



Judgment dated 21.06.2023 in  
S.A.(MD).No.895 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 21.06.2023

Coram:

THE HONOURABLE MR.JUSTICE P.VELUMURUGAN

S.A.(MD).No.895 of 2014  
and  
M.P.(MD).No.1 of 2014

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Periyakaruppan

.. Appellant/plaintiff

Vs.

Gurusamy

.. Respondent/defendant

Second Appeal (MD), filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 23.06.2014 in the Appeal Suit No.12 of 2013 on the file of the Subordinate Court, Paramakudi, confirming the judgment and decree dated 18.06.2013 in the Original Suit No.78 of 2011 on the file of the District Munsif Court, Paramakudi.

For appellant : M/s.V.Muthukamatchi and S.Vishnuvardhan  
(change of vakalat -- dated 11.04.2023)

For respondent: Mr.S.Srinivasa Raghavan (caveator)

### JUDGMENT

This Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 23.06.2014 in the Appeal Suit

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No.12 of 2013 on the file of the Subordinate Court, Paramakudi, confirming the judgment and decree dated 18.06.2013 in the Original Suit No.78 of 2011 on the file of the District Munsif Court, Paramakudi, against which, the present Second Appeal has been filed by the plaintiff.

2. Brief facts as averred in the plaint, are as follows:

(a) The suit property's East and West portion originally belonged to one Nagalingam Servai, Ponnusamy Servai and Chinnakannu Servai. The above said three brothers entered into a partition deed, dated 20.09.1947, in which, it is mentioned that if any Wall is erected in the 'A' schedule property, that can be done by fixing the same on the Western side of the North-South disputed wall. Further, if any parties want to repair the disputed wall, that can be done by the parties by themselves in respect of the portion which they have been allotted. Moreover, in the said partition deed, North-South disputed wall should be a 'Common Wall'.

(b) In the partition deed, if any repair is wanted to be done by the parties, the same can be done by the parties concerned in respect of the portion which they have been allotted. Further, it is also mentioned in the said partition deed that the North-South disputed wall should be a common wall. '

(c) Ponnusamy Servai and his brother Sangu Servai earlier filed a suit



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against Nagalingam Servai before the District Munsif Court, Paramakudi, in O.S.No.194 of 1958, in which, the learned District Munsif gave a finding that the suit property(ies) is a 'common wall'. Subsequently, there was a family arrangement in respect of the present suit property, which as alleged, belonged to the plaintiff, who enjoyed the same for a long time, in which, Door No.7/58 was allotted to the plaintiff and he enjoyed the same for a long time. The Door number of the property is given as No.7/58, for which, the plaintiff was also paying Tax to the Revenue Authorities and also paying TNEB charges for a long time.

(d) Subsequently, the defendant herein filed a suit in O.S.No.108 of 2004 before the Court against the said Ponnusamy Servi for declaration that the suit property(ies) therein belonged to the defendant therein and also prayed for grant of permanent injunction. The said suit in O.S.No.108 of 2004 was dismissed on 18.03.2005 and the defendant therein preferred a First Appeal (Appeal Suit) in A.S.No.29 of 2005 before the Sub-Court, Paramakudi , and this appeal filed by the said defendant was also against Paramakudi Municipality also was dismissed in the year 2005, resulting in filing of the present suit, but the defendant, without having any exclusive right and title over the property, he fixed a cup-board and removed "Uthirra" wooden logs in respect of the present suit property. Furthermore, the defendant herein also damaged the suit property



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herein from 01.06.2011.

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(e) Hence, for the reasons stated above, the plaintiff herein had filed the present suit praying to grant the relief of permanent injunction and mandatory injunction not to remove the 'common Wall' and not to cause damage the suit property in respect of the North-South disputed wall, and accordingly, the trial Court amended the prayer in the present suit for restoring the damages in the North-South common Wall.

