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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2022

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

S.A.NO.431 OF 2017

&

C.M.P.NO.10803 OF 2017

M.V.Swaminathan

... Appellant/Defendant

Versus

A.Swaminathan

... Respondent/Plaintiff

PRAYER:-

Second Appeal filed under Section 100 of CPC against the judgment and decree made in A.S.No.11 of 2016 dated 17.11.2016 on the file of the learned III Additional District Judge, Vellore at Thirupathur, confirming the judgment and decree made in O.S.No.47 of 2011 dated 11.11.2013 on the file of the learned Subordinate Judge, Vaniyambadi.

For Appellant : Mr.V.Selvaraj

For Respondent : Mr.R.Subramanian

JUDGMENT

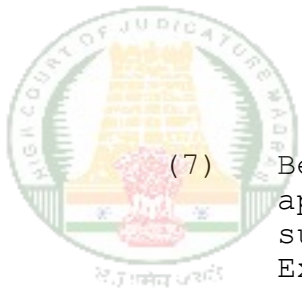
- (1) The defendant in the suit in O.S.No.47/2011 on the file of the Sub Court, Vaniyambadi, Vellore District is the appellant in the above Second Appeal.
- (2) The respondent herein, as plaintiff, filed the suit in O.S.No.47/2011 for a declaration, declaring the title of the plaintiff in respect of a compound wall described as ABC in the Rough Plan attached to the plaint and for consequential permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the suit property by the plaintiff.
- (3) The plaint pleadings are as follows. The suit property and other properties belonged to the plaintiff's ancestors and



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the same was allotted to the plaintiff's father in a partition that took place in the year 1968. In the family of the plaintiff, there was a subsequent partition by a registered Partition Deed dated 07.03.1973 under which the suit property which was referred to in the document as 'A' Schedule, was allotted to the plaintiff's father. The plaintiff's father constructed a house after getting permission from the Municipality/Local Body. The plaintiff's father by name Chittambala Chettiyar died on 07.03.1979 leaving behind the plaintiff and his mother as his legal heirs. The plaintiff's mother also died on 04.08.2010 and the suit property became the absolute property of the plaintiff.

- (4) The defendant owns the house on the Western side of the suit property and vacant land on the Southern side of the suit property. The property of the defendant is in S.No.91, whereas the property of the plaintiff is comprised in S.Nos.89 and 90. The length of the AB portion of the compound wall is measuring 13 feet and the length of the BC portion of the compound wall is 27 feet. The width of the compound wall is 1 ½ feet and its height is 20 feet.
- (5) The defendant started putting up his construction adjoining the BC portion of the wall and at that time, requested the plaintiff to give him the entire compound wall. Since the plaintiff refused to consider the request of the defendant, the defendant tried to damage the ABC wall and therefore, a police complaint was lodged. The suit property was allotted to the plaintiff's father on 07.03.1973 and he was in enjoyment of the same for more than 40 years. Since the defendant tried to damage the ABC compound wall, the plaintiff was constrained to file the suit.
- (6) The suit was contested by the defendant by filing a written statement, totally denying all the averments made in the plaint. However, it is admitted that the defendant started putting up a new house adjacent to the BC wall. The contention of the plaintiff that the entire ABC wall belongs to him, is specifically denied by the defendant in the written statement. It is admitted by the defendant that AB portion of the wall belongs to the plaintiff. However, the defendant contended that the BC portion of the compound wall was constructed by the predecessors in title of the defendant about 100 years back and therefore, the BC wall is the exclusive wall of the defendant.



