



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2023

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.1626 of 2011

&

M.P. No. 1 of 2011 and C.M.P. No.7071 of 2022

S. Ahamed Shafie

...Appellant

Vs.

R. Sekar

... Respondent

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 13.07.2011 passed in A.S. No.5 of 2011, on the file of the Principal Subordinate Judge, Erode, upholding the decree and judgment dated 19.01.2010 passed in O.S. No.162 of 2006, on the file of the II Additional District Munsif, Erode.

For Appellant : Mr. K.S. Jeyaganeshan

For Respondent : Mr. M. Guruprasad

JUDGMENT

The defendant who failed before both the courts below has filed this present Second Appeal.



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

2. The respondent/plaintiff filed the suit in O.S. No.162/06 before the II Additional District Munsif, Erode for a permanent injunction restraining the appellant/defendant from interfering with his peaceful possession and enjoyment of the suit property and also for a mandatory injunction directing the appellant/defendant to remove the encroachments made by him on the common wall. The suit property as described in the plaint, is a house bearing Door No.27, T.S. No.43 P, East Kongalamman Kovil Street, Erode Taluk and District, measuring 997 sq.ft. within the boundaries stated therein.

3. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

4. The case of the plaintiff in nutshell is as follows:

- I. The suit property and the other properties originally belonged to one S.K.H.M. Kahija Bee @ Jimminiammal, wife of S.K. Mohammed Ibrahim Sahib. After her death, her legal heirs



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

divided her properties through a registered partition deed dated 24.12.1971 (Ex.B2).

II. The suit property was allotted to the share of one E.K.M. Abdul Gani and E.M.M. Mohammed Hassan Sahib, sons of E.K.Mohammed Ibrahim Sahim and brothers of S.K.H.M. Kahija Bee @ Jimminiammal.

III.The plaintiff and his brothers purchased the suit property from E.K.M. Abdul Gani and the legal heirs of the deceased E.M.M.Mohammed Hassan Sahib through a registered sale deed dated 18.08.1994 (Ex.A1). Ever since the date of purchase the plaintiff and his brothers were in possession and enjoyment of the same by paying necessary tax to the Government.

IV.Subsequently, the plaintiff and his brothers divided their properties in a partition suit filed by them in O.S. No.655 of 1998 before the same court. In the final decree, the suit property was allotted to the share of the plaintiff. Thus the plaintiff is the absolute owner of the suit property.

V. The defendant is the owner of the property which is situate on the



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

northern side of the plaintiff's property. The defendant had acquired title to his property through a registered settlement deed dated 21.01.2000 (Ex.B4) executed by one Raffia Bibi, the mother of the defendant.

VI.The plaintiff and the defendant are equally entitled to enjoy the wall which lies between their properties. The sale deed in favour of the plaintiff clearly mentions that the wall between the property of the plaintiff and the defendant should be enjoyed in common and that the plaintiff is entitled to half share in the said wall. The defendant, however, constructed a building in his property which rests on the common wall. Thus he has encroached upon the entire common wall.

VII.The plaintiff wanted to reconstruct his property and requested the defendant to remove the encroachment made by him over the common wall. However the defendant rushed to the court and filed a false suit in O.S. No.62/2005 before the I Additional District Munsif, Erode with an allegation that the plaintiff attempted to demolish the wall. The interim injunction application



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

filed by the defendant was dismissed and in the appeal the First Appellate Court directed the trial court to expedite the trial and both the parties should maintain status quo till the disposal of the suit.

VIII. Since the defendant had filed the said suit alleging that the plaintiff is the wrong doer, he is contained to file the present suit.

5. The suit was resisted by the defendant on the following grounds.

- I. The house bearing Door No.27 situate on the northern side of the house belonging to E.K.M. Abdul Gani and E.M.M. Mohammed Hassan Sahib, was allotted to U.K. Hajee Pathumuthu Bibi in the family partition and the said U.K. Hajee Pathumuthu Bibi bequeathed the said property to her daughter Rafia Bibi under the settlement deed dated 30.08.1974 (Ex.B3).
- II. The said property was actually situate on the northern side of the property of her maternal uncles namely E.K.M. Abdul Gani and E.K.M. Mohammed Hassan. Rafia Bibi demolished the entire



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

existing tiled house and put up a pucca terraced building in the site and she also constructed a Madras terraced building in the first floor.

III. Since E.K.M. Abdul Gani and E.K.M. Mohammed Hassan are the maternal uncles of Rafia Bibi, they allowed their niece to put up the first floor on the southern side of East-West suit Wall. Thus the terraced first floor building of the defendant was constructed on the southern East-West wall with the consent, knowledge and approval of the erstwhile southern side owners.