3. The facts in a nut-shell, as stated in the written statement, are as follows:

(i) The suit property herein is not a 'common Wall'. As per the partition deed, dated 29.10.1947, the North-South disputed wall is not the present suit property. As per the said partition deed, no one can fix a cup-board on the disputed wall and against the said condition in the partition deed, the plaintiff also made certain fixtures on the said disputed wall. The plaintiff suppressed this material fact in the First Appeal earlier filed in A.S.No.67 of 1960 relating to the suit in O.S.No.194 of 1958. In the said appeal in A.S.No.67 of 1960, the Court had rendered a finding that the North-South disputed wall is not a 'Common Wall'.

(ii) It is not correct as alleged by the plaintiff to say that there was family



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arrangement between the said Nagalingam Servai and the plaintiff herein. The defendant also paid Tax to the Revenue Authorities in respect of Door Nos.7/58 and 7/58-A.

(iii) The defendant prepared an Appeal in A.S.No.29 of 2005 in O.S.No.108 of 2004, and this appeal was not prosecuted any further, since the defendant had purchased the Western side of the suit property.

(iv) It is the stand of the defendant that he did not damage the common wall and the defendant had no intention at all to damage the said disputed wall itself.

(v) The defendant proposed to construct a building adjacent to the suit property by putting up a Pillar. As per the partition deed, Nagalingam Servai has no right to do the same.

(vi) The defendant purchased 'B' and 'C' schedule properties mentioned in the partition deed from Sangu Servai of an extent of 11-1/2 feet. The Patta is also given to the suit property as T.S.No.148/2 in the name of the defendants. Therefore, for all the forgoing reasonings, the defendant herein prayed that the present suit may be dismissed.

4. Based on the above pleadings, the trial Court framed the following issues:

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(i) Whether the plaintiff has title over the suit property ?

(ii) Whether the suit property is a common wall ?

(iii) Whether the plaintiff is entitled for permanent injunction as prayed for in the plaint ?

(iv) Whether the plaintiff is entitled to get the relief of mandatory injunction as prayed for, and

(v) To what other relief the plaintiff is entitled to ?

5. Based on the above pleadings, in order to substantiate the case, on the side of the plaintiff, one Periakaruppan was examined as P.W.1 and 27 documents were marked as Exs.A-1 to A-27, besides two documents Ex.C-1 and Ex.C-2 were marked as Court documents, which are respectively the Advocate Commissioner's report and plan. On the side of the defendant, one Gurusamy was examined as D.W.1, and 16 documents were marked as Exs.B-1 to B-16.

6. Based on the pleadings and the oral and documentary evidence, the trial Court dismissed the suit on 18.06.2023 and there-against, the appellant/plaintiff preferred First Appeal in A.S.No.12 of 2013 before the Sub-Court, Paramakudi. The first appellate Court, after considering the said facts and circumstances and also on re-appreciation of the oral and documentary evidence,

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had framed the following points for consideration:

- (i) Whether the plaintiff is entitled to get injunction as prayed for ? and
- (ii) To what other relief, the parties herein are entitled to ?

The lower appellate Court dismissed the appeal on 23.06.2014, against which, the present Second Appeal had been filed before this Court by the plaintiff.

7. This Court, while admitting the Second Appeal on 06.01.2015, formulated the following Substantial questions of law:

(i) Whether the Courts below are justified in dismissing the suit of the appellant, contrary to the findings rendered in O.S.No.108 of 2004 and A.S.No.29 of 2005 ?

(ii) When the plaint scheduled property, has been declared as 'Common Wall' as per the suit filed by the respondent in O.S.No.108 of 2004 on the file of the District Munsif Court, Paramakudi, seeking and confirmed in Appeal Suit in A.S.No.29 of 2005 on the file of the Sub-Court, Paramakudi, and whether the Courts below are justified in declaring that the plaint scheduled



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property is absolute property of the respondent ?

