.No.13 of 2010 dated 27.06.2011 on the file of the Court of Principal District Munsif, Mayiladuthurai.

For Appellants : M/s. A. Muthukumar

For Respondents : M/s. S. Sounthar

JUDGMENT

This Second Appeal has been filed by the defendants against the judgment and decree passed by the Additional Sub-Judge, Myladuthurai in A.S.No.72 of 2011 dated 04.07.2012 reversing the judgment and decree passed by the Principal District Munsif, Myladuthurai in O.S.No.13 of 2010 dated 27.06.2011.

2. The respondents herein had filed a suit in O.S.No.13 of 2010 on the file of the Principal District Munsif, Myladuthurai, to restrain the defendants and their men from in anyway demolishing the eastern wall of the plaintiffs. The learned District Munsif, Myladuthurai, by the judgment dated 27.06.2011 had dismissed the said suit with costs. Aggrieved by



the same, the plaintiffs had filed an appeal in A.S.No.72 of 2011 on the file of the Additional Sub-Judge, Myladuthurai. The learned Additional Sub-Judge, Myladuthurai, by the judgment dated 04.07.2012 had allowed the said appeal and set aside the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendants have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The suit property was purchased by one Eswarathammal who is the mother of the first plaintiff in the year 1958 under a registered sale deed. In the partition which took place on 04.07.1981 between the first plaintiff and his brother and their mother Eswarathammal, the suit property was allotted to the first plaintiff. The second plaintiff is the wife of the first plaintiff and they have been in possession and enjoyment of the suit property, the defendants are the owners of the house situated on the east of the plaintiffs' house. The defendants are making arrangements to demolish their house and construct a new one. In that process, they tried to demolish the eastern wall of the plaintiffs. The defendants have no right in the said wall. Hence, the plaintiffs are constrained to file the above suit for permanent injunction to restrain the defendants and their men demolishing the eastern wall of the plaintiffs.

4. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 and 3 are, in brief, as follows:

The description of the property given in the plaint schedule is not correct. The defendants have admitted that they are owners of the house situated on the east of the plaintiffs' house. The wall which is situated on the east of the plaintiffs' house exclusively belongs to the defendant. The plaintiffs' house is situated in S.No.480 whereas the defendants' property is situated in S.No.479 and the said wall is situated only in S.No.479. Therefore, the plaintiff cannot claim any right over the said wall. The defendants' roof rests on the said wall. The plaintiffs have demolished the house tiles situated in S.No.480 and constructed a terraced building. The said construction has been made just adjacent to the defendants' parent wall. Further, the plaintiffs, at the time of constructing the building in S.No.480 caused damage to the aforesaid wall and the said wall may fall at any time. Therefore, the defendants prayed to dismiss the above suit.



5. Based on the aforesaid pleadings, the learned Principal District Munsif, Myladuthurai, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff examined himself as PW1 and further they have marked Exs.A1 and A2 as exhibits. On the side of the defendants, the third defendant was examined as DW1 and they have marked as Exs.B1 and B2 as Exhibits. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2 respectively. The surveyor's report and plan were marked as Exs.C3 and C4 respectively .

6. The learned Principal District Munsif after considering the materials placed before him, found that the tiled roof of the defendants rests on the disputed wall and hence, the defendants have right over the disputed wall. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.72 of 2011 on the file of the Additional Sub-Judge, Myladuthurai. The learned Additional Sub-Judge, Myladuthurai, had allotted the said appeal and set aside the judgment and decree passed by the trial court and held that the plaintiffs are entitled for the relief of permanent injunction as prayed for. Feeling aggrieved, the defendants have filed the present second appeal.

7. This court, at the time of admitting the second appeal has formulated the following substantial questions of law 1 to 4:

"1) Whether the lower appellate court has committed an error in holding that the disputed wall in entirety belongs to the plaintiffs despite the fact that the surveyor has measured the property and found that disputed wall to be situated in T.S.No.479 belonging to the defendants?

2) Whether the lower appellate court is right in holding that the plaintiffs have got title to the disputed wall simply because Ex.A1 refer to a parent wall on the back side of the property sold therein, whereas the subsequent deed Ex.A2 does not refer to such a wall?

3) Whether the finding of the lower appellate court with regard to the title to the disputed wall is perverse?

4) Whether the lower appellate court has committed an error in law in granting the relief of permanent injunction when the title has been disputed?"



8. Heard Mr.A. Muthukumar, learned counsel for the appellants and Mr.S.Sounthar, learned counsel for the respondents.

9. The substantial questions of law 1 to 4:

The learned counsel for the appellants/defendants has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that admittedly the plaintiffs' property is situated in T.S.No.480 whereas the defendants' property is situated in T.S.No.479 and that the Advocate Commissioner's report and plan would clearly show that the disputed wall is situated only in T.S.No.479 and as such, the first appellate court ought not to have granted judgment and decree in favour of the plaintiffs'. He further submitted that in Ex.A1 sale deed, he recital that the eastern wall belongs to the plaintiffs has been inserted as interpolation and taking into consideration of the same, the trial court had rightly dismissed the suit but the first appellate court without appreciating the evidence in a proper perspective had allowed the appeal and set aside the judgments and decrees passed by the trial court and granted the judgment and decree in favour of the plaintiffs. He further submitted that since the defendants are seriously disputing the title of the plaintiffs over the disputed wall, the plaintiffs have filed a suit for declaration of title but they have filed bare injunction suit and hence, the suit is not maintainable. In support of the aforesaid contentions, he relied upon the decision in Anathula Sudhakar Vs. P. Buchi Reddy (dead) by LRs and others (2009) -2 -LW 546.