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- (7) Before the Trial Court, an Advocate Commissioner was appointed and he filed a Report under Ex.C1 and the Plan submitted by the Advocate Commissioner was marked as Ex.C2. The Advocate Commissioner has given a Report pointing out that the disputed wall when measured from South, partly falls within the survey field belonging to the defendant and partly falls within the survey field belonging to the plaintiff. After referring to the survey plan and measurements as per the Revenue Records, the Advocate Commissioner also found that the disputed wall falls within the property of the plaintiff, which falls in S.No.89.
- (8) On behalf of the plaintiff, the plaintiff examined himself as PW1 and examined one Soundararajan as PW2. The defendant examined himself as DW1 and two other witnesses as DW2 and DW3. While the plaintiff marked Exs.A1 to A8, the defendant marked Exs.B1 to B4.
- (9) The Trial Court, considering the pleadings, framed a specific issue as to whether the suit ABC wall is proved to be the wall belonging to the plaintiff? Since there is no dispute with regard to the title and right in respect of AB portion of the wall that it belongs to the plaintiff, the Trial Court considered the next issue as to whether the BC suit wall comes within the plaintiff's property. Based on the document-Ex.A1 under which the plaintiff's father was allotted a plot measuring 45x45 feet, the Trial Court, in the light of the Advocate Commissioner's Report and the entire evidence adduced on both sides, held that the plaintiff has proved his case that ABC wall belongs to him. Even though the Partition Deed does not refer to any compound wall, the Trial Court found that the Planning Permission obtained by the plaintiff from the Local Body, shows the construction of the house with compound wall and held that the case of the defendant is not probable. Since the title in respect of BC portion of the disputed wall is held in favour of the plaintiff, the Trial Court also granted the consequential prayer for permanent injunction.
- (10) Aggrieved by the judgment and decree of the Trial Court, the defendant preferred an Appeal in AS.No.11/2016 on the file of the III Additional District Judge, Vellore at Tirupathur.
- (11) The Lower Appellate Court also considered the pleadings, evidence and the arguments independently and confirmed the findings of the Trial Court and dismissed the appeal. Aggrieved by the concurrent judgments and findings of the



Courts below, the above Second Appeal is filed by the defendant.

(12) The appellant has raised the following substantial questions of law in the Memorandum of Grounds of Second Appeal:-

- A) Whether the Courts below were right in not considering the Advocate Commissioner's Report [Ex.C1] and the sketch [Ex.C2] properly before holding that the ABC wall belongs to the plaintiff and decree the suit?
- B) Whether the Courts below were right in granting decree in favour of the plaintiff, when he has admittedly pleaded that his property comes within the S.Nos.89 and 90, while the Advocate Commissioner's report and evidence establishes that the 3/4th feet of BC wall comes within the property survey number of the Defendant?
- C) Whether the Courts below were right in decreeing the suit without noting in the Advocate Commissioner Report [Ex.C1] which clearly indicates that the 45x45 feet size of the property as claimed by the plaintiff is not there and it is only lesser extent is in existence?
- D) Whether the Courts below were right in relying upon Ex.A2 the Municipal Plan, for deciding about the BC portion of the wall when the plan is only for the building and not for the ABC wall?
- E) Whether the Courts below were right in presuming that the schedule of the property of the Ex.A1 Partition Deed and Schedule of the Property of the plaint are same, without noting that they are different and ABC wall has been added in the plaint by the plaintiff falsely?
- F) Whether the Courts below, especially the first Appellate Court was right in not considering the oral and documentary evidence adduced on the side of the appellant/defendant before decreeing the suit in contrary to the rulings of the Hon'ble Supreme Court and this Hon'ble Court?



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- G) Whether the Courts below have erred in not considering Ex.B3-CD/Photo which discloses the old age of the BC wall and visibility of bricks indicating its existence for more than 100 years made of staked lime [chunnambu] when the modern constructions are made with cement?
- H) Whether the Courts below were right in not giving more importance and consideration to the Advocate Commissioner's Report-Ex.C1 and his deposition as DW2 since all the documentary evidence does not include ABC compound wall either in the schedule of the property or elsewhere?
- I) Whether the learned Appellate Judge is right in observing that in the written statement, the location of iron grill in the wall has not been denied without noting as the plaint no such allegations were made, in the written statement, the same has not been denied?
- J) Whether the Courts below have erred in decreeing the suit when admittedly no material has been given by the plaintiff regarding the ABC compound wall as the documents on the side of the plaintiff are all relating to the house property alone and no mention of the ABC wall any where in the recitals of the documents viz Partition Deed, Property Tax Receipt, EB receipt, water tax receipt and Ambur Town Surveyor Sketch?
- K) Whether the Courts below were right in decreeing the suit inspite of Ex.A1 Partition Deed was read and explained to the learned Judge that compound wall is not the subject matter of the partition?
- L) Whether the Courts below were right in rejecting the submission that in the 1973 Partition Deed Ex.A1, it has been specifically stated that there is no compound wall and decreeing the suit?
- M) Whether the Courts below were right in decreeing the suit on the basis of misreading of the materials on record and not noting the real dispute involved in the suit which relates to



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the ''BC'' wall and not ''AB'' wall and house property?