(iii) When the issue relating to the Common Wall, was left open in the appeal suit in A.S.No.67 of 1960, whether the Courts below are justified in declaring the title of plaint scheduled property in favour of the respondent ?.

8. Learned counsel for the appellant/plaintiff submitted that the suit property originally belonged to Nagalingam Servai, Ponnusamy Servai and Chinnakannu Servai. Later on, they entered into partition, vide partition deed, dated 28.10.1947, in which the suit property in the present suit, was shown as 'Common Wall'. Though on an earlier occasion, the said Ponnusamy Servai and his brother Sangu Servai filed the suit in O.S.No.194 of 1958 against the brother Nagalingam Servai before the District Munsif Court, Paramakudi and in the said suit, the suit property shown in the present suit, was declared as 'Common Wall'. Thereafter, there was a family arrangement, as per which also, the suit property belonged to the appellant/plaintiff and he enjoyed the same and also paid the Tax assessment in respect of Door No.7 of 1958, and therefore, subsequently, the respondent/defendant filed a suit in O.S.No.108 of 2004 against the said



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Ponnusamy Servai, for declaration and injunction and the said suit was dismissed on 18.03.2005, there-against, the defendant therein filed First Appeal in A.S.No. 29 of 2005 on the file of the Sub-Court, Paramakudi and the said First Appeal was also dismissed on 18.03.2005.

9. Learned counsel for the appellant/plaintiff further contended that as per the above said partition deed and the said family arrangement and also in the subsequent suit and in the First Appeal, the suit property therein is shown only as 'Common Wall' and the respondent/defendant had no exclusive right, title and interest over the suit property and they cannot put up any construction on the 'common wall' or they also cannot put up any cup-board and remove the 'Uthira Kattaigal' (wooden logs) fixed in the 'Common Wall', and since the parties have admitted it, the plaintiff filed the present suit.

10. Learned counsel for the appellant/plaintiff further contended that both the Courts below have failed to consider the partition deed, as also the family arrangement and the subsequent suit filed by the vendor of the respondent/defendant, was dismissed, thereby, the declaration was denied. The trial Court erroneously held that the suit is not 'Common Wall', which is against the recitals in the partition deed as well as the family arrangement/settlement,



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and also the findings given in the earlier suit, and in the First Appeal in A.S.No.29 of 2005 filed regarding O.S.No.108 of 2004. The first appellate Court also failed to re-appreciate the evidence and considering the above said materials, thereby the First Appeal was dismissed by endorsing the view of the trial Court, and hence, the substantial questions of law is being raised before this Court, which had to be answered in favour of the appellant/plaintiff and the present Second Appeal may be allowed, thereby, the impugned judgment and decree of both the Courts below are liable to be set aside, thereby, the respondent/defendant was restrained from causing damages to the 'Common Wall' and also sought for mandatory injunction to revoke the damages caused by the defendant in the present suit.

11. Learned counsel for the respondent/defendant submitted that though, earlier, the suit property(ies) belong to the above said three brothers and even though it is not exclusively declared as 'Common Wall', but on the either side, if the property share-holders wanted to put up construction, without damage to the North-South disputed wall, they can construct the building and on their side also, they should not remove the 'Uthira wooden logs', or alter the physical features of the present suit property. However, the suit filed by the respondent/defendant in O.S.No.108 of 2004 for declaration and injunction, was dismissed, subsequently,



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they have filed A.S.No.29 of 2005 on the file of the Sub-Court, Paramakudi, and challenging the judgment and decree of the first appellate Court, the First Appeal was preferred by the present defendant, in A.S.No.29 of 2005 on the file of the Sub-Court, Paramakudi, and that, pending the First Appeal, earlier, the respondent/defendant had purchased the Western side of the suit property from the legal heirs of the said Nagalingam Servai and they have not altered the said disputed wall and now, in the present suit, the property is not 'Common Wall' and adjacent to the said disputed wall, they have erected a pillar and had put up the construction even without touching the said disputed wall. Therefore, since the present respondent/defendant purchased 2/3 of the property, the first appellate Court had not decided the said First Appeal in A.S.No.29 of 2005, on merits and thereafter, under the present Exs.B-5 and B-6, the respondent/defendant purchased  $\frac{3}{4}$  share of the property (out of the 'Common Wall') and therefore, the substantial questions of law does not arise for consideration in this Second Appeal. Even the substantial question of law so formulated by this Court, had become infructuous, and the Second Appeal is liable to be dismissed as such.