IV. The plaintiff who is the subsequent purchaser cannot question the same at this point of time. In fact such a massive construction could not have been built over night as alleged by the plaintiff. If really the construction had been put up after the purchase made by the plaintiff on 18.08.1994, the plaintiff should have immediately taken action against the defendant. The plaintiff having kept quiet all these years cannot now contend otherwise. He therefore prayed for dismissal of the suit.



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

6. On the basis of the above pleadings, the trial Court framed the following issues :

- i. "Whether the plaintiff is entitled for a mandatory injunction as prayed for by him?
- ii. Whether the plaintiff is entitled for a Permanent Injunction as prayed for by him?
- iii. To what relief, the plaintiff is entitled?"

7. In the trial Court, the plaintiff examined himself and marked Ex.A1 to Ex.A6. The defendant examined himself and marked Ex.B1 to Ex.B9.

8. The trial Court Judge, after full contest, decreed the suit in favour of the plaintiff vide his decree and judgment dated 19.01.2010 on the following grounds :

- i. A perusal of the sale deed (Ex.A1), decree and judgment passed in O.S. No.655 of 1998 (Ex.A2) and the settlement deeds dated 30.08.1974 (Ex.B3) and 21.01.2000 (Ex.B4) clearly show that the



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY disputed wall is the common wall.

- ii. The defendant also during the course of cross examination admitted that the disputed wall is common to both the plaintiff and the defendant and her mother constructed the first floor resting on the common wall with the permission of her maternal uncles who were the original owners and vendors of the plaintiff.
- iii. Moreover, normally the Sub Registrar would inspect the property before valuing the property in Annexure IA. The Sub Registrar has not indicated in Annexure IA about the existence of first floor in the property of the defendant.
- iv. In any event, the defendant did not adduce any acceptable evidence to show that her mother, after getting permission from the erstwhile owners of the plaintiff's property, constructed the first floor resting on the common wall. The erstwhile owners were Rafia Bibi's own maternal uncles and they have not been examined in the present case.
- v. Since the plaintiff and the defendant were enjoying the wall in common, the defendant cannot construct a building over the said



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY wall and therefore the same is liable to be demolished.

9. Aggrieved over the decree and judgment passed by the trial Court Judge, the defendant filed an appeal in A.S. No.5 of 2011 before the Principal Subordinate Court, Erode. The learned Principal Subordinate Judge, Erode, after analysing the oral and documentary evidence adduced on both sides upheld the findings of the trial court vide his decree and judgment dated 13.07.2011.

10. Now the present Second Appeal is filed by the defendant and the following substantial questions of law were framed by my learned predecessor.

- i. "Whether the Courts below are correct in allowing the suit if the same is barred by the Doctrine of Res judicata?
- ii. Whether the Courts below are correct in granting the relief in the absence of a clear description of property?
- iii. Whether the Lower Appellate Court is right in holding that the appellant/defendant cannot raise a question of law at the appellate



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY stage?

iv. Whether the Courts below are correct in granting a finding which has not been prayed for?

11. Heard Mr. K.S. Jeyaganeshan, learned counsel for the appellant and Mr. Guruprasad learned counsel for the second respondent.

12. Mr. K.S. Jeyaganeshan, learned counsel for the appellant contended that both the courts below committed an error in placing the entire burden upon the defendant and decreed the suit in favour of the plaintiff. His further contention is that as per Section 101 to 103 of Indian Evidence Act, the onus is on the plaintiff to prove his case and in the present case, the plaintiff has failed to prove his contentions. It is also his contention that the defendant could not have constructed the entire building over night as alleged by the plaintiff and the plaintiff who purchased his property during the year 1994 did not take any action against the defendant and on the other hand, he had approached the court only during the year 2006 and that too after filing of the suit in



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

O.S.No.62/2005 by the defendant. It is his further submission that the suit filed by the plaintiff is also hopelessly barred by limitation on the ground of delay and laches and also in view of Article 113 of the Limitation Act.

13. Per contra, Mr. Guruprasad, learned counsel for the respondent contended that both the courts below, after analysing the oral and documentary evidence adduced on both sides had rendered a concurrent finding and this Court cannot interfere with the same when they are not perverse. He also relied on the decision in ***Gurdev Kaur vs. Kaki (Appeal (civil) 2083 of 2006 dated 18.04.2006)*** and contended that the Hon'ble Supreme Court had expressed its deep anguish that still the scope of Section 100 CPC has not been correctly appreciated and applied by the High Courts in a large number of cases. The Hon'ble Supreme Court had also made an observation that the High Courts would decide the appeal only in accordance with the scope of Section 100 CPC and should not interfere with the concurrent decisions rendered by the courts below. It is also his contention that there is no jurisdiction to entertain a



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

Second Appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be.

