



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT  
JUDGMENT RESERVED : 04.10.2019  
JUDGMENT PRONOUNCED : 23.10.2019  
CORAM :

**THE HONOURABLE Ms. JUSTICE P.T. ASHA**

**S.A. (MD)No.27 of 2015**  
**and**  
**C.M.P. (MD) No.1 of 2015**

K.Ramaseshan ... Appellant/Respondent/Plaintiff  
Vs  
S.N.Abaranam ... Respondent/Appellant/Defendant

**PRAYER:** Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree of the II Additional Subordinate Judge, Nagercoil in A.S.No.6 of 2012 dated 10.12.2012 in confirming the well considered judgment and decree of the Principal District Munsif Court, Nagercoil in O.S.No.649 of 2009 dated 20.10.2011.

For Appellant : Mr.S.Ramesh  
For Respondent : Mr.V.Meenakshisundaram

**JUDGMENT**

The plaintiff in the suit O.S.No.649 of 2009 filed for bare injunction and mandatory injunction, is the appellant before this Court.

2.This second appeal is filed challenging the judgment and decree in A.S.No.6 of 2012 on the file of the learned II Additional Subordinate Judge, Nagercoil, reversing the judgment and decree in O.S.No.649 of 2009 of the file of the learned Principal District Munsif, Nagercoil.

3.The subject matter of the suit in O.S.No.649 of 2009 is a wall situated between the properties of the plaintiff and the defendant, which has been described as 'B' schedule property in the suit schedule and the same is as follows:

**B-SCHEDULE PROPERTY**

DISTRICT : KANYAKUMARI  
TALUK : AGASTEESWARAN  
VILLAGE : VADIVEESWARAM  
Sr.No. : Old Sr.No.1679/4188  
Re.Sr.No.Q12/61



**EXTENT** : Party wall having 1.5 ft., width  
and 115 ft., length

**DESCRIPTION OF  
PROPERTY** : Party wall having a width of 1.5 ft.,  
and length of 115 ft.,

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4.The parties are referred to in the same array as in the suit in O.S.No.649 of 2009.

**PLAINTIFF'S CASE:**

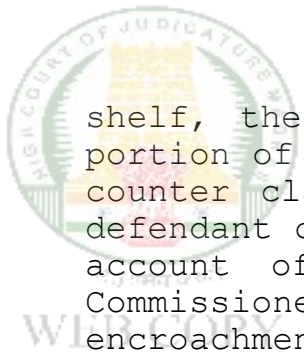
5.1.The plaintiff would submit that 'A' schedule property was purchased by her in the year 1997 under a registered document bearing Document No.1652/1797. The plaintiff had purchased an extent of 5 cents as per old survey number and 4.84 cents as per re-survey number bearing R.S.No.Q12/61 at Vadiveeswaram Village. He would further submit that the property consisted of a old tiled roof house, which was part of a row of houses. The houses were all facing the north and each of them was supported by a single wall. The western wall belonged to the eastern owner, who was entitled to derive lateral support from all these wall.

5.2.The plaintiff would further submit that on 11.03.1998, the defendant had purchased the property on the western side, where he is residing with his daughter and when the plaintiff had put up a RCC construction by removing the tiled structure, the defendant had filed a suit in O.S.No.866 of 2004 on the file of the I Additional District Munsif, Nagercoil, for declaration that the 'B' schedule wall was a common wall, recovery of possession and mandatory injunction against the plaintiff. After contest, the learned Judge had dismissed the said suit by holding that the 'B' schedule wall was a common wall. The relief of mandatory injunction was turned down. The parties namely, the plaintiff and the defendant herein did not challenge the said judgment and decree in O.S.No.866 of 2004 and the same has attained finality.

5.3.The plaintiff would further submit that the common wall is measuring 176 ft. in length, 1½ ft. in width and 10 ft. in height. On 15.09.2009, the defendant, her daughter and their men and agents had demolished a portion of "B" schedule wall to a length of 65 ft. and height of 14 ft., and despite the attempts of the plaintiff to bring about an amicable solution, the same did not fructify and therefore, left with no other alternative, the plaintiff had come forward with the suit in question.

**DEFENDANT'S CASE (COUNTER CLAIM) :**

6.The defendant had taken a defence that the western wall was not damaged on account of the construction being put up by the defendant but that the plaintiff had demolished the eastern portion of the common wall and put up his new house without the consent of the defendant. He would further submit that the plaintiff's wall



shelf, the concrete roof projection of his house covered a major portion of the common wall and the defendant had come forward with a counter claim for removing this unauthorised construction and the defendant complained that the wall in question had collapsed only on account of the construction put up by the plaintiff and the Commissioner's report in the earlier suit would clearly prove the encroachment made by the plaintiff.

