



S.A(MD)No.548 of 20

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.10.2024

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.548 of 2005

N.Vedamurthy ... Appellant/Appellant/Plaintiff

Vs.

1.R.Janaki (died)
2.R.Vedavalli (died)
3.R.Thillaivanam
4.R.Kanakasabai
5.R.Muruganandham
6.R.Thirugnanasambandam ... Respondents/Respondents/Defendants

(Memo dated 18.08.2024 filed on 21.08.2024 in U.S.R.No.30137 is recorded that R1 died without any issue and R2 also died and the respondents 3 to 6, who are already on record, are recorded as Lrs of the deceased R2 vide order dated 29.08.2024)

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 08.12.2004 passed in A.S.No.47 of 2004 on the file of the Additional District Court cum Fast Track Court No.1, Thanjavur, modifying the judgment and decree dated 09.12.2003 passed in O.S.No.41 of 2000 on the file of the Principal Sub Court, Kumbakonam.



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For Appellant : Mr.V.K.Vijayaraghavan
For RR 3 to 6 : Mr.P.Thiyagarajan

JUDGMENT

This Second Appeal has been directed against the Judgment and decree, dated 08.12.2004 passed in A.S.No.47 of 2004 on the file of the Additional District Court cum Fast Track Court No.1, Thanjavur, wherein, the Judgment and decree, dated 09.12.2003 passed in O.S.No.41 of 2000 on the file of the Principal Sub Court, Kumbakonam, are modified.

2.The appellant herein as plaintiff instituted a suit in O.S.No.41 of 2000 on the file of the trial Court against the defendants seeking for the relief of mandatory injunction directing the defendants to demolish the new construction made in the old foundation of the plaintiff's compound wall and also to close the doorway of the defendants to have easy access to the plaintiff's property and restore the old compound wall to its original position or in the alternative, direct the defendants to pay the plaintiff a sum of Rs.30,000/- as the damages or cost for demolishing the existing new compound wall and new construction in the place of old compound wall and to restore the old compound wall to its original position and to restrain the

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defendants from in any manner interfering with the plaintiff's peaceful possession and enjoyment of the remaining compound wall and to direct the defendants to pay the plaintiff the cost of the suit.

3.For the sake of convenience, the parties are referred to as, as described before the trial Court.

4.According to the plaintiff, the suit schedule property originally belonged to one Siva Subramaniya Mudaliyar and he sold the same to the plaintiff's father-A.S.Sabapathy @ Narthana Sabapathy Mudaiyar, who had purchased under a registered sale deed, dated 25.01.1954. After the death of the plaintiff's father, the plaintiff had filed a suit for partition in O.S.No.102 of 1983 on the file of the Sub Court, Kumbakonam and a final decree was passed on 27.04.1989 and the plaintiff got the plaint schedule property as Door No.14A measuring to an extent of 26-3/4 feet east-west and 196-3/4 feet north-south and the remaining extent was allotted to the share of his brother Nadavanandh with Door No.14. Adjacent to the plaintiff's house on the eastern side was the house belonged to one Subramaniya Mudaliyar.



He had executed a will in respect of the said property in favour of his two daughters namely Janaki and Vedhavalli, the defendants 1 and 2 herein. The defendants 1 and 2 are to enjoy the property for their lives and are given a right to give the property to any of their male heirs. Janaki had no issues. Vedhavalli has four sons namely the defendants 3 to 6. Due to his avocation, the plaintiff resided in Guduvancheri and the property was situated at Papanasam. The plaintiff's property extends upto the vaikal on the southern side and the street on the northern side. In this vaikal, a bank was constructed by the plaintiff's father in June 1954. This serves as the southeastern boundary for the plaintiff's house and backyard. Since there was a dispute with regard to the plaintiff's property and the defendants' property, Mediation was held in June 1992 and in the Mediation, the Mediators requested the plaintiff to give 1-1/2 feet in the south eastern side to the defendants and the plaintiff had also agreed for the same. The plaintiff has raised a wall. The plaintiff had leased out his house to a tenant. Taking advantage of the absence of the plaintiff, the defendants have high-handedly and illegally put up a doorway on their own western wall and demolished the compound wall to a length of 40' and constructed a new house and demolished a further 32-1/2' and constructed a new compound wall and remaining compound wall to an extent of 61'3" was still in



existence and the defendants are making arrangements to demolish the remaining compound wall and to make construction in that portion also. The defendants are very evasive in their reply and they are not taking steps to settle the matter. When the tenant asked the defendants, they stated that they got permission and believed theirs, he could not take any further action in this matter. Hence, the plaintiff has filed the said suit for the abovestated relief.