12. Heard both sides and perused the materials available on record.



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13. It is the main stand of the appellant that the suit property is 'Common Wall' and between Nagalingam Servai and other brothers, a partition deed was entered into to the effect that no one should damage it and also that no one should put up any new cup-board or should not remove the 'Uthira Kattaigal' (wooden logs) and since the respondent/defendant caused damage, the present suit for injunction and also for damages, is filed by the plaintiff.

14. It is the case of the respondent/defendant that though it is not expressly stated as 'common wall', there are recitals in the partition deed that no cup-board should put up in the 'disputed wall' and that the 'Uthira kattaigal' should be removed, but however, the parties can raise a new Wall adjacent to the present disputed wall, without disturbing the present disputed wall. Subsequent development is that the respondent/defendant had purchased major portion from the legal heirs of the said Nagalingam Servai and he also had put up construction by putting up a 'pillar' and without touching the disputed wall and therefore, the substantial questions of law and the prayer sought for in the said facts and circumstances were based on the factual aspects and both the Courts below have rendered a finding specifically considering the subsequent event that the respondent/defendant had purchased a major portion of the main property and also got paid the tax being assessed and paid necessary house-tax also, and



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the Door number was also allotted and now, the property is the exclusive property of the defendant and the Western side of the disputed wall belonged to the defendant/respondent herein, and therefore, both the Courts below have considered the case based on merits only.

15. All the three substantial questions of law are inter-linked and they have to be answered accordingly.

16. Though the main contention of the appellant/plaintiff is that as per the partition deed and the family arrangement, the present suit property is 'common Wall' and further, the main contention is that in the suit in O.S.No.108 of 2004 and also appeal in A.S.No.29 of 2005, the plaint schedule property was declared as "common wall" and therefore, both the trial Court and the lower appellate Court failed to appreciate the same.

17. On a perusal of the entire materials, and, oral and documentary evidence, it is seen that though the respondent/defendant filed the suit in O.S.No.108 of 2004, which was filed for declaration and permanent injunction, the same was dismissed, however, he filed A.S.No.29 of 2005 and pending the said A.S.No.29 of 205, the respondent/defendant had purchased the properties



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under Exs.B-5 to B-7. The disputed land was only 'common wall' and subsequently, respondent/defendant purchased major share (3/4 share) of the property from Nagalingam Servai and further, the present respondent/defendant had put up a disputed wall. An Advocate Commissioner was also appointed in the suit and he filed his report and plan. Even the evidence of the respondent/defendant that due to subsequent purchase, they shall not contest the appeal. A perusal of the judgment in appeal in A.S.No.29 of 2005 shows that it was not decided on merits. The appellant/plaintiff also admitted it only in the evidence and the said judgment and decree was marked as Exs.A-3 and A4.

18. From the evidence on record and as the said appeal in A.S.No.29 of 2005 was ultimately not decided on merits, and further in Ex.B-11 (being change of Patta order stands in the name of the defendant). the present suit property is shown as S.F.No.148/2. The defendant also admitted that the present suit property was assessed to tax in T.T.S.No.148/2 in the name of the respondent/defendant.. and individual Patta was also granted.