**REPLY TO THE COUNTER CLAIM:**

7.In reply, the plaintiff would contend that the construction in question in respect of which the plaintiff seeks a mandatory injunction was put up much prior to the filing of the suit in O.S.No.866 of 2004. He would further contend that the very same relief which is claimed in the form of a counter claim had been sought for in the earlier suit and the same was rejected. Therefore, the judgment in the said suit, it would operate as *resjudicata* against the defendant.

**TRIAL COURT:**

8.1.The learned Principal District Munsif, Nagercoil, had framed the following issues:

*1.Whether the plaintiff is entitled to a decree for permanent injunction as prayed for?*

*2.Whether the defendant had demolished a portion of 'B' schedule property as alleged by the plaintiff?*

*3.Whether the plaintiff is entitled to a decree for mandatory injunction as prayed for?*

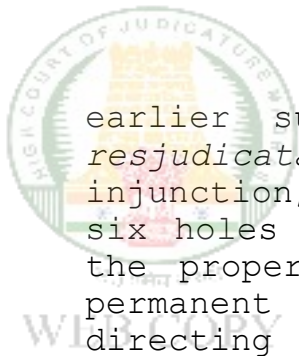
*4.Whether the constructions allegedly made by plaintiff are before the filing of O.S.No.866 of 2004?*

*5.Whether the defendant is entitled to the counter claim as prayed for?*

*6.What other reliefs?*

8.2.On the side of the plaintiff, the plaintiff had examined himself as P.W1 and 14 documents were marked as Ex.A1 to Ex.A14. On the side of the defendant, the defendant's daughter, P.Suseela was examined as D.W1 and 7 documents were marked as Ex.B1 to Ex.B7. In the cross examination of D.W1, Ex.A15 was marked on the side of the plaintiff. The Commissioner's report and plan were marked as Ex.C1 to Ex.C4.

8.3.After hearing the arguments advanced on either side, the learned Principal District Munsif, Nagercoil, had written the finding that the defendant was not entitled to the relief claimed in his counter claim since the very same issue was sought for in the



earlier suit in O.S.No.866 of 2004 and it would operate as *resjudicata*. With reference to the defendant's claim for permanent injunction, the learned Judge had held that the defendant had dug six holes adjacent to the common wall, which was caused damage to the property. The learned Judge therefore decreed the suit for permanent injunction and had granted a mandatory injunction directing the defendant to construct the damage portion of 65 ft., length, 14 ft. height, 1½ ft., width, of 'B' schedule property by dismissing the counter claim.

**APPELLATE COURT:**

9. Aggrieved by the judgment and decree in O.S.No.649 of 2009, the defendant had filed A.S.No.6 of 2012 on the file of the learned II Additional Subordinate Judge, Nagercoil. The learned Subordinate Judge while upholding the judgment and decree of the learned Principal District Munsif, Nagercoil, insofar it related to the decree for permanent injunction and mandatory injunction and was pleased to allow the appeal by granting the relief claimed by the defendant in his counter claim. Challenging the said judgment and decree insofar as it related to the counter claim being decreed, the plaintiff is before this Court.

**SECOND APPEAL:**

10. This second appeal is admitted on the following substantial questions of law:

*1. Whether the 1<sup>st</sup> appellate Court is right in granting the relief of counter claim without considering the law of limitation under Article 113 applicable for mandatory injunction?*

*2. Whether the 1<sup>st</sup> appellate Court is right in granting the relief of counter claim without applying the principles of *resjudicata* and having found that the plaintiff's construction have been put up even prior to the earlier suit O.S.No.866 of 2004?*

*3. Whether the 1<sup>st</sup> appellate Court is right in stating that the cause of action stated in the counter claim is continuous in nature though there was no such pleading by the defendant?*

*4. Whether the 1<sup>st</sup> appellate Court is right in granting the relief of mandatory injunction in the counter claim as the defendant had acquiescence of the construction put up by the plaintiff and have laid his claim belatedly after the prescribed period of limitation?*

10.1. Though the arguments had been addressed about the maintainability of a second appeal against the decree in the suit, in the counter claim, no substantial question of law has been framed in this regard. Therefore, this Court framed the following



additional substantial question of law and the arguments have also been addressed on this.