5.The defendants filed a written statement and stated that the description of the property given in the plaint was not correct. The plaintiff was bound to give a correct description of the property. The Commissioner's report and plan itself falsify the claim of the plaintiff. The defendants have not committed any encroachment into any portion of the plaintiff's property. The plaintiff has constructed the compound wall 9 inches well into the defendants' western wall. The compound wall has also been constructed by him well into the defendants property on the western side to the breadth of $\frac{3}{4}$ feet on the northern side and 1-1/2 feet on the southern side and to a length of about 133 feet. This has been allowed by late. Rathina Mudaliar to have a smooth relationship with the plaintiff. When the defendants made a new construction after demolishing the old building, they opened a doorway

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on the western side of their wall and that was used to take sand, cement etc., to be used for the new construction. In fact, the plaintiff often visited the new construction and inspected the same and he never made any objection. The plaintiff used to attend Papanasam court in connection with two cases which were pending before the Magistrate cum District Court, Papanasam. Under the will of Subramania Mudaliar, the measurements given for the defendants property as 30 feet east to west (kaladi) and north to south as 'Asal oppantham'. The defendants also took the permission of the plaintiff to have access through the backyard on the other side for the construction. The old wall was constructed in the year 1992 with the permission of late. Rathina Mudaliar by Vedamurthy. At that time, there was no fence and there was no actual division of the demarcating line between the backyard of the parties. The defendants house, more particularly the western wall of the house extends upto the ornamental garnish which was found on the western wall of the defendants property. The Commissioner has failed to measure certain important measurements and also failed to note the important physical features. The defendants have not committed any encroachment over the property of the plaintiff and prayed for dismissal of the suit.



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6.Before the trial Court, on the side of the plaintiff, the plaintiff himself was examined as P.W.1 and P.W.2 and P.W.3 were examined and Exs.A1 to A9 were marked. On the side of the defendants, the fifth defendant was examined as D.W.1 and D.W.2 & D.W.3 were examined and Exs.B.1 & B.2 were marked and Ex.C.1 and Ex.C.2 and Ex.X.1 were marked.

7.On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit.

8.Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff as appellant, had filed an Appeal Suit in A.S.No. 47 of 2004 on the file of the first Appellate Court.

9.The first Appellate Court, after hearing both sides and upon reappraising the evidence available on record, has modified the



appeal.

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10.Challenging the Judgment and decree of the disallowed portion passed by the first Appellate Court, the present Second Appeal has been preferred at the instance of the plaintiff as appellant.

11.At the time of admitting the present second appeal, this Court had framed the following substantial questions of law for consideration:

'a) Whether the respondents had accepted the construction of wall by the appellant and its demolition by them would not the appellant entitled to the relief of mandatory injunction either for restoration of wall or for payment of damages and compensation and whether the dismissal of suit legal?

b) Whether the respondents having accepted that the appellant was allowed to construct wall is it open for them to demolish the same or when the appellant was permitted to put up wall are not the defendants precluded in law from demolishing the same subsequently?'



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12.The learned counsel appearing for the appellant/plaintiff would submit that the Appellate Court has accepted the case of the plaintiff in respect of the new entrance created by the respondents in the wall and having granted a permanent injunction in respect of 61'6" in the compound wall, mentioned as 'DE' as per Ex.C.1 and Ex.C.2 should have granted the other relief claimed by the plaintiff; the Appellate Court has observed that the respondents did not raise wall in the plaintiff's property is not correct and does not arise in the peculiar circumstances of the case when the compound wall was admittedly constructed by the plaintiff and the title decided by the Appellate Court in favour of the defendants would not arise; the Appellate Court failed to appreciate the fundamental point viz., that the compound wall was constructed admittedly by the plaintiff after the dispute arose between the parties in the year 1992, pursuant to the Mediation, regardless of its acceptance. The plaintiff was entitled to 23-3/4' east to west and 196-3/4' north to south. The plaintiff has contended that he had constructed a compound wall within the boundary of his property, 40' of the compound wall belonging to him was demolished and new construction (house) was done by the defendants on the old foundation belonging to the appellant, which was done during December 1999.



