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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	20.07.2021
PRONOUNCED ON	16.08.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

S.A.NOS.81 & 82 OF 2016
(Through Video Conferencing)

S.Muthusamy

...Appellant in both S.As./
1st Defendant in O.S.No.294/2002 &
Plaintiff in O.S.No.490/2007

Vs.

K.Ramalingam

...First Respondent in S.A.No.81/2016
and Respondent in S.A.No.82/2016/
Plaintiff in O.S.No.294/2002 &
Defendant in O.S.No.490/2007

R.Marriappa Udayar

...Second Respondent in S.A.No.81/2016/
2nd Defendant in O.S.No.294/2002

Common Prayer:- Second Appeals filed under Section 100 of Civil Procedure Code, 1908, against the Judgments and Decrees dated 18.08.2011 passed by the Subordinate Court, Pollachi in A.S.Nos.32 & 33 of 2010 confirming the Judgments and Decrees dated 05.07.2010 passed by the District Munsif Court, Pollachi in O.S.No.294 of 2002 and O.S.No.490 of 2007.

For Appellants in both S.As. : Mr.A.S.Balaji

For R1 in S.A.No.81/2016 &
Respondent in S.A.No.82/2016 : Mr.C.Veeraraghavan

COMMON JUDGMENT

By this common Judgment, both the Second Appeals are being disposed.

2. At the time of admission of these Second Appeals, the following substantial questions of law have been framed for being answered:-



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S.A.No.81 of 2016	S.A.No.82 of 2016
Whether the Courts below is right in coming to the conclusion and following the suit filed by the first respondent when it clearly established that there is encroachment by the first respondent in the appellant?	Whether the Lower Appellate Court is right in dismissing the appeal preferred by the appellant on the point of limitation, while coming to conclusion that the finding of the trial court is not correct?

3. These Second Appeals have been filed against two separate impugned Judgments and Decrees both dated 18.08.2011 passed by the Subordinate Court, Pollachi (hereinafter referred to as First Appellate Court) in A.S.Nos.32 and 33 of 2010.

4. By the impugned Judgments and Decrees, the First Appellate Court has dismissed the appeals filed by the appellant against two separate Judgments and Decree both dated 05.07.2010 passed by the District Munsif Court, Pollachi (hereinafter referred to as Trial Court) in O.S.No.294 of 2002 and O.S.No.490 of 2007.

5. The Trial Court decreed the suit in O.S.No.294 of 2002 filed by the contesting respondent and dismissed the suit in O.S.No.490 of 2007 filed by the appellant vide its separate Judgments and Decrees both dated 05.07.2010.

6. Aggrieved by the same, the appellant has filed A.S.Nos.32 and 33 of 2010 before the First Appellate Court. By the separate impugned Judgments and Decrees both dated 18.08.2011, both the appeals were dismissed by the First Appellate Court. It is under these circumstances, the present Second Appeals have been filed.

7. The appellant was the defendant in O.S.No.294 of 2002 and the plaintiff in O.S.No.490 of 2007 (hereinafter referred to as appellant only). The first respondent in S.A.No.81 of 2016/sole respondent in S.A.No.82 of 2016 was the plaintiff in O.S.No.294 of 2002 and the sole defendant in O.S.No.490 of 2007 (hereinafter referred to as contesting respondent only). The second respondent in S.A.No.81 of 2016 was the second defendant in O.S.No.294 of 2002 (hereinafter referred to as second respondent only).

8. The above suits were filed for the following relief:-



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O.S.No.294 of 2002 (filed by the contesting respondent)	O.S.No.490 of 2007 (filed by the appellant)
For a permanent injunction restraining the defendants with the plaintiff's peaceful possession and enjoyment of the suit 'A' and 'B' schedule property.	For a permanent injunction restraining the defendant and his men in interfering with the plaintiff's peaceful possession and enjoyment of the suit 'A' Schedule Property and for a mandatory injunction directing the defendant to remove the encroachment namely suit 'B' schedule property from the suit 'A' schedule property.

