



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.04.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)Nos.542 and 543 of 2011

K.Dhanapal ... Appellant in both S.As/Appellant/2nd Plaintiff

Vs.

G.Swaminathan ... Respondent in both S.As/Respondent/Defendant

Common Prayer : Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 22.04.2010 passed in A.S.Nos.114 and 132 of 2008, respectively, on the file of the Additional Subordinate Court, Kumbakonam, confirming the judgment and decree dated 23.01.2007, passed in O.S.Nos.337 and 279 of 2004, respectively, on the file of the Principal District Munsif Court, Kumbakonam.

(In both S.As)

For Appellant : Mr.Lakshmi Shankar,
For Mr.T.V.Sivakumar
For Respondent : Mr.S.Prabhu

COMMON JUDGMENT

The unsuccessful plaintiff in O.S.Nos.114 and 337 of 2004 on the file of the Principal District Munsif Court, Kumbakonam, is the appellant in these second appeals. The appellant filed the suit along with his mother. The case of the plaintiffs is that the property described as 'A' schedule in the plaint was originally purchased by one Vaithiyalingam Pillai through Court auction on 29.06.1966. Subsequently, the said Vaithiyalingam sold the same in favour of one Govindaraj vide sale deed dated 05.12.1966. From the said Govindraj, the appellant's mother namely., Subbammal purchased vide sale deed dated 14.06.1977. The defendant/Swaminathan in O.S.No.337 of 2004 owns the adjacent property bearing D.No.15, Veerapandiya Kattabomman Street, Madhalampettai, Kumbakonam. According to the plaintiffs on 26.02.2001, the defendant encroached a portion of the suit property covered under Door No.14B to an extent of 4 feet by 20 feet on the southern side of the suit property belonging to the first plaintiff and started digging foundation for the purpose of construction of wall. In the face of obstruction and resistance from the plaintiffs, the defendant went ahead with the construction. The encroached the portion has been described in the 'B' schedule property. Seeking the relief of



permanent injunction as well as mandatory injunction for removal of offending construction, the plaintiffs filed O.S.No.68 of 2001 (Later re-numbered as O.S.No.337 of 2004).

2.The defendant filed his written statement controverting the claims of the plaintiffs. The stand of the defendant was that he had not committed any encroachment and he pressed for dismissal of the suit. The Trial Court appointed an Advocate Commissioner who submitted more than one report in this regard after conducting spot inspection.

3.The plaintiffs subsequently filed O.S.No.279 of 2004 before the very same Court seeking compensation for the damage caused to the wall of the plaintiffs' property bearing D.No.14A, Veerapandiya Kattabomman Street, Madhalampettai, Kumbakonam.

4.The plaintiffs alleged that on account of the new construction, put up by the defendant, their wall got badly damaged and cracks had also developed in the wall.

5.The defendant filed his written statement contending that the wall of the plaintiffs' house is a very old one and that it was made of mud and mortar and that the cracks had occurred in natural course and on account of improper maintenance by the plaintiffs. In paragraph No.6 of the written statement, the defendant had denied the plaint allegations made in paragraph No.6. The defendant pressed for dismissal of the suit.

6.Both the suits were taken up together and common evidence was let in. The appellant herein examined himself as P.W.1 and three other witnesses were examined on the side of the plaintiffs. The defendant examined himself as D.W.1 and two other witnesses. On the side of the plaintiffs Exs.A.1 to A.18 were marked. On the side of the defendant Exs.B.1 to B.8 were marked. The reports of the Advocate Commissioner, his sketches and plan were marked as Exs.C.1 to C.9.

7.The Trial Court after considering the evidence on record by judgment and decree dated 23.01.2007 dismissed both the suits. During the pendency of the suit, the first plaintiff passed away. Since the second plaintiff namely., Dhanapal, the son of the first plaintiff was already on record, the second plaintiff filed A.S.Nos.114 and 132 of 2008 before the Additional Sub Court, Kumbakonam. By judgment and decree dated 22.04.2010, both the appeals were dismissed and the decision of the Trial Court was confirmed. Challenging the same, these second appeals have been filed.

8.S.A.(MD)No.542 of 2011 arises out O.S.No.337 of 2004. It was admitted on the following substantial questions of law:-



(a) Are the Courts below correct and justified in negating the claim of the plaintiff/appellant when the defendant has not produced any document of title to his property in which he has made an offending construction?

(b) Are the Courts below correct and justified in negating the claim of the plaintiff/appellant without looking into the report of the Commissioner along with help of Surveyor?

(c) Are the Courts below correct and justified in negating the claim of the plaintiff without framing the necessary issues for proper determination as contemplated under C.P.C.? and

(d) Are the Courts below correct and justified in negating the claim of the plaintiff without adverting to the fact that the evidence has got to be looked into as a whole?"