The Appellate Court has failed to appreciate that the defendants are claiming excess extent over and above the document; the Appellate Court failed to appreciate that the new wall constructed by the defendants was overlapping on the old wall and the foundation laid by the appellant already and in view of the physical features, the case of the plaintiff has become acceptable and probable; the Appellate Court has erroneously accepted the 2nd report filed by the Commissioner and the appointment of Commissioner for the 2nd time and the report filed by him cannot be accepted; the observation that the plaintiff was aware of demolition etc., made in the Judgments are not correct and the Courts below have gone beyond the pleadings of parties which is impermissible and the impugned judgments insofar as the disallowed portion concerned and not considering the relevant evidence on record are liable to be set aside.

13.The learned counsel appearing for the respondents 3 to 6/defendants reiterated the averments made in the plaint and the appeal and submitted that the Appellate Court had rightly modified the suit.



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14.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents 3 to 6 and also perused the records carefully.

15.According to the plaintiff, the suit schedule property originally belonged to one Siva Subramaniya Mudaliyar and he sold the same to the plaintiff's father-A.S.Sabapathy @ Narthana Sabapathy Mudaiyar, who had purchased under a registered sale deed, dated 25.01.1954. After the death of the plaintiff's father, the plaintiff had filed a suit for partition in O.S.No.102 of 1983 on the file of the Sub Court, Kumbakonam and a final decree was passed on 27.04.1989 and the plaintiff got the plaint schedule property as Door No.14A measuring to an extent of 26-3/4 feet east west and 196-3/4 feet north south and the remaining extent was allotted to the share of his brother Nadavanandh with Door No.14. Adjacent to the plaintiff's house on the eastern side was the house belonged to one Subramaniya Mudaliyar. He had executed a will in respect of the said property in favour of his two daughters namely Janaki and Vedhavalli, the defendants 1 and 2

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herein. The defendants 1 and 2 are to enjoy the property for their lives and are given a right to give the property to any of their male heirs. Janaki had no issues. Vedhavalli has four sons namely the defendants 3 to 6. Due to his avocation, the plaintiff resided in Guduvancheri and the property was situated at Papanasam. The plaintiff's property extends upto the vaikal on the southern side and the street on the northern side. In this vaikal, a bank was constructed by the plaintiff's father in June 1954. This serves as the south eastern boundary for the plaintiff's house and backyard. Since there was a dispute with regard to the plaintiff's property and the defendants property, Mediation was held in June 1992 and in the Mediation, the Mediators requested the plaintiff to give 1-1/2 feet in the south eastern side to the defendants and the plaintiff had also agreed for the same. The plaintiff has raised a wall. The plaintiff had leased out his house to a tenant. Taking advantage of the absence of the plaintiff, the defendants have high-handedly and illegally put up a doorway on their own western wall and demolished the compound wall to a length of 40' and constructed a new house and demolished a further 32-1/2' and constructed a new compound wall and remaining compound wall to an extent of 61'3" was still in existence and the defendants are making arrangements to demolish the remaining compound wall and to make construction in that portion



also. The defendants are very evasive in their reply and they are not taking steps to settle the matter. When the tenant asked the defendants, they stated that they got permission and believed their words, he could not take any further action in this matter.

16. According to the defendants, the description of the property given in the plaint was not correct. The plaintiff was bound to give a correct description of the property. The Commissioner's report and plan itself falsify the claim of the plaintiff. The defendants have not committed any encroachment into any portion of the plaintiff's property. The plaintiff has constructed the compound wall 9 inches well into the defendants western wall. The compound wall has also been constructed by him well into the defendants property on the western side to a breadth of $\frac{3}{4}$ feet on the northern side and 1-1/2 feet on the southern side and to a length of about 133 feet. This has been allowed by late. Rathina Mudaliar to have a smooth relationship with the plaintiff. When the defendants made a new construction after demolishing the old building, they opened a doorway on the western side of their wall and that was used to take sand, cement etc., to be used for the new construction. In fact, the plaintiff often visited the new construction and inspected the same and he never made any

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objection. The plaintiff used to attend Papanasam court in connection with two cases which were pending before the Magistrate cum District Court, Papanasam. Under the will of Subramania Mudaliar, the measurements given for the defendants property as 30 feet east to west (kaladi) and north to south as 'Asal oppantham'. The defendants also took the permission of the plaintiff to have access through the backyard on the other side for the construction. The old wall was constructed in the year 1992 with the permission of late. Rathina Mudaliar by Vedamurthy. At that time, there was no fence and there was no actual division of the demarcating line between the backyard of the parties. The defendants house, more particularly the western wall of the house extends upto the ornamental garnish which was found on the western wall of the defendants property. The Commissioner has failed to measure certain important measurements and also failed to note the important physical features. The defendants have not committed any encroachment over the property of the plaintiff.