10. Per contra, the learned counsel for the respondents/plaintiffs has submitted that the trial court has erred in holding that in Ex.A1, the recital that the eastern wall belongs to the plaintiffs has been subsequently inserted. He further submitted that in the parent document dated 06.08.1941 itself, it has been clearly stated that the eastern wall belongs to the vendors of the plaintiffs and therefore, the trial court findings that the plaintiffs have inserted the recital that the eastern wall belongs to them in Ex.A1, is not correct. He further submitted that in order to prove the aforesaid fact, the respondents have filed the CMP.No.13656 of 2013 to receive a registration copy of the sale deed dated 06.08.1941 as additional documentary evidence and hence, he requests to receive the said document as an additional documentary evidence on the side of the respondents/plaintiffs. He further submitted that even though the Advocate Commissioner has stated in his report and plan that the disputed wall comes within the boundary of T.S.No.479, since in Ex.A1 boundaries also mentioned, the principle of boundaries will prevail over



measurement will apply and as such, the disputed wall exclusively belongs to the plaintiffs. He further submitted that the DW1 has admitted in his cross-examination that on the western side of the said wall that there are provisions for Almirahs and the said fact would also strengthen the case of the plaintiffs. He further submitted that the first appellate court taking into consideration of the aforesaid facts has rightly reversed the findings of the trial court and granted decree in favour of the plaintiffs and therefore, he prayed to dismiss the second appeal. He further submitted that since the documentary evidence has clearly established that the plaintiffs are the absolute owners of the said wall, there is no necessity for the plaintiffs to amend the plaint for the relief of declaration of title.

11. Admittedly, the plaintiffs' house is situated in T.S.No.480 and the defendants' house is situated in T.S.No.479. The plaintiffs' house is situated on the western side and the defendants' house is situated on the eastern side. The lands in which the houses of both parties constructed belong to the temple. Both the parties can have right over the superstructures alone. Both the parties claiming right over the wall which is situated in between their houses. The plaintiffs are claiming exclusive right over the said wall based on Ex.A1 sale deed. In Ex.A1 sale deed, there is a recital that the eastern wall also sold through the said document. The defendants' claim exclusive right over the said wall based on the Advocate Commissioner's report and plan. In the Advocate Commissioner's report and plan, it is stated that the said wall comes within the boundaries of T.S.No.479.

12. It is to be pointed out that in the Advocate Commissioner's report, it is stated that the roof of the defendants' house rests on the said wall. Further, the defendants have been enjoying the said wall on their side by putting almirah. DW1 has admitted in his cross-examination the existence of almirahs on the western side of the said wall. The said physical features would show that both the parties have enjoyed the said wall commonly all these years. That must be the reason for the plaintiffs, that after demolishing their house, they have constructed the new terraced building leaving the said wall. If really they got exclusive right over the said wall, they would have demolished the said wall also. It appears that the defendants are claiming exclusive right over the said wall based on the surveyor's report and plan. Because in the said plan, it is stated that the said wall comes within the boundary of T.S.No.479 but the physical features would clearly show that the said wall has been commonly enjoyed by both the parties all these years.



13. In Anathula Sudhakar Vs. P. Buchi Reddy (dead) by LRs and others (cited supra), the Hon'ble Supreme Court has held that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiffs to the property. It has further held that a cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. In this case, the plaintiffs claimed exclusive right over the said wall based on the recitals found in Ex.A1 sale deed. The defendants based their right only on the basis of Commissioner's report and plan. So, it cannot be said that the defendants raised a cloud over the title of the plaintiff and hence it is not necessary for the plaintiff to sue for declaration and a suit for injunction is sufficient.

14. Admittedly, the plaintiffs have already demolished their house and constructed a terraced house leaving the disputed wall. According to the defendants, their house also requires demolition and reconstruction. Further the Advocate Commissioner's report and plan also would show that the said wall is a very old one and requires repairs. Under the said circumstances, it is open to both the parties either to enjoy the said wall commonly by making necessary repairs or demolish the same and take the land equally and thereafter the defendants can construct their house within their boundaries leaving $\frac{1}{2}$ portion of the land in which the said wall has been constructed. The plaintiffs can enjoy the remaining portions. Accordingly, the substantial questions of law are answered in favour of the appellant.

15. In the result, the second appeal is allowed. Consequently, connected injunction petition in M.P.No.1 of 2013 is closed. No costs. The judgment and decree passed by the first appellate court are set aside. Since this court found that the disputed wall is a common wall and it belongs to both the parties, it is open to both the parties either to enjoy the said wall commonly by making necessary repairs or demolish the same and take the land equally. Accordingly, the suit in O.S.No.13 of 2010 is dismissed. Since this court found that the disputed wall belongs to both the parties, there is no necessity to receive the document filed by the respondents vide CMP.No.13656 of 2018 as an additional evidence. Hence, the CMP.No.13656 of 2018 is dismissed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

gv

Sub Assistant Registrar



To

1. The Additional Sub-Ordinate Judge,
Mayiladuthurai.
2. The Principal District Munsif,
Mayiladuthurai.
3. The Section Officer,
V.R.Section, Madras High Court, Chennai.

+1 cc to Mr.S.Sounthar, Advocate, S.R.No.35192

+1 cc to Mr.A.Muthukumar, Advocate, S.R.No.35181

Judgment made in
S.A.No.3 of 2013
and
M.P.No.1 of 2013 &
CMP.No.13656 of 2018

GMR(CO)
SSM(14/11/2019)