
(1996) 09 MAD CK 0014
In the Madras High Court

Manonmani alias Kalimuthu Ammal

APPELLANT

Vs

RM. S.V. Vairavan alias Kasi Chettiar (Died) and Others

RESPONDENT

Date of Decision : 11-09-1996

Acts Referred:

Evidence Act, 1872 — Section 114

Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (1997) 1 MLJ 138

Hon'ble Judges : D. Raju, J

Bench : Division Bench

Judgement

D. Raju, J.—The defendant in O.S. No. 197 of 1977 on the file of the District Munsif Court, Sivaganga, is (he appellant in the above

second appeal. The suit was filed by the original respondent, who is no more and whose legal representatives have been brought on record in the

appeal, for declaration that the suit property belongs to the plaintiff and in consequence for a permanent injunction restraining the defendant in any

way interfering with the plaintiff's possession and in any way using the property.

2. The case of the plaintiff before the trial court was that the suit property is the southern wall of the plaintiff's house, which belonged to him

ancestrally, that the house was purchased by the junior grandfather of the plaintiff under a registered deed dated 21.1.1918 for the benefit of the

joint family and the house was built in the said property about 55 years before the suit, that the house as well as the appurtenance thereto belonged

to the plaintiff absolutely and the suit wall was built along with the house as part and parcel thereof and the plaintiff's tiled hall, room and cattle shed

had been built on the southern wall. The defendant, who was said to have purchased the property south of the suit wall on 2.6.1976, nor his

predecessor-in-title had any right or title to the suit wall and since the defendant had been giving out that the suit wall belonged to her as well as the

plaintiff as a common wall, after exchange of notices, the suit came to be filed for the reliefs referred to supra.

3. The defendant in the written statement contended that it is false to claim that the suit wall belonged to the plaintiff ancestrally, that the

defendant's rough sketch filed along with the written statement may be read as part and parcel of the pleadings, that the defendant's tiled hall was

constructed along with the house purchased by her and the rafters of the said hall had been inserted in the suit wall and similarly, the eastern room

had also been constructed by inserting "thandials" into the suit wall and the tiled shed situate east of the said room, rests on the suit wall. The

further claim of the defendant was that he had put up the tiled warm marked as H, HI, H2, H3 in the rough sketch from the suit wall and the

plaintiff had not objected to the same and on the other hand, the plaintiff's hall as well as the tiled sheds had not been constructed on the suit wall,

but they merely touch the same and the predecessors-in-interest of both the plaintiff and the defendant had agreed to treat the suit wall as a

common wall and it is only thereupon the plaintiff's predecessor was permitted to construct his hall and sheds and rest the same on the southern

wall. The defendant's house originally was said to belong to one Narayanan Chettiar, under whom the defendant was occupying the house earlier

as a tenant and subsequently came to purchase the same under the registered sale deed dated 5.9.1966 and except the H, H1, H2, H3 warm

marked in the rough sketch filed along with the written statement, the other constructions were in existence even prior to the occupation by the

defendant as tenant and, therefore, the plaintiff is not entitled to get any relief as prayed for.

4. Both parties adduced oral and documentary evidence. A Commissioner was also appointed, who filed his report and plan dated 19.12.1978

marked as Exs. C-1 and C-2 and an additional report dated 22.2.1979 marked as Ex. C-3.

5. After considering the materials on record, the learned trial Judge decreed the suit holding that the suit wall is the exclusive wall of the plaintiff and

that the same does not belong to the defendant and the wall is not also the common wall of the plaintiff and the defendant as claimed in the written

statement. The learned trial Judge came to such a conclusion on the basis of the physical features as noticed by the Commissioner in the report and

additional report died along with a plan as also on certain admissions in the course of evidence by the defendant as D.W. 1.

6. Aggrieved, the defendant filed A.S. No. 106 of 1980 (A.S. No. 52 of 1979 on the file of Sub Court, Sivaganga) and the learned Subordinate

Judge, Devakkottai, who ultimately dealt with the appeal, concurred with the findings recorded by the learned trial Judge and dismissed the appeal.

Hence, the above second appeal.