- N) Whether the Courts below were right in not appreciating the report of the Commissioner which says that the plaint schedule property is not in conformity with the size of the property described in Ex.A1?
- O) Whether the Courts below were right in fixing the burden of proof on this appellant/defendant when it is actually on the plaintiff who has to prove his case as stated in the plaint?
- P) Whether the Trial Court were right in presuming that the dispute relating to AB compound wall, ignoring the real dispute for ''BC'' compound wall and decreeing the suit without proper application of mind?
- (13) Though the appellant has raised several questions of law, Mr.V.Selvaraj, learned counsel for the appellant challenged the findings of the Courts below by referring to the documents and evidence. Learned counsel pointed out that the document [Ex.A1], namely the Partition Deed dated 07.03.1973 does not refer to any compound wall and therefore, the Trial Court had erred in holding that the BC portion of the disputed wall belongs to the plaintiff'. Referring to the Advocate Commissioner's Report and Plan, the learned counsel for the appellant contended that the recitals of the document [Ex.A1] is not in tune with the case of the plaintiff/respondent herein or in support of the findings of the Courts below. The learned counsel further submitted that the burden of proof is on the respondent herein to prove that BC portion of the disputed wall belongs to him absolutely and that the Courts below failed to consider the oral and documentary evidence produced by the appellant/defendant and the case of the appellant that the disputed wall is more than 100 years old as it can be seen from the photographs and videos marked as exhibits.
- (14) The learned counsel for the appellant by referring to the Plan as approved by the Local Body, submitted that the Plan does not include the compound wall. Similarly, the annexure to Ex.A1, which is the self declaration of the parties to the document-Ex.A1, also does not refer to the compound wall. The details of the property is given in the Annexure. In the column relating to the existence of compound wall, it is specifically answered in negative.



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Pointing out that the document-Ex.A1, specifically states that there is no compound wall and the Building Plan Approval does not show the approval with regard to the construction of a compound wall, the learned counsel contended that the findings of the Courts below without looking into these aspects is perverse. He then relied upon the Advocate Commissioner's Report - Ex.C1 and Plan-Ex.C2 and contended that the respondent's claim is not corroborated by the Advocate Commissioner's Report and Plan. Though the learned counsel for the appellant contended that the Approved Plan marked as Ex.A2 does not show any compound wall, Mr.R.Subramanian, learned counsel for the respondent demonstrated before this Court that the Building Plan Approval under Ex.A2 refers to the compound wall. Learned counsel for the appellant strenuously argued that the respondent's case claiming title to the BC wall is not proved in the manner known to law. Stating that the findings of the Courts below are on the basis of misconception of evidence and misconstruction of documents, the learned counsel for the appellant submitted that the judgments and decrees of the Courts below are liable to be set aside.

- (15) Learned counsel also pointed out that the document under Ex.A2 is dated 23.07.1970. The subsequent partition under Ex.A1 does not refer to the existence of the compound wall. Therefore, the findings of the Courts below on the basis of Ex.A2 is perverse.
- (16) Per contra, Mr.R.Subramanian, learned counsel for the respondent referred to the relevant portions of the Advocate Commissioner's Report and the oral evidence of the witnesses examined on both sides and submitted that since the findings of the Courts below are based on proper appreciation of pleadings and evidence, both oral and documentary, there is no scope for any interference as there is no question of law involved.
- (17) This Court has carefully considered the submissions of the respective learned counsels and also perused the materials placed.
- (18) From the pleadings, it is seen that the appellant has admitted the title of the respondent/plaintiff over AB portion of the compound wall. From the rough plan and the Advocate Commissioner's Plan, it is seen that the AB portion of the wall lies North-South with the length 13 ½ feet. BC portion of the compound wall runs East-West with the length of 27 feet. It is admitted that the appellant's land lies on the South of the BC wall and construction



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activity was started just before the filing of the suit and the entire portion was kept vacant by the appellant. DW1/appellant herein, during cross-examination, has specifically admitted that AB and BC portions appear to be the same construction and that the appellant's portion was kept vacant. It is also admitted by the appellant during cross-examination that the respondent/plaintiff has rested the iron grill on AB and BC walls at the time when the respondent/plaintiff had put up his residential house. The relevant portion of the evidence of DW1/appellant is extracted below:-

''......AB, BC சுவரில் BC சுவரின் கனம் மட்டுமே எனக்கு தெரியும். AB சுவரின் கனம் எனக்கு தெரியாது. என்று அடையாளம் காணப்பட்ட AB, BC சுவர்கள் களிமண்ணால் கட்டப்பட்டு சுண்ணாம்பு பூச்சு பூசப்பட்டது. எனவே AB, BC இரண்டு சுவர்களின் கட்டிடத்தின் தன்மை ஒரே மாதிரியாக உள்ளது என்றால் சரிதான்.....,