19. On a further perusal of records, Exs.A-9 (Municipality Receipts), A-10 (TNEB receipts), A-11 (Municipality Receipts), it is clear that they do not relate to S.F.No.148/2 and Exs.A-25 to A27, i.e. again the Municipality Receipts (two) and



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TNEB receipt, respectively also, do not relate to the present suit property. Exs.B-5 to B-9 (being the sale deed standing in the name of the present defendant) show that the defendant had purchased the property adjacent to the disputed wall and the appellant/plaintiff has no right, title and interest over the present suit property, and therefore, the trial Court dismissed the suit as it was filed for bare injunction, seeking mandatory injunction and permanent injunction. The respondent/defendant denied the right, title and interest of the appellant, but the appellant has not filed the suit for declaration or amended the relief for declaration.

20. Further, Ex.C-1 being the learned Advocate Commissioner's report filed before the trial Court, shows that there was a construction in the present suit property, but that cannot be a cause for claiming damages. Further, it is found that the respondent proposed to construct a building in his property, and there were no damages as alleged by the appellant. The appellant has not filed the suit for declaration and not proved that the disputed Wall was the common Wall also and not proved the cause of action.

21. However, the fact remains that after the suit in O.S.No.108 of 2004 filed by the present respondent, he had purchased a major portion/share of



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disputed Wall from rightful son, and therefore, they did not prosecute the First Appeal therein in A.S.No.29 of 2005. The said Appeal Suit was dismissed, not on merits, but due to non-prosecution of the appeal and due to subsequent events that had taken place, namely purchase, etc. The substantial questions of law as framed by this Court are answered against the appellant, but in favour of the respondent.

22. Thus, for the reasons stated above, this Second Appeal is dismissed, as there is no perversity or illegality or infirmity in appreciation of evidence by the trial Court and re-appreciation of the evidence by the first appellate Court, and the judgments of both the Courts below are based on only factual aspects and the evidence also has been properly appreciated and answered by the Courts below by considering only the evidence on record, and therefore, especially the earlier First Appeal in A.S.No.29 of 2005 on the file of the Sub-Court, Paramakudi, was not decided on merits, as stated by the appellant, but based on the findings of the trial Court and the appellate Court, which are against the findings rendered in the earlier suit filed by the present respondent in A.S.No.29 of 2005 on the file of the Sub-Court, Paramakudi

23. Now, considering the findings of the trial Court, as also the lower



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appellate Court, and also the findings rendered in the earlier suit and appeal and also on a perusal of Exs.B-5 and B-6, being the sale deed standing in the name of Gurusamy, and that the respondent had purchased major portion, i.e. 3/4th share of the disputed Wall from Nagalingam Servai, and due to that, the earlier First Appeal in A.S.No.29 of 2005 was not substantially decided on merits, and hence the appellant is not entitled to the relief sought for in the present suit in O.S.No.78 of 2011. Even the learned Advocate Commissioner's report shows otherwise.

24. Further, as the trial Court and the lower appellate Court had taken a similar view and further, as there are concurrent findings in the judgments of both the Courts below, as laid down by the Supreme Court in a catena of judgments, this Court as Second Appellate Court, shall not interfere with the findings so rendered by both the Courts below.

25. At this juncture, it is to be noted that the respondent herein purchased the property from the legal heirs of the original owner, namely, Nagalingam Servai. Therefore, prior to the sale, the disputed Wall was a common wall. Exs.B. 5 and B.6 show that the respondent has purchased 3/4 share of the property of Nagalingam.



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26. Hence, this Court does not find any substantial question of law to be answered and the substantial questions of law so formulated by this Court are answered accordingly.

27. Hence, this Second Appeal is liable to be dismissed. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs in the present Second Appeal. Consequently, the Miscellaneous Petition is closed.

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Index: Yes/no

Speaking Order: Yes/no

Neutral Citation: Yes/no

cs/skn

To

1. The District Munsif, Paramakudi.
2. The Subordinate Judge, Paramakudi.
3. The Section Officer, V.R.Section, Madurai Bench of Madras High Court.

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