7. Mr. A. Shanmugavel, learned Counsel appearing for the appellant, while elaborating the substantial questions of law formulated for

consideration, at the time of admission of the appeal, contended that the courts below misconstrued the description of the property and the recitals

relating thereto in Ex. A-3 sale deed dated 21.1.1918 and it was not permissible for the courts below without any pleading or evidence in support

thereof to infer the coming up of a new construction in the place of an old construction and that the plaintiff has miserably failed to discharge his

burden of proving, how he came to acquire exclusive right in the suit well, when there are sufficient materials to indicate to the contrary that the suit

was a common wall of both the parties and particularly when the predecessor-in-title of the plaintiff has, for a long time acquiesced in the

common user by both parties. The learned Counsel for the appellant also contended that the omission on the part of the plaintiff to produce the

partition deed wider which the plaintiff came to acquire rights in the property, is a deliberate one of withholding the relevant and vital material in his

possession justifying the drawal of an adverse inference against him and the courts below failed to do so and thereby committed a grave error of

law. The learned Counsel for the respondents, while adopting the reasons assigned by the courts below, submitted that the concurrent findings

recorded by both the courts below are in conformity with the facts proved and there is so merit in the challenge made to the judgments of the

courts below in this appeal and consequently, the appeal is liable to be rejected as of no merit.

8. The learned Counsel for the appellant invited my attention to some of the judicial pronouncements to which a reference may be made before

undertaking a consideration of the claims projected by both parties in this appeal. In *Kundan Lal Rallaram v. Custodian, Evacuee Property*,

Bombay AIR 1961 S.C. 1116, the Apex Court, while dealing with the applicability of the presumption u/s 118 of the Negotiable Instruments Act,

Section 114 and the rebuttal evidence necessary in the context of such a presumption, observed that if in a given case the relevant evidence is withheld

by the plaintiff, Section 114 of the Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said documents would

be unfavourable to the plaintiff and if such a presumption is raised by a Court, that can also be rebutted by the presumption u/s 118 of the

Negotiable Instruments Act.

9. In *Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others*, , the Apex Court observed that a party in possession of best evidence, which

would throw light on the issue in controversy, but withholding it, the Court ought to draw an adverse inference against such a person, even though

the onus of proof does not lie on him and a party cannot take shelter on abstract doctrine of onus of proof or that he was not called upon to

produce it to dissuade adverse inference against such party.

10. In, *Peddi Reddi Jogi Reddi v. Panem Chinnabbi Redds* AIR 1929 P.C. 13, it was held that when the courts below have thrown the onus upon

the defendant of proving that the properties he claimed were his own, instead of placing it as it should be upon the plaintiff, the question of fact

found cannot be binding upon an appellate court, even in a second appeal, and the Privy Council is not precluded from considering what the true

position in respect of such fact or situation is.

11. In *Rassonada Rayar v. Sitharama Pillai* 2 M.H.C.R. 171, while dealing with the principle of burden of proof, it was observed that where a

plaintiff brings a suit for declaration of his title as owner, he is bound to establish his title affirmatively, he being in the same position as any other

plaintiff and must make out his case and the onus probandi that he is in possession as owner is upon him.

12. In *Karuppiah Pillai v. Narayana Mudaliar* (1967) 1 M.L.J. 91, a learned single Judge of this Court, while dealing with Section 4 of the

Easements Act and the conflicting claim of parties in respect of a wall, held that in the case of a party wall which belongs exclusively to one of the

adjoining owners of two amendments, but which is subject to an assessment or right in the other to have it maintained as a dividing wall, it is

permissible for the former to pull it down altogether temporarily with the idea of renovating it and also with the idea of having in it a door and a

window when no right to privacy was established and in such a case, the latter cannot ask for a mandatory injunction for restoration of the original

wall.

13. In *Makhan Lal v. Moti Ram* AIR 1928 Lah. 429, a learned single Judge of the Lahore High Court observed that where a plaintiff claims to be

the exclusive owner of a property, but it was ultimately found that he was only a join owner, the suit should have proceeded further on the basis of

joint ownership only. It was also observed therein that there may be cases in which a wall, which is a party wall up to a certain height, may even

above that by the separate property of one of the owners.

14. In *Udebhan Zangoji Patil v. Vithoba Ukandajai Dhangar* AIR 1939 Nag. 78, Vivian Bose, J. as the learned Judge then was, while dealing with

the principle of burden of proof, observed that when a court examines only the case of open side and disbelieves his evidence and then dismisses

his claim on the ground that he has not proved his assertions, it is clear that the case is being decided solely on the question of onus and no amount

of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of fact.