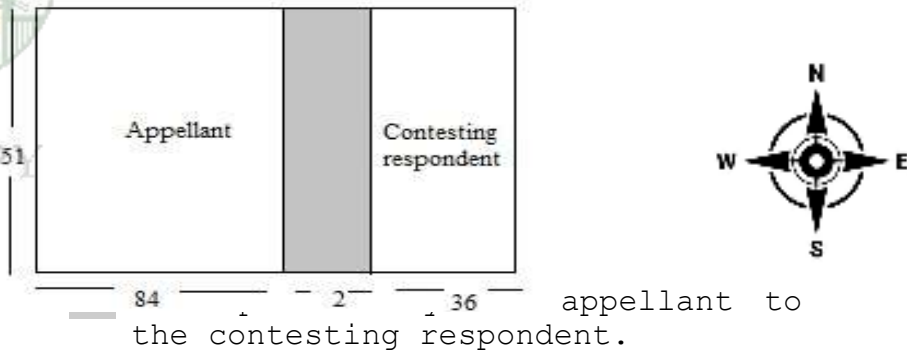
9. O.S.No.294 of 2002 was filed by the contesting respondent and was resisted by the appellant and O.S.No.490 of 2007 was filed by the appellant for a permanent injunction to restrain the contesting respondent and his men or agent from interfering with the appellant's peaceful possession and enjoyment of the suit 'A' Schedule Property and for a mandatory injunction directing the contesting respondent to remove the encroachment, namely, suit 'B' schedule property from the suit 'A' schedule property.

10. The facts are not in dispute. The dispute pertains to a common area abutting between the appellant's and the contesting respondent's property. The appellant and the contesting respondent are neighbours. The contesting respondent and the second respondent also neighbours. The appellant and the second respondent are family friends.

11. The contesting respondent had purchased an extent of 1836 sq.ft. (36 x 51 sq.ft.) of land from one Kumarasamy Konar vide Sale Deed dated 26.10.1978 (Ex.A1 in O.S.No.294 of 2002). The appellant had purchased an extent of 4,386 sq.ft. (86 x 51 sq.ft.) of land from the said Kumarasamy Konar vide Sale Deed dated 02.06.1979. Out of 4,386 sq.ft. purchased by the appellant, the appellant sold an extent of 102 sq.ft. (2 x 102 sq.ft.) of land vide Sale Deed 13.12.1980 (Ex.A2 in O.S.No.294 of 2002) on the western side of his property to the contesting respondent. The details of the property are given as follows:-



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12. The contesting respondent had filed O.S.No.294 of 2002 alleging that the appellant was disturbing peaceful possession over the suit schedule property. It was alleged that the appellant herein wanted to put up a compound wall over the property sold to the contesting respondent and since the contesting respondent opposed same, there was a misunderstanding between them. Therefore, the contesting respondent therefore filed the above suit for a permanent injunction to restrain the appellants from interfering with the peaceful possession of the suit schedule properties.

13. The appellant herein denied the same in his written statement and stated that the contesting respondent had failed to give the clear boundary of the suit schedule properties and that the intention of the contesting respondent was to capture the appellant's vacant land, on which, he attempted to construct pucca terrace building to the south west corner of the contesting respondent's property.

14. The appellant thereafter filed O.S.No.490 of 2007 by alleging that the contesting respondent had thereafter put up a construction by encroaching on the property of the appellant herein. Therefore, the appellant prayed for a permanent injunction to restrain the contesting respondent from interfering with the peaceful possession of the suit schedule properties.

15. In the aforesaid proceedings, the contesting respondent admitted having started the construction on the north-west side of the land on the adjacent to the appellant's property. The contesting respondent further stated that he had started to construct a terrace house facing the north-west corner side of his land and only at the time of plastering on the western side facing the appellant's side, the appellant herein caused hindrance by not allowing the contesting respondent to plaster the sun shade of the new building. It was the case of the contesting respondent that the sun shade over the window facing the appellant's house was within the land purchased from the appellant herein vide (Ex.A2 in O.S.No.294 of 2002) Sale Deed



dated 13.12.1980.

16. It was further the case of the contesting respondent that appellant had forcefully constructed to a tiled house parallel to the contesting respondent's western window using political clout. Under these circumstances, the contesting respondent defended himself in O.S.No.490 of 2007 by stating that he was constrained to file O.S.No.294 of 2002 to restrain the appellant from interfering with the peaceful possession of the aforesaid property.