17. On a perusal of the materials available on record, it is seen that the plaintiff has constructed the wall to the length of 133-3/4 ft North South based on the mediation in July 1992. Later in the year 2000, he came to know that the wall constructed was demolished to an



extent of 72-1/2 ft and a new house of 40 ft was constructed over the same foundation and in the remaining 32-1/2 ft, a new wall was constructed on their side. The plaintiff claims that the new construction made by the defendants has to be demolished and the doorway in the old wall has to be closed. The defendants have objected to the claim of the plaintiff and stated that their house (60 ft NS) is of 100 years old and they have demolished 15 ft of the old house and constructed a new house and the remaining extent is left as such. The planning approval has been obtained from the panchayat and it has been marked as Ex.B.1. The length of the new building is 51 ft. The old wall and the new wall in the North South lie in a straight line and the new wall was not constructed on the old wall foundation. It was constructed leaving 4 inches. It was incorrect that the plaintiff has given 1-1/2 ft East West from his land. The wall has been constructed only in the defendants property. While constructing the building, the plaintiff created a doorway for bringing out the construction materials, now it has been locked by key and the defendants are ready to remove the doorway. The old wall has been demolished with the consent of the plaintiff. The breadth of the defendants house is 24-1/2 ft and plaintiff's house is 25-1/4 ft. The Western Wall was within the defendants property and the ventilators had been mounted based on



the wish of the plaintiff. The plaintiff is not entitled to the wall, if the wall is demolished, the entire house will be collapsed and it has been admitted by the plaintiff in his evidence.

18.P.W.2-Azhagar Vanniyar has deposed that he constructed the wall for the plaintiff based on the mediation 10-12 years ago and that the plaintiff has given up 1-1/2 ft of his property East West to the defendants. But in the cross examination, he admitted that he had not listened and had no knowledge about the mediation. He further admits that the defendants house is 80 years old and there was an ornamental cornice (Kosalai) for 1-1/2 ft in the defendants house. P.W.2 has not deposed with respect to any other plaint pleadings. P.W.3 is residing in the schedule property. He admits that he had informed about the demolition of the wall to the plaintiff. Further admits that the doorway was constructed for taking construction materials. P.W.3 admits the plaintiff's presence in Papanasam when the defendants were constructing the wall. Earlier, the first Advocate Commissioner was appointed and the sketch plan & report with respect to the schedule property has been filed and marked as Exs.C.1 & C. 2.The same advocate commissioner has been appointed to file the report since the first commissioner's report does not have any

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measurement about the plaintiff and the defendants house and the measurement of the new construction and demolished and undemolished wall. Thereafter, he has filed the report and plan with measurements and marked as Exs.C.3 and C.4.

19. Based on Exs.A1 and A.2, the breadth of the plaintiff's house East West is 26-3/4 ft. Based on Ex.B.2, the defendants are entitled to 30 Kaladi. The plaintiff has stated that one kaladi is equal to 8.8 inches and based on this measurement the Appellate Court found that the plaintiff's property has been encroached. But there is no evidence to substantiate that one kaladi is equal to 8.8 inches. But one Kaladi is equal to 10 inches is a satisfactory measurement. Therefore, 30 kaladi equals 300 inches which is equal to 25 ft, which is the breadth of the defendant's property. The second Advocate Commissioner's report Exs.C.3 and C.4 describes the measurement of the schedule property. Ex.C.4 shows that 'AB' is the front portion of the plaintiff's property, it measures about 26-3/4 ft excluding the eastern wall. The plaintiff's old wall 'EF' East West measures as 26-3/4 ft. It is found that there is a two-finger gap between the 'EF' wall and defendants new wall 'IJ'. In defendants house 'G' is the wall including the wall (G) 'AG' measures about 23 ft 1 inch. The East West



measurement of the defendants new construction from the terrace is 22 ft 2 inches. It is found that East West measurement of the plaintiff's house is 26-3/4 ft as said in Exs.A.1 and A.2, but the defendants house East West measurement is lesser than Ex.B.2 measurement. Therefore, the defendants have not encroached and constructed in the plaintiff's 26-3/4 ft East West portion. In addition, Ex.C.3 shows that the front portion of the plaintiff's house 'AB' excluding the wall comes around 26-3/4 ft. BB' measures about 26-1/4 ft, 'BE' measures about 17-1/2 ft 'EE' measures about 18 ft. Further, there is a 2-finger gap between the old wall 'EF' and new wall 'IJ', the length of the wall 'EF' is 26-3/4 ft and the defendants have not encroached on the plaintiff's property and any building and therefore, it is seen that the defendants have constructed only in their property.