14. Though the suit property in the plaint schedule is indicated as the house of the plaintiff, the actual dispute between the plaintiff and the defendant is in respect of East-west common wall between the property of the plaintiff and the defendant. The plaintiff and his brothers purchased the suit property from one E.K.M.Abdul Gani and the legal heirs of E.M.M. Mohammed Hassan Sahib through a registered sale deed dated 18.08.1994 (Ex.A1). Originally the suit property and the adjacent properties were owned by one S.K.H.M. Kahija Bee @ Jimminiammal, wife of S.K. Mohammed Ibrahim Sahib. After her demise, her properties were partitioned among her legal heirs through a registered partition deed dated 24.12.1971 (Ex.B1). In the said partition, the suit property fell to the share of E.K.M. Abdul Gani and E.M.M. Mohammed Hassan Sahib. According to the plaintiff he and his brothers were in possession and enjoyment of the suit property and the common wall on the northern side of their property. Thereafter in the suit for partition in O.S. NO.655 of



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

1998, the suit property was allotted to the share of the plaintiff. The appellant/defendant acquired the property through a registered settlement deed dated 21.01.2000 (Ex.B4) executed by her mother Rafia Bibi. All these aspects are admitted by both the parties. According to the plaintiff the East-west wall on the northern side of his house is a common wall of the plaintiff and the defendant and the defendant had encroached upon the entire wall by constructing the first floor which rests on the entire common wall.

15. On the other hand, the contention of the defendant is that E.K.M. Abdul Gani and E.M.M. Mohammed Hassan Sahib, from whom the plaintiff and his brothers purchased the suit property, were his mother's maternal uncles and her mother with their consent and knowledge constructed the first floor and they did not raise any objection. Except the oral evidence of D.W.1, there is no other acceptable evidence to show that her mother got an oral consent from the vendors of the plaintiff to put up the construction over the common wall. The sale deeds (Ex.A1 and Ex.A2), the partition deeds and the settlement



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

deeds (Ex.B1 to Ex.B4) clearly show that the disputed wall is a common wall. In fact the settlement deed dated 30.08.1974 (Ex.B3) executed in favour of the defendant's mother clearly shows that the property measuring 350 sq. ft was settled in her favour by her mother U.K. Hajee Pathumuthu Bibi. The very same property was settled in favour of the defendant by her mother Rafia Bibi and this settlement deed dated 21.01.2000 was marked as Ex.B4. In the settlement deed (Ex.B4) there is no mention about the construction of the first floor. The plaintiff and his brothers purchased the suit property during the year 1994 through Ex.A1 and as already observed, in the suit for partition in O.S. No.655/1998, the suit property was allotted to the share of the plaintiff on 20.04.1998. The defendant did not adduce any evidence to show that the first floor of the house was constructed even prior to the purchase of suit property by the plaintiff.

16. Both the courts below had analysed the entire oral and documentary evidence adduced by both the parties and had rightly concluded that the disputed wall is a common wall and that the defendant



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

had not established that her mother got oral consent for constructing the first floor which rests on the entire common wall. In fact, in the settlement deed Ex.B4 executed by Rafia Bibi in favour of the defendant, there is no mention about the existence of first floor. As already observed, this settlement deed is of the year 2000 and the plaintiff and his brothers had purchased the suit property even during the year 1994. Therefore, it cannot be said that the suit is barred by limitation as contended by the learned counsel for the appellant.

17. The substantial question of law No.1 does not arise as it is not the case of the defendant that the suit is barred by the principles of Resjudicata and the substantial questions of law 2,3 and 4 are answered against the defendant.

18. In the result,

- i. the Second Appeal is dismissed. No costs. Consequently, connected Civil Miscellaneous Petitions are closed.



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

WEB COPY

ii. the decree and judgment dated 13.07.2011 passed in A.S. No.5 of 2011, on the file of the Principal Subordinate Judge, Erode, and the decree and judgment dated 19.01.2010 passed in O.S. No.162 of 2006, on the file of the II Additional District Munsif, Erode, are upheld.

12.06.2023

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga



WEB COPY



S.A.No.1626 of 2011 & M.P. No. 1 of 2011 & C.M.P. No.7071 of 2022

R. HEMALATHA, J.
bga

To

1. The Principal Subordinate Judge, Erode.
2. The II Additional District Munsif, Erode
3. The Section Officer, VR Section, High Court, Madras.

S.A.No.1626 of 2011
&
M.P. No. 1 of 2011 and C.M.P. No.7071 of 2022

12.06.2023