.....இரும்பு பந்தல் போட்டதற்கு மேல் 3 அடி சுவர் AB, BC மீது கட்டப்பட்டிருக்கிறது அவ்வாறு கட்டப்பட்ட மேற்படி 3 அடி சுவரும் களிமண்ணால் கட்டப்பட்டு சிமெண்டால் பூசப்பட்டிருக்கிறது. இரும்பு பந்தல் போட்டு சுவர் கட்டியது வாதி வீடு கட்டும் போது கட்டியது தான். இந்த பிரச்சினை வந்த போது தான் முதன் முதலாக BC அளந்து பார்த்தேன்.....

- (19) The document-Ex.A1 dated 07.03.1973 does not include the compound wall. However, the Approved Plan-Ex.A2 refers to the compound wall and the respondent had obtained permission from the Local Body for the construction of the building and the compound wall surrounding the building. Though the compound wall is not mentioned in the Partition Deed, it cannot be a clinching circumstance to disprove the case of the plaintiff/respondent. When the respondent/plaintiff's father obtained Planning Permission under Ex.A2, the compound wall as it exists, is shown. It is admitted that AB portion of the compound wall belongs to plaintiff. Therefore, the self declaration attached to Ex.A1-Partition Deed indicating that there was no compound wall cannot be given much importance. Hence, this Court is unable to find any irregularity in the findings of the Courts below in relying upon Ex.A2.
- (20) The Advocate Commissioner's Report should be considered in the light of the specific pleadings and the entire Report. When the entire property measured from the property of the appellant on the South side, the Advocate Commissioner has indicated that BC portion of the wall partly comes within



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the property of the respondent/plaintiff and partly falls in the survey field belonging to the appellant. It is admitted that the width of the wall is 1.25 feet and out of 1.25 feet, the Commissioner found that 1/2 feet falls within the property of respondent/plaintiff and 3/4th feet falls in S.No.91 which belongs to the appellant/defendant. However, the Advocate Commissioner, with the help of the Surveyor resurveyed the wall at the request of the plaintiff's advocate. He has given the Report in the following lines:-

.....மேற்படி விவரத்தை நில அளவையர் குறிப்பிட்டு சொன்னபோது அளவீடு குறித்து எதிர்மனுதாரர் தரப்பில் மீண்டும் ஒரு முறை அளக்க கேட்டமையால் நகர நில அளவையர் சாலையின் இரண்டு பக்கங்கிலிருந்தும் உள்ள அளவீடுகளை சரிபார்த்து மீண்டும் ஒருமுறை அளந்து காண்பிக்கப்பட்டது. அப்போதும் மேற்படி பிரச்சினைக்குரிய சுவர் பகுதி மனு சொத்தில் அடங்குகிறது என்பது தெரியவந்தது.

- (21) Therefore, the Advocate Commissioner's Report ultimately proves the case of the respondent/plaintiff. It is to be noted that the Advocate Commissioner has mentioned in his Report that the measurements found during survey does not tally with the measurements of the property of the appellant which is shown as 45x45 feet. The Advocate Commissioner in paragraph No.4 of his Report observed that the North-South measurement is slightly less than 45 feet and this shortage is noted while measuring the property from South. It is then observed to the effect 3/4th feet of the compound wall falls in the survey field belonging to the appellant. The Advocate Commissioner has not referred to the survey plan and measurements before holding that the portion of the wall falls within the property of the appellant. The Commissioner's Report therefore reveals that the compound wall [BC portion] comes within the measurements given under Ex.A1.
- (22) The Surveyor who assisted the Advocate Commissioner was examined as PW2. Whereas, the Advocate Commissioner was examined as DW2. He has stated in his evidence that he has not mentioned about the age of the compound wall as he was not asked to give a report as to the age of the building. This Court is able to see that the Courts below have considered the Report and Plan of the Advocate Commissioner in proper perspective and the appellant has not explained as to how the Advocate Commissioner's Report is in favour of the appellant. Since the last portion of the Report clearly support the plea of the respondent's/plaintiff's title to the BC portion of the wall, this



Court is unable to appreciate the arguments of the learned counsel of the appellant. The most important finding of the Advocate Commissioner in his Report is not explained while examining the Advocate Commissioner as DW2.