15. In *Gulabchand Gappalal Sarawgi Vs. Manikchand Gulabchand Sarawgi*, , a learned single Judge of the Madhya Pradesh High Court, while

dealing with conflicting claims in respect of a wall, held that in the case of a party wall, each co-owner can reasonably use it, without interfering

with the enjoyment of the wall by the other, but he must not do anything which will damage or weaken the wall, or if one co-owner builds a new

piece of wall on the top of the party wall, either with the consent or with the acquiescence of the other co-owner, the raised portion of the wall

assumes the same character as the original party wall, that if one co-owner raises the wall without the consent or acquiescence of the other co-

owner, he makes himself liable to an action for an injunction and where a party wall is reconstructed by one co-owner at his exclusive expense, it

retains the original character of a party wall and he cannot ask for an injunction

to restrain the other co-owner from claiming ownership in it. It was observed therein that where the defendant raised a party wall without the consent of the plaintiff, the plaintiff should not be placed at a more disadvantageous position than if he had given such consent and therefore the raised portion of the wall should be the joint property of both parties.

The construction of over on party wall by one. co-owner overhanging on the land of the other co-owner was also held to be capable of being demolished and removed in order to avoid a possible future claim of adverse possession on space occupied by them.

16. In Paduman Das Vs. Shrimati Parbati, , a learned single Judge of the Allahabad High Court held that co-ownership implies that each co-owner

should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the

enjoyment of that wall by the other party or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in

common, he is entitled to do what he likes and a co-owner of a party wall has no right to do any act which may have the effect of excluding the

other co-owner from the wall or interfering with his reasonable use of the wall.

17. I have carefully considered the submissions of learned Counsel appearing on either side in the light of the principles referred to in the above

decisions, very strongly relied upon for the appellant. In my view, the decisions referred to only lay down the well accepted, broad and certain

general principles of law and the observations appear to have been made in those cases with particular reference to the nature of relief claimed

therein and the peculiar case projected by the respective parties before the courts. So far as the case on hand is concerned, the dispute between

the parties in this appeal is as to whether the wall in question is the exclusive wall as claimed by the plaintiff or it is a common wall as claimed by the

defendant and as belonging to both parties jointly. The claim of the appellant that an adverse inference should be drawn against the plaintiff in this

case for withholding the partition deed in the family of the plaintiff is not justified on the facts and circumstances of the case. The partition

document, if any, could only be in respect of the property acquired under the earlier document and the same cannot be said to be a vitally essential

document to prove the ownership of the wall and which has been deliberately

withheld and consequently, there is no scope for drawing any adverse inference in this case against the plaintiff.

18. The evidence on record was in the form of not only oral and documentary evidence adduced by both sides, but also the two reports of the Commissioner and his plan. The Commissioner's reports graphically highlight the physical features of the wall and the construction put up on the wall as also by inserting "thandials" and it is only after adverting to factual details found noticed in the Commissioner's report submitted after local inspection and a plan submitted by him that the courts below have concurrently found that the red-washed wall must have in the possession and enjoyment, of the plaintiff his exclusive wall. The forceful submissions. Of the learned Counsel for the appellant on the question of burden of proof not having been sufficiently discharged by the plaintiff to entitle him to a decree as prayed for, is devoid of merit in that the Courts below have us adverted to the materials in great detail to justify the findings arrived at by them and when all sufficient materials were brought on record, for effectively adjudicating the issue before court, the formality of burden of proof is not that much material unless it shown that either the burden has been wrongly cast upon a party not bound to substantiated fact or that there are no sufficient materials on record to prove the disputed claim, and on the basis of such wrong casting of burden or absence of material alone party to the proceedings have been made to suffer. In this case as notice earlier, both the courts below have elaborately adverted to the relevant factual details and circumstances available on record, both in the form of two reports of the Commissioner and the Commissioner's plan, as overwhelming materials to prove the claim of the plaintiff and, therefore the technicalities based on the courts below are well merited and supported by proper relevant evidence and I do not find any justification to interfere with those finding of fact concurrently recorded by both the courts below

19. The learned Counsel for the appellant vehemently contended also that the fact that the defendant also has been using the wall in question by inserting rafter and the "thandials" into the suit well and a continuation wall as also the wall marked as H,H1,H2,H3 would go to show that the defendant has been using the well without any obstruction or objection from the