20.The plaintiff has stated that his old wall of 40 ft. length has been demolished and the defendants have constructed a new building and further 32-1/2 ft new wall has been constructed over the old foundation therefore it has to be restored. The Advocate Commissioner in Ex.C.3 has shown that the 'JI' wall is the defendants western wall of RCC building and in the earlier report, it has been shown as 'AB'. It has five concrete pillars. It is admitted by the plaintiff



that the defendants house is 80 years old. The front portion is 'GA' (EX.C.4) and measures about 23 ft 1 inch. The 'AI' is the old wall it has been admitted. The defendants newly constructed building has been marked as 'HLJK'. Hence, it is seen that the said building has been constructed only in the defendants property. D.W.1 states that the new wall 'IJ' and old wall 'AI' are in a straight line. The Commissioner's report and plan substantiate the same. Therefore, the defendants have not constructed any construction in the plaintiff's property, further, they have demolished the wall which is in their property and it does not cause any injury to the plaintiff Further, Ex.C.4 shows that the wall 'IJ' has been constructed in the defendants property and the old wall has not been demolished from the plaintiff's property. Therefore, this Court comes to a conclusion that the plaintiff is not entitled to the relief of mandatory injunction of the wall 'IJ'.

21.Further, the plaintiff states that undemolished wall of length 61 ft 3 inches belongs to the plaintiff and there should be a relief of permanent injunction that the defendants should not do anything to that wall and the wall has been shown as 'DE' in the old plan and 'DJ' in the new plan, the plaintiff states that it has been constructed by him. It has not been stated that this wall has been



constructed or belongs to the defendants. It is found that it is an old wall from evidence. Further in Ex.C.2, it shown as 'DE', it has been built by the plaintiff and this Court accepts the possession over the wall. Therefore, this Court is inclined to accept the injunction with respect to the undemolished wall against the defendants not to demolish it.

22.The plaintiff in his pleadings stated that the doorway had been created on the wall by the defendants and entered into the plaintiff's property and prayed it had to be closed. D.W.1 (5th defendant) Muruganantham deposed that during construction, the plaintiff had created a doorway for bringing the construction materials and now it is locked with a key and is ready to remove it. The doorway has been marked as 'X' in Ex.C.2. It has been constructed in the defendants old wall, it gives access to the plaintiff's property. The defendants are not entitled to that doorway. D.W.1 has admitted that it has been used for bringing things. The plaintiff is entitled to close the doorway. Therefore, this Court comes to a conclusion that the defendants have to close the doorway and bring it back to its original position. Further, the defendants have constructed the new construction in their property and the pillars on the southern side are



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also on the defendants property, therefore the alternative plea of Rs.30,000/- cannot be imposed on the defendants for removal and to construct the removed wall.

23.The Appellate Court has held that the plaintiff is entitled to the relief of mandatory injunction for removing the doorway in the old wall and permanent injunction against the defendants in the wall 'DE' in Ex.C.2 and the plaintiff is not entitled to the remaining reliefs. Accordingly, the plaintiff is not entitled to the relief of mandatory injunction to demolish the new wall and is not entitled to the alternative plea of Rs.30,000/- to be paid to the plaintiff by the respondents to demolish the new construction. The Judgment and Decree of the lower trial Court is confirmed and it is modified with respect to the mandatory injunction to close the doorway in 'AF' in Exs.C.1& C.2. The permanent injunction with respect to 'DE' wall of length 61-1/2 ft in Exs.C.1 and C.2 and partly allowed the first appeal and with respect to the other relief, the Judgment and Decree of the trial court was confirmed.



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24.From the above, this Court is of the view that the Judgment and Decree of the Appellate Court are accompanied with sufficient reasons, in which, this Court does not want to make any interference. Accordingly, the substantial questions of law framed are ordered as against the plaintiff and in favour of the defendants.

25.In the result, the Second Appeal stands dismissed. No costs.

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To

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- 1.The Additional District Court cum Fast Track Court No.1,
Thanjavur.
- 2.The Principal Sub Court,
Kumbakonam.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

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Judgment made in
S.A(MD)No.548 of 2005

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