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- (23) The appellant has admitted that the property belongs to him in S.No.91 was kept vacant without construction even though he had house on the Western side of the suit property. When it is admitted that AB portion of the compound wall which is adjacent to the appellant's house is the wall put up by the respondent/plaintiff, this Court is unable to consider the appellant's plea of title over BC portion of the compound wall. Both AB and BC portions of the disputed compound wall is admitted to be constructed with the same material at the same time. The respondent/plaintiff had put up an iron grill resting on BC portion of the wall at the time of putting up the construction pursuant to the approved plan under Ex.A2. This Court is unable to visualize any probability of the case pleaded by the appellant that BC portion of the wall belongs to him. The respondent/plaintiff has proved his case by producing the document-Ex.A2. The Advocate Commissioner's Report and Plan corroborates the case of the respondent/plaintiff rather than helping the appellant/defendant to sustain the plea that BC portion of the wall belongs to the appellant.
- (24) The reading of the Advocate Commissioner's Report in entirety gives a clear indication that the BC portion of the wall is the property of the respondent/plaintiff especially when the small discrepancy in the Report is also explained if one accepts the case of the respondent/plaintiff. This Court is of the view that the Courts below have resolved the issue with the full understanding of the dispute and the evidence adduced on both sides. The Advocate Commissioner's Report cannot be interpreted to support the case of the appellant as it was contended by the learned counsel for the appellant.
- (25) It is true that the property of the respondent/plaintiff is located in S.Nos.89 and 90 and the property of the appellant falls in S.No.91. Though the Advocate Commissioner's Report refers to a portion of BC wall falling within the property in S.No.91, a reading of the entire Report explains the inconsistency in the Report of the Advocate Commissioner. The total extent of the property of the respondent/plaintiff as per Ex.A1 is 45x45 feet. The Advocate Commissioner has found that there is a small reduction in the extent of the respondent's property. Hence, the finding of the Advocate Commissioner



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that the property measuring 45x45 feet is not available on ground, is perverse. If the case of the respondent/plaintiff that the BC portion of the wall belongs to the respondent is accepted, then the respondent's title under Ex.A1 as per the measurements stands proved. The Advocate Commissioner has not given any reason to measure the property from south and then to say, the suit property does not lie within the property allotted to plaintiff's father under Ex.A1. Though the learned counsel referred to the Plan under Ex.A2 and submitted that there is no indication about the approval granted in respect of the wall portion, the learned counsel for the respondent demonstrated that the plan approval is obtained in respect of the wall. Therefore, the document-Ex.A2 establishes the case of the respondent/plaintiff that BC portion of the wall belongs to him exclusively. The failure to mention the existence of the compound wall in Ex.A1 may be a circumstance in favour of the appellant. However, that is not a decisive factor to decide whether the disputed wall belongs to the appellant or the respondent. Admittedly, the appellant/defendant does not dispute the title of the respondent/plaintiff over AB portion of the wall. BC portion of the wall is not a separate wall and it is attached to AB portion of the wall. The construction is the same and the width of the wall is same and it is also continuous. In such circumstances, the case of the appellant that the wall was constructed by his forefathers about 100 years back, cannot be believed without any oral or documentary evidence to support his case. When the appellant/defendant had no building adjacent to the BC portion and the commencement of construction by the appellant in the vacant land was just prior to the filing of the suit, this Court is unable to see a probability in the case of the appellant that BC portion of the wall was constructed by his forefathers. The existence of the iron grill resting over BC portion of the wall at the time of construction of the respondent's/plaintiff's house clearly indicate that the respondent/plaintiff has asserted his right. The case of the appellant/defendant that the iron gate was put up by the respondent/plaintiff with the permission of the appellant is not proved.

- (26) After considering the pleadings, evidence both oral and documentary, the Trial Court as well as the Lower Appellate Court has concurrently held that the suit ABC wall is the absolute property of the respondent/plaintiff and that the appellant has no right to either interfere or put up his construction as if the suit wall is the exclusive wall of the appellant or the common wall of the appellant/defendant and the respondent/plaintiff.



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(27) In view of the concurrent findings of facts and this Court is convinced that the findings of the Courts below are supported by reasons, the substantial questions of law raised by the appellant in the Second Appeal have no substance. Hence, this Court finds no merit in the Second Appeal.

(28) In fine, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1. The III Additional District Judge,
Vellore at Thirupathur.
2. The Subordinate Judge,
Vaniyambadi.

Copy To:-

The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.V.Selvaraj, Advocate, S.R.No.25388

+1cc to Mr.R.Subramanian, Advocate, S.R.No.25441

S.A.NO.431 OF 2017

SMI (CO)
PBS/18/05/2022