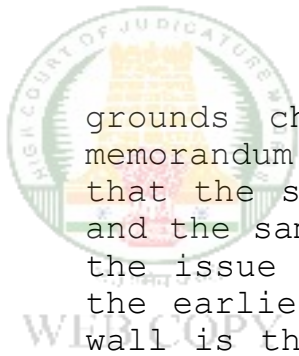
*Whether the lower appellate Court was correct in law in entertaining the appeal against the decree when the defendant failed to file a separate appeal against the counter claim.*

**SUBMISSIONS:**

11.Mr.S.Ramesh, learned counsel appearing for the plaintiff would submit that in the earlier suit in O.S.No.866 of 2004, the plaintiff herein is the defendant. The learned Principal District Munsif, Nagercoil, in the earlier suit had held that the plaintiff therein, who is the defendant in this suit, had not proved that the plaintiff herein, had caused damage to the common wall and that there was an encroachment by the plaintiff herein. He would further submit that the counter claim filed by the defendant is not maintainable in the light of the judgment passed in the earlier suit. In the suit in O.S.No.866 of 2004, the defendant herein had made the very same claim that is made in the counter claim namely, for mandatory injunction directing the plaintiff herein to remove the projection over the "B" schedule property. This finding has not been challenged by the defendant by way of an appeal and therefore, the decree passed in the said suit had become final. Therefore, in the light of the same, the present counter claim ought not to have been decreed by the lower appellate Court and the learned Subordinate Judge, Nagercoil, ought to have confirmed the decree and judgment of the trial Court.

12.The learned counsel further would submit that apart from the plea of *resjudicata*, the plaintiff had also raised the issue of maintainability of the second appeal since the defendant had not filed a separate appeal challenging the rejection of the counter claim and has only filed a single appeal challenging the decree passed by the trial Court. In support of his contention, the learned counsel would rely on the judgments of the Hon'ble Supreme Court in the case of ***Union of India Vs. Hari Krishan Khosla (dead) by Lrs.***, reported in **1993 Supp (2) Supreme Court Cases 149** and in the case of ***Girija and others Vs. Rajan and others*** reported in **2015 SCC Online Ker 3799: (2015) 1 KLN 689: (2015) 1 KLT 695: (2015) 2 ICC 221: (2015) 2 RCR (Civil) 320: (2015) 2 CCC 563.**

13.*Per contra*, Mr.V.Meenakshisundaram, learned counsel appearing for the respondent/defendant would submit that the cause of action in the earlier suit and the cause of action in the present suit are different. He would further submit that there is a clear finding in the earlier suit that the 'B' schedule wall is the common wall. As regards the maintainability of the appeal against the counter claim, the learned counsel would submit that the counter claim as well as the relief claimed in the suit has been disposed of by way of single decree and therefore, the defendant has raised



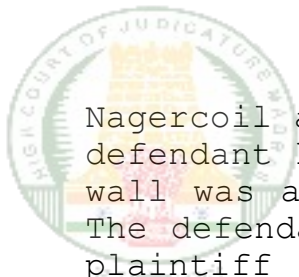
grounds challenging the dismissal of the counter claim in the memorandum of grounds of appeal. Therefore, considering the fact that the subject matter in the suit and the counter claim were one and the same, filing of the single appeal was not fatal. As regards the issue of *resjudicata*, the learned counsel would submit that in the earlier suit, the learned Judge had held that the 'B' schedule wall is the common wall and the plaintiff having made a projection over the common wall, the defendant was well within his right to seek the counter claim.

**DISCUSSIONS:**

14.The issue involved in the above second appeal is only with reference to the decree insofar as it related to the counter claim. The defendant has not filed any appeal challenging the grant of the relief of permanent injunction and mandatory injunction. The defendant has made the following contentions in the written statement in support of the counter claim and the same is reproduced herein below:

*The western part of the 'B' schedule common wall. For doing that work, the wall shelf projections and the roof concrete projections are causing hindrance to the new wall construction of the house of the defendant. Hence, that objections/projections has to be removed by a decree of mandatory injunction against the plaintiff by way of counter claim and also the defendant may be allowed to construct here eastern house wall in the remaining part of the common wall ie., only on the western half portion of the common wall area. In the previous suit, the property was not measured and the common wall area was not located by means of a sketch. The encroachment over the 'B' schedule common wall by the plaintiff was no ascertained by the Commissioner in that case by preparing a sketch. Hence that could be decided in this case. In this case the property was measured by the qualified Surveyor and sketch also prepared. Hence this Honourable Court has got right to decide them on merits and the previous judgment would not operate as *resjudicata* in this respect. Otherwise it is just and proper to remove the wall constructed by the plaintiff exclusively on the eastern part and a common wall for the use of the plaintiff and defendant has to be constructed at the cost of both parties in the entire 1½ ft., common wall area. As the plaintiff has made exclusive construction by occupying the eastern portion of the 'B' schedule common wall, he is stopped from making any objection to make construction by the defendant over the remaining western portion of the 'B' schedule wall.*

15.The suit in O.S.No.866 of 2004 had been filed by the defendant herein originally on the file of the learned Principal Subordinate Court, Nagercoil in O.S.No.284 of 2001, which was later transferred to the file of the learned I Additional District Munsif,



Nagercoil and numbered as O.S.No.649 of 2009. In the said suit, the defendant herein had sought for a declaration that the "B" schedule wall was a common wall and for recovery of possession of the same. The defendant had also asked for a mandatory injunction against the plaintiff herein to remove the construction put up on the common wall.