9.S.A.(MD)No.543 of 2011 arises out O.S.No.279 of 2004. It was admitted on the following substantial questions of law:-

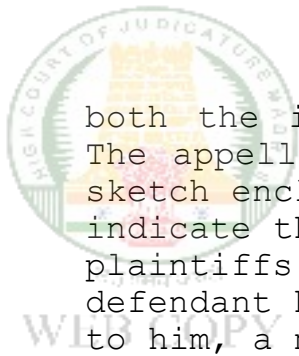
(a) Are the Courts below correct and justified in negating the claim of the plaintiff/appellant without looking into Ex.A15 to Ex.A18?

(b) Are the Courts below correct and justified in negating the claim of the plaintiff/appellant despite the admission of the defendant regarding the offending construction? and

(c) Are the Courts below correct and justified in negating the claim of the plaintiff without framing the necessary issues for deciding the point for determination as contemplated under C.P.C.?

10.Heard the learned counsel on either side.

11.The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds. He pointedly contended that the defendant had not filed his title document and had chosen to contest the case by picking holes in the plaintiffs' case. He would point out that even though the defendant would claim that only after getting approval from the local body, the new construction was put up, the approved building plan was not even marked. He would also state that there were two issues involved. One is regarding damage caused to the suit wall and the other is regarding encroachment. The Commissioner had conducted more than one spot inspection and filed several reports. According to the appellant's counsel, the Trial Court had mixed up



both the issues and that resulted in the dismissal of the suits. The appellant's counsel would also contend that a mere look at the sketch enclosed by the defendant himself in O.S.No.279 of 2004 would indicate that the suit wall shown as "AD" absolutely belonged to the plaintiffs. The specific allegation of the plaintiffs is that the defendant had gone beyond "AD" wall on the northern side. According to him, a mere look at the photographs would indicate that "AD" wall takes a bend at the encroached site. He would also contend that the defendant had no right whatsoever to rest the cantilever on the "AD" wall. He would also state that as a result of the offending construction, the wall had developed cracks and suffered damage. He therefore submitted that the appeals will have to be allowed in respect of both the cases by answering the substantial questions of law in favour of the appellant.

12.Per contra, the learned counsel appearing for the respondent would contend that since both the Courts below have concurrently found the issues in favour of the respondent, no interference is called for in exercise of jurisdiction under Section 100 of Civil Procedure Code. The learned counsel would draw my attention to the elaborate discussion made by the Trial Court on various issues. He also pointed out that Exs.A.1 and A.2 are parent documents for the plaintiffs. In both Exs.A.1 and A.2, the dimensions have not at all been given. He would also state that what was purchased was only the superstructure bearing Door No.14A. Only in Ex.A.3/sale deed executed by Govindaraj in favour of Subbammal, the dimensions have been given. He would point out that the plaintiffs did not have any title over the vacant land lying on the eastern side of the superstructure. He would also state that the surveyor, who accompanied the Advocate Commissioner and who was examined as P.W.3 had categorically deposed that there was no encroachment had been committed by the defendant. The learned counsel for the defendant also drew my attention to Ex.B.8/FMB sketch issued by the Commissioner, Kumbakonam Municipality to show that the dimensions given in the suit schedule are totally erroneous. He would also reiterate that no damage was actually caused to the suit wall by the new construction put up by the defendant. There is nothing on record to show that the so-called cracks and damage suffered by the suit wall were as a result of the construction put up by the defendant. He called upon this Court to endorse the findings given by the Courts below and dismiss both the appeals.

13.I carefully considered rival contentions and perused the evidence on record. It is true that the First Appellate Court had not framed the points for determination as envisaged by Order 41 Rule 31 of Civil Procedure Code. Since the learned First Appellate Judge had dealt with all the issues that had arisen for consideration, non-framing of the points for determination cannot be said to have vitiated the eventual decision. Therefore, this substantial question of law is answered against the appellant.



14.As rightly pointed out by the learned counsel for the defendant that the parent deeds of the plaintiffs do not contain any measurement and four boundaries have alone been given. That apart, the superstructure alone has been conveyed both under Ex.A.1 as well as Ex.A.2. However, in Ex.A.3 the dimensions have been given. Even in Ex.A.3, it has been mentioned that the property is comprised in Survey No.1620. A mere look at Ex.B.8/FMB sketch would show that the Survey No.1620 measures 42 feet on west, 118 feet on the north, 87 feet on the south and 54.5 feet on the east. In the plaint, the plaintiffs have given the north-south measurement as 54.5 feet and east-west measurement as 118.5 feet. This may be true in respect of one side but not in respect of the other side. That apart, the Surveyor who was examined on the side of the plaintiffs had categorically deposed that no encroachment was committed by the defendant. The learned counsel for the appellant would of course point out that not only the property of the appellant but also that of the defendant/respondent is comprised within the very same survey number namely., S.No.1620. The wall of the plaintiffs running from A to D as shown in the defendant's rough sketch is the demarcating line. According to the plaintiffs, the defendant has admitted that the A.D. wall belonged to the plaintiffs and that while the plaintiffs will not have claim on the property lying to the south of the wall, likewise the defendant did not have any right on the property lying to the north of the wall. According to the appellant's counsel, the appellant need not ask for any formal relief regarding declaration. It is true that the Courts below have not gone into the said aspect at all. In this case, there is a real dispute between the parties as to whether there has been encroachment or not. The defendant asserts that the new construction lies within his boundaries. In such circumstances, without also asking for relief of declaration, it is idle to maintain the suit for mere permanent injunction and mandatory injunction. In this view of the matter, the substantial questions of law are answered against the appellant and in favour of the respondent. Hence, I decline to interfere with the judgment and decree impugned in S.A.(MD)No.543 of 2011 and it is dismissed.

