



WEB COPY



S.A.No.147 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2023

CORAM

THE HONOURABLE JUSTICE Mr.V.LAKSHMINARAYANAN

S.A.No.147 of 2009

1.Subramania Mudaliar (died)
2.Natarajan
3.Usha
4.Thirunavukkarasu
5.Punitha

...Appellants.

(Appellant Nos.2 to 5 brought on record as LR's of the deceased sole appellant viz., Subramania Mudaliar vide court order dated 05/10/2021 made in C.M.P.No.15671 of 2021 in S.A.No.147 of 2009 by R.Hemlatha,J.)

Vs.

M.Natarajan

...Respondent.

PRAYER:Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 28.07.2008 passed in A.S.No.53/2006 on the file of the I Additional Sub Court, Cuddalore reversing the judgment and decree dated 08.03.2006 passed in O.S.No.587/2003 before the Principal District Munsif's Court.



For Appellants : Mrs.Nilophar

For Respondent : Mr.R.Gururaj

JUDGMENT

The first defendant is the appellant. The plaintiff filed a suit for a declaration for the following reliefs:-

1.Declaring the C Schedule property is a party wall belonging to plaintiff and defendant.

2.Restricting the defendant, his men, agents and any person claiming under him by a decree of permanent injunction from in any manner interfering with plaintiff's right to enjoy and enjoyment of the C schedule property.

3. Directing the defendant to pay plaintiff the cost of this suit and,

4.Granted such other relief and as are deemed fit.

It was the specific case that the wall is a common wall and it is a party wall. The pleadings proceeded that the plaintiff as well as the defendant have common and equal rights over the said wall.

2.According to the plaintiff, the defendant had approached him for the purpose of demolition of his house including the common wall.



The plaintiff feared if the wall is demolished, his house will come down collapsing and therefore, he presented the suit for a declaration that the wall is a party wall.

3.Resisting the claim of the plaintiff, the defendant specifically pleaded that the B and C walls belong absolutely to the defendants for more than a century. According to the defendant, both the schedules were allotted to the father of the defendant by name Thillaivana mudaliar. The defendant further pleaded that the entire property including the B & C schedule walls had been mortgaged with their family on 24.04.1956. As such, it is not a party wall but a wall constructed within the boundaries of their properties. According to the defendants, the plaintiff does not have any right, title or interest over the suit property. In fine, the plea is that it is not a party wall and it is the own property of the defendant.

4.The parties went to Trial and examined themselves. On the side of the plaintiff, 8 documents were marked and on the side of the defendants, equal number of documents were marked.



5. An Advocate Commissioner was appointed by the court, whose records were filed as Exs.C1 to C3. The plaintiff examined himself as P.W.1 and the defendant examined himself as D.W.1. After a full trial, the Trial Court came to a conclusion that the suit wall belong to the defendant and dismissed the suit with costs.

6. On appeal by the plaintiff, the Lower Appellate Court denied title but granted a relief of injunction. It is pertinent to point out as against the disallowed portion, the plaintiff has not presented an appeal. The defendants, who are aggrieved by the grant of injunction, alone have filed this appeal.

7. At the time of the admission, the following Substantial Questions of Law were framed:-

(i) Whether in law the lower appellate court was right in failing to see that under Section 13 of the Indian Easements Act an easementary right should not be presumed in the absence of pleadings, issues and proof.

(ii) Whether in law the lower appellate court was right in omitting to see that a claim of title and easementary right are distinct and contradictory and that once title has been denied, any relief based on



easement could not be granted vide AIR 1987 Mad 102?

(iii) Whether in law the lower appellate court was right in presuming that long user over the statutory period, animus of enjoying the easement in the wall belonging to the appellant, and acceptance that the title vests with the other person existed while granting a decree for injunction against the true owner?

8.Mrs.Nilophar, learned Counsel appearing for the appellants would submit that, when both the courts had come to the conclusion that the defendant is the owner of the wall and that the C schedule property is not a party wall but falls within the property of the defendant, the appellate court erred in granting the relief of injunction. She would submit that it was not a case of easement of support but a case where the plaintiff came with a categorical plea that the wall belonged to him as well as the defendant. She would submit that burdening the appellants' property with an injunction when the plaintiff had not pleaded easement is unfortunate. She would further state that, having denied title, the Court should not have granted the relief of injunction.