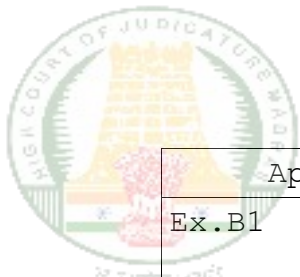
17. In the written statement, the contesting respondent further alleged that a Commissioner was appointed in O.S.No.294 of 2002 and that the Commissioner in his report has indicated that house of the contesting respondent was within the boundary and there was no encroachment over the appellant's property. It was further stated by the contesting respondent that there was nothing in the Commissioner's report to show that the contesting respondent tiled roof projected on the west into the appellant's property.

18. The Trial Court framed the following issues in the respective suits:-

O.S.No.294 of 2002	O.S.No.490 of 2007
i. Whether the plaintiff (the contesting respondent) is entitled to a permanent injunction as prayed for? ii. To what other relief?	i. Whether the plaintiff (the appellant) is entitled for a relief of permanent injunction in respect of 'A' schedule property? ii. Whether it is true that the defendant (the contesting respondent) has encroached the 'A' schedule property? iii. Whether the plaintiff is entitled for a relief of Mandatory injunction in respect of 'B' schedule property? iv. To what other relief the plaintiff (the appellant) is entitled to?

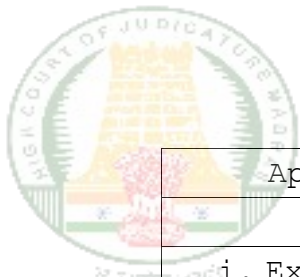
19. Before the Trial Court, the appellant and the respective respondent and the Trial Court had marked the following exhibits in the respective suits:-

Appellant	Contesting respondent	Court
S.A.No.294 of 2002		



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Appellant	Contesting respondent	Court
Ex.B1 Xerox copy of Commissioner report and plan in Petition No.1126/08 in O.S.No.490/07 on the file of District Munsif Court, Pollachi.	i. Ex.A1 - 26.10.1978 Original Sale Deed executed by the Kumarasamy Konar in favour of the Ramalingam. ii.Ex.A2 - 13.12.1980 Original Sale Deed executed by Muthusamy Konar in favour of the Ramalingam. iii.Ex.A3 House Tax receipt in the name of Ramalingam. iv.Ex.A4 Miscellaneous receipt in the name of Ramalingam. v. Ex.A5 E.B. receipt in the name of Ramalingam vi.Ex.A6 Photo with negative - 2 Numbers (Series) vii.Ex.A7 dated 10.08.2002 Receipt issued by the Manjus Colour Studio & Video to Ramalingam. viii.Ex.A8 Photo with negative	i. Ex.C1 Commissioner Report ii.Ex.C2 Commissioner Plan iii.Ex.C3 Commissioner Plan iv.Ex.C4 Commissioner Plan



Appellant	Contesting respondent	Court
O.S.No.490 of 2007		
i. Ex.A1 02.06.1979 Kumarasamy Konar in favour of Muthusamy	i. Ex.B1 Photo with negative	i. Ex.C1 Commissioner Report
ii.Ex.A2 29.05.2007 House tax receipt in the name of Muthusamy Gounder	ii.Ex.B2 Photo with negative	ii.Ex.C2 Commissioner Plan
iii.Ex.A3 Xerox copy of commissioner report in O.S.No.294/02.		

20. As mentioned above, the Trial Court decreed the suit in O.S.No.294 of 2002 filed by the contesting respondent and dismissed the suit in O.S.No.490 of 2007 filed by the appellant. In O.S.No.490 of 2007 filed by the appellant, the Trial Court observed as under while answering the issues in Paragraph Nos.11 and 12:-