15.Next comes the question as to whether the Courts below were justified in dismissing O.S.No.337 of 2004 filed by the plaintiffs. The basic facts are not in dispute. The first plaintiff had purchased the superstructure bearing Door No.14A, Veeirapandiya Kattabomban Street, way back in the year 1977 itself. The defendant appears to have become the plaintiffs' neighbour much later. The title documents of the plaintiffs show Sankara Padyachi's house as southern boundary. The defendant would claim that he purchased Sankara Padayachi's house and after demolishing the old wall, put up a new construction. The document whereby the defendant traces his title has not been exhibited before the Courts below. The defendant also admits that the "AD" wall absolutely belongs to the plaintiffs.
 https://hcservices.mca.gov.in/hcservices/ Services/portal/portal.jsp



came to rest on the suit wall belonging to the plaintiffs. In fact paragraph No.2 of the Advocate Commissioner's report (Ex.C.7) dated 31.10.2001 clearly mentions that the cantilever of the defendant's house rests on the suit wall of the plaintiffs. It has been mentioned that some ten tiles of the plaintiffs' roof have also been found damaged. The cracks in the suit wall have also been mentioned. In fact, the learned Trial Munsif in paragraph No.46 of the judgment would indicate that he considered awarding of some compensation to the plaintiffs. But he refrained from doing so, because the suit wall was admittedly an old one and the plaintiffs had not established that the cracks found on the wall were on account of the offending construction put up by the defendant.

16.I concur with the submission of the appellant's counsel that the principle of *res ipsa loquitur* can be applied to the case on hand. The construction by the defendant begun to be put in the year 2001. The plaintiffs had also issued suit notice dated 26.06.2001 (Ex.A.13). Photographs have also been enclosed. From a mere look at the photographs that had been exhibited on the side of the plaintiffs and from a reading of the commissioner's report, I can come to the conclusion that the construction by the defendant has been put up in such a way that no space has been left between the plaintiffs' wall and the new construction. In other words, without leaving set back area, the defendant had put up the construction. To a question from the Court, the learned counsel for the defendant would reply that the construction was put up after obtaining approved building plan from the local body. But the building plan was not marked before the Courts below. In any event, the defendant has no right to rest even a portion of the construction on the plaintiffs' property. The Trial Court would remark whenever a new construction comes up, it is customary to erect lateral support and they are bound to rest on the neighbour's building. If there is goodwill between the neighbours, it should not give rise to any cause of action. If there is no goodwill between the neighbours, without getting the permission from the neighbour, it is not open to one party to unilaterally erect such laterally supporting pillars on the neighbours building. That is precisely what the defendant has done. The Courts below ought to have sustained the claim of the plaintiffs for damages. The plaintiffs had stated that for effecting repairs, they had incurred a sum of Rs.24,000/- and for the mental agony suffered by them, they wanted compensation of Rs.10,000/- more and that is how, the suit claim has been quantified.

17.There is merit in the appellant's counsel's contention that when the defendant was aware that the suit wall was an old one, he could not have recklessly rested the cantilever on the same. The compensation payable to the appellant is quantified as Rs.15,000/- and the respondent is directed to pay the same to the appellant with interest at the rate of 6% per annum with effect from 26.06.2001

<https://hcservices.ehrgov.in/hcservices/> payment.



18.In view of the above, S.A.(MD)No.542 of 2011 is partly allowed and S.A.(MD)No.543 of 2011 is dismissed. No costs.

Sd/-

Assistant Registrar(P & A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

- 1.The Additional Subordinate Court,
Kumbakonam.
- 2.The Principal District Munsif Court,
Kumbakonam.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai(2 copies)

+1 CC to M/s.V.K.VIJAYARAGAVAN, Advocate (SR-16809[F] dated 21/04/2021)

+1 CC to M/s.T.V.SIVAKUMAR, Advocate (SR-16853[F] dated 21/04/2021)

**S.A. (MD)Nos.542 and 543 of 2011
20.04.2021**

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TR(21.05.2021) 7P 7C