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16.The learned Principal District Munsif, Nagercoil, after considering the evidence in detail had returned a finding that the defendant herein, who is the plaintiff in that suit has failed to prove that the plaintiff herein had encroached on the common wall and put up a construction and ultimately, the learned Judge had only granted the prayer for declaration by declaring the 'B' schedule wall to be a common wall and rejecting the relief for possession and mandatory injunction. It is the very same relief which was earlier negated that is now sought for by the defendant in the instant suit.

17.From a perusal of Ex.A11 and Ex.A13, it is clearly evident that even as early as in the year 2002, the plaintiff had completed the construction of his house in the 'A' schedule property. Therefore, the defendant cannot seek the grant of mandatory injunction to remove the alleged offending construction put up by the plaintiff as early as in the year 2002 by way of a counter claim, in the instant suit vide his written statement filed on 13.02.2010. That apart, the very same relief was sought for in the earlier suit in O.S.No.866 of 2004 and the same has been rejected by the learned Principal District Munsif, Nagercoil and that the decree has attained finality inasmuch as the defendant herein had not challenged the said finding.

18.Therefore, the lower Appellate Court has failed to take note of the fact that the relief claimed by way of counter claim was clearly barred by limitation as well as the principles of *resjudicata*. The cause of action for the said relief is not a continuing one and the same had arisen even prior to the filing of the earlier suit in the year 2001. The learned Principal District Munsif, Nagercoil, after considering the various provisions as well as the judicial pronouncement has finally observed as follows:

14.In the instance case, since admittedly the plaintiff's schedule property is a common wall, both the plaintiff and the defendant should restrain themselves from damaging or altering the shape of the common wall. The daughter of the defendant, D.W1 in her cross-examination has also admitted that even before the filing of O.S.No.866 of 2004, the roof of the plaintiff's house was resting on the common wall. In the instant case, as already held in issue Nos.3 and 4, the plaintiff had not made any construction subsequent to the disposal of O.S.No.866 of 2004. But, admittedly, the defendant had dug six holes adjacent to the common wall



causing reasonable apprehension to the plaintiff that the common wall would collapse.

19. In view of the above, the questions of law 1 to 4 framed in the above second appeal are answered in favour of the appellant/plaintiff.

20. As regards the issue of maintainability of a single appeal against the decree in the suit as well as against the decree in the counter claim useful reference can be made to the judgment of the Hon'ble Kerala High Court in the matter of Girija and others cited supra on the side of the appellant/plaintiff.

21. The facts in the case of **Girija and others Vs. Rajan and others** reported in **2015 SCC Online Ker 3799: (2015) 1 KLN 689: (2015) 1 KLT 695: (2015) 2 ICC 221: (2015) 2 RCR (Civil) 320: (2015) 2 CCC 563**, are applicable squarely to the facts in the instant appeal. Therefore, the question of law, which was framed by this Court as additional question of law, is answered in favour of the appellant/plaintiff.

22. In the result, this Second Appeal is allowed and the judgment and decree in A.S.No.6 of 2012 on the file of the learned II Additional Subordinate Judge, Nagercoil, reversing the judgment and decree in O.S.No.649 of 2009 on the file of the learned Principal District Munsif, Nagercoil insofar as it related to the counter claim is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

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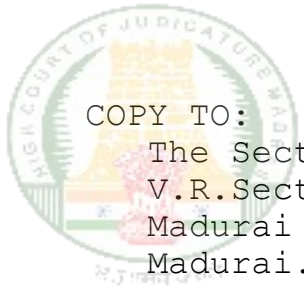
Sub Assistant Registrar(CS )

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To

1. The II Additional Subordinate Judge,  
Nagercoil.

2. The Principal District Munsif,  
Nagercoil.



COPY TO:

The Section Officer, (2 copies)  
V.R.Section,  
Madurai Bench of Madras High Court,  
Madurai.

+1 CC to MR.D.NALLATHAMBI, Advocate ( SR-93876[F] dated 23/10/2019 )  
+1 CC to MR.V.RAGHAVACHARI, Advocate ( SR-93948[F] dated 23/10/2019 )

**judgment made in**  
**S.A. (MD)No.27 of 2015**  
**23.10.2019**

MK (21.01.2020) 9P 7C