11.The Ex.C1, C2 Commissioner report shows that there is a lesser measurement of land that belonged to the plaintiff* and only 80 feet east - west measurement is in existence. The commissioner report filed in O.S.No.294/2002 reveals that the defendant's** property is correct and there is an existence of 38 feet East - West and 51 feet North - West. As per the sale deeds of defendant and the revenue records pertaining to S.F.No.49/3H, the measurement of defendant** is correct in existence. Admittedly 4 feet East West measurement is depreciated in plaintiff's* land. Hence, it is necessary to find whether the defendant** has encroached the 4 feet of land in plaintiff's* property. To substantiate his case, the plaintiff* has himself examined as P.W.1. P.W.1 would depose that there is a 6 feet cart track situate on the western side of his property. But in Ex.A1, it is mentioned that the suit property is situate on the Eastern side of S.F.No.49/1 and north south pathway. The measurement of pathway or width of pathway is not elucidated either in oral evidence



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or in documentary evidence. The learned counsel for the defendant** argued that six feet of cart truck on the western side of the plaintiff's* property is situate only in plaintiff's* property and leaving 6 feet for cart track the plaintiff* is demanding land in defendant's** property as if the defendant** has encroached the plaintiff's* property. To substantiate the plaintiff's* case and to contradict the argument of defendant**, the plaintiff* has not filed any blue print or the layout plan made by the Kumarasamy Konar who is the vendor of plaintiff* and the defendant**. Admittedly, Kumarasamy Konar has made house plots and the plaintiff* has purchased the site No.6 and 7 and the defendant** has purchased the site No.8. The layout plan or the plan prepared by the Kumarasamy Konar for house sight is neither produced before this court nor the plaintiff* has taken any steps to produce any document pertaining to the 6 feet cart track that is situate not in the plaintiff's* property. The plaintiff* has not taken any steps to examine the vendor Kumarasamy Konar to elucidate that the 6 feet cart track was left by the vendor Kumarasamy Konar while the land is made into house site.

12. Only because of there is a lesser measurement in existence for plaintiff's* property when compared to the actual measurement mentioned in Ex.A1 sale deed, the plaintiff* cannot seek remedy from the defendant's** property as if he has encroached the property. Even assuming for argument sake the defendant** has encroached the plaintiff's* property it would reveal in the commissioner report and there should be a larger extent of measurement available for defendant** in his property than mentioned in his sale deeds. But the defendant's** property is same and correct in existence as if in the sale deed. It is the bounden duty of the plaintiff* to prove his case that the defendant** has encroached his property. The oral and documentary evidence do not reveal any encroachment over the suit property. Hence this issues are decided against the plaintiff*.

* Appellant

** Contesting respondent

21. In O.S.No.294 of 2002 filed by the contesting respondent, the Trial Court concluded as follows:-



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10. The oral and documentary evidence clearly shows that the plaintiff* has constructed the building only in his property and the plaintiff* property is situate in S.F.No.49/3H and the 1st defendant's** property is situate in S.F.No.49/3G. The learned counsel for the plaintiff* argued that the plaintiff* has put up a sun shade within the 'B' schedule property and the western wall alone is to be plastered. The learned counsel also further stated that the 1st defendant** has started digging for drainage and not completed the works with the intention to cause damage to the western wall of the plaintiff* and Ex.A9 photographs shows the unfinished drainage. D.W.1 has also accepted in his oral evidence that the boundary stone is fixed leaving the two feet sold by 1st defendant** in favour of plaintiff*. Hence is court is of view that the plaintiff* has clearly proved his title and the 1st defendant** interference with the peaceful enjoyment is also clearly proved.

11. The oral and documentary evidence clearly shows that there is a dispute between plaintiff* and 1st defendant**. The 2nd defendant's*** house is situate on the eastern side of plaintiff's* house. The compound wall that is situate in between the plaintiff* and 2nd defendant's*** property is admitted by plaintiff* that it belongs to the 2nd defendant***. P.W.1 has deposed that there is no enmity or problem between himself and 2nd defendant*** is not proved and the plaintiff* is not entitled to seek relief against 2nd defendant***.

12. Hence the plaintiff* is entitled for the relief of permanent injunction only against the 1st defendant** and not against the 2nd defendant***. Hence, this issue is answered accordingly.

13. ISSU NO.2:

Since earlier issue is decided in favour of the plaintiff*, there is no more issue to be decided in favour of the plaintiff*.