9.Mr.R.Gururaj, learned Counsel for the respondent would



submit that it is true that the wall does not belong to the respondent but he would state that the court should grant an alternate relief of easement by support.

10.I have considered the arguments advanced by the learned counsel for the appellant and learned counsel for the respondent.

11.Here is the case where a suit is presented on the basis of title and had been concurrently held against the plaintiff. He has not filed an appeal against the portion rejecting the claim for title. The trial court has dismissed the suit in full and on appeal, the lower appellate court concurred with the finding that the plaintiff is not entitled to a relief of title but had curiously granted an order of injunction.

12.When I pointed out to this, Mr.Gururaj, learned counsel for the respondent would submit that the plea of easement is in the alternative and the court has the power to grant alternative reliefs.

13.Apart from that, he would submit that the court can always mould the relief and grant a decree for easement, though the plea is based on title. For this proposition, he would rely upon various



judgments:-

(i). ***Somnath Berman, Appellant Vs. Dr.S.P.Raju and Anr.*** in Civil Appeal No.2342 of 1996 with C.M.P.No.3588 of 1968 dated 16.10.1996.

(ii). ***Govind Singh Vs. A.Khaja Mohiddin*** in Second Appeal No.493 of 2013 & M.P.Nos.1 to 3 of 2013 dated 30.07.2013.

(iii). ***Madhavan Vs. Kannammal and Ors.*** in Second Appeal Nos.1542 and 1543 of 1985 dated 25.11.1987.

(iv). ***Visalakshi Ammal Vs. Narayanaswami Naidu and Ors.*** in Second Appeal No.1431 of 1973 dated 06.07.1976.

14.I have carefully considered the arguments of either side and gone through the records. Fortunately for me, the issue of title should not detain me, as both the courts below have concurrently held that the plaintiff is not the owner of the property and he has failed to prove that it is a party wall and that it was enjoyed in common in ownership, title and interest by the plaintiffs and the defendants. The plaintiff having failed, ought to have carried the judgment on appeal before this



court. The plaintiff has failed to file an appeal as against the decree of dismissal of title. Therefore, I am saved from the trouble of probing into the issue of title. Both the courts below have held that the wall belongs to the defendant and that portion of the decree has become final.

15.The only issue is, having succeeded before the courts below on title, whether the lower appellate court was correct in granting a decree of injunction.

16.I am afraid that when title has been denied and the pleading is that of ownership, grant of injunction against the true owner is improper. Mr.Gururaj, cited several judgments before me. In none of these cases, have the courts in a suit predicated on title, a decree, has been granted, on easement. This is exactly the error committed by the lower appellate court. There is no quarrel that this court does possess the power to grant alternate reliefs but it cannot be extended to contradictory reliefs and where there is no foundational pleadings for easement.



17.The suit claiming that the wall is a party wall, implies that both the plaintiffs and the defendants are the owners of the wall. If I were to uphold the decree of injunction, it would be an invasion into the right of the defendant for a property which absolutely belongs to him. It is not the duty of a court to burden the owner with a liability, when the same has not been pleaded. Had the plaintiff pleaded easement, he has to necessarily concede to the title of the defendant. Therefore, the pleading of easement and title are inherently destructive of each other.

18.Civil Law does not know of a suit presented on title and a decree being granted on easement.

19.The authorities that are cited by Mr. Gururaj are all cases where the relief granted by the court is in contradictory to the relief pleaded. I am not willing to read the plaint as one on easement and grant a decree of injunction.

20.I answer the question of law in favour of the appellant holding that the Lower Appellate Court having come to a conclusion



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that the appellant is the owner of the property, it erred in granting an injunction against him.

21.Consequently, the Second Appeal is allowed. The judgment and decree in A.S.No.53 of 2006 dated 28.07.2008 in partly reversing the judgment and decree of the Principal District Munsif Court in OS.No. 587 of 2003 dated 08.03.2003 stands set aside. The order of injunction granted by the Lower Appellate Court is hereby dissolved. The suit shall stand dismissed in its entirety. Costs throughout.

19.04.2023

nst

Index : Yes/No

Speaking : Yes/No

Neutral Citations : Yes/No

V.LAKSHMINARAYANAN. J.

nst

To:

1.The Principal District Munsif,
Cuddalore.



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2. The I Additional Sub Judge,
Cuddalore.

3. Record Keeper
VR Section
High Court of Madras
Chennai.

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