* Contesting respondent

** Appellant

*** Second respondent

22. Further appeals filed by the appellant herein before the First Appellate Court were also dismissed by upholding the Judgment and Decree passed in the respective suits. Aggrieved by



the same, the present Second Appeals have been filed.

23. Heard the learned counsel for the appellant and the learned counsel for the respondent. I have perused the impugned Judgment and Decree of the First Appellate Court and the Judgment and Decree of the Trial Court and the evidence on record.

24. The First Appellate Court in A.S.No.32 of 2010 has concluded that the contesting respondent herein had indeed encroached into the appellant's property and has put up the construction to an extent of 33 sq.ft. (0.075 Cents). However, the First Appellate Court has found fault with the appellant in as much as the appellant did not take any steps to rectify the mistakes in the revenue records regarding the measurement of his property till date and had failed to raise any objections at the time of commencement of the construction of the building by the contesting respondent.

25. The First Appellate Court further has held that the contesting respondent had constructed the building as per the measurement in the revenue records on a mistaken belief that the contesting respondent's construction was within his property and that there was acquiescence by the appellant in the aforesaid construction to be put up by the contesting respondent. Thus, the First Appellate Court has concluded that even though the contesting respondent had encroached on the property of the appellant, the appellant was not entitled to relief of peaceful possession and enjoyment of the suit schedule property without resorting to legal remedy in accordance with law.

26. The First Appellate Court has further concluded that Ex.A9 Photographs clearly establishes the interference made by the appellant by digging up a drainage in the property which was in possession of the contesting respondent.

27. In Judgment and Decree passed in A.S.No.33 of 2010 against the Judgment and Decree passed in O.S.No.490 of 2007 filed by the appellant, the First Appellate Court has confirmed the views given in the Judgment and Decree in A.S.No.32 of 2010.

28. Thus, it stands concluded that the contesting respondent had encroached on the property of the appellant and had filed O.S.No.294 of 2002 on 28.08.2002. The allegation of the contesting respondent in the said suit was that the appellant was attempting to put up a compound wall over the property belonging to the contesting respondent which was defended by the appellant by filing written statement denying the allegations in the plaint. What is evident is that the contesting respondent had put up the construction pending disposal of O.S.No.294 of



2002. The appellant was thus compelled to file O.S.No.490 of 2007 to restrain the contesting respondent from interfering with the peaceful possession of the suit schedule property.

29. The contesting respondent was not entitled to put up the offending constructions during the pendency of O.S.No.294 of 2002 without establishing right over the disputed area. The issue in O.S.No.294 of 2002 was whether the appellant was justified in putting up a compound wall on the eastern side of his property / the western side of the contesting respondent's property.

30. It stands concluded now by the Appellate Court that the offending construction put by the contesting respondent was on the appellant's land. The construction put up by the contesting respondent during the pendency of O.S.No.294 of 2002 was to be subject to the final outcome of the final proceedings in the respective proceedings. The contesting respondent ought to have adopted a hands-off approach and awaited for the outcome of the litigation in O.S.No.294 of 2002. Construction put by the contesting respondent pending litigation cannot and will not present as a fait accompli to the disadvantage of the appellant. Having taken a risky construction, the contesting respondent cannot get any protection as the construction was not a bonafide construction.

31. Since the contesting respondent had encroached on the appellant's property over and above the property sold by the appellant measuring to an extent of 102 sq.ft. (2 x 51), the questions of law raised is to be therefore answered in favour of the appellant by setting aside the impugned Judgments and Decrees dated 18.08.2011 of the First Appellate Court in A.S.Nos.32 & 33 of 2010 and the separate Judgments and Decrees both dated 05.07.2010 of the Trial Court in O.S.No.294 of 2002 and O.S.No.490 of 2007. Accordingly, O.S.No.490 of 2007 filed by the appellant herein deserves to be decreed as prayed for and O.S.No.294 of 2002 filed by the contesting respondent deserves to be dismissed.

32. In the result, both the Second Appeals are allowed with consequential relief to the appellant. No cost.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Pollachi.
2. The District Munsif, Pollachi.
3. The Section Officer,
V.R.Section, Madras High Court.

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S.A.Nos.81 & 82 of 2016

PA (CO)
RGA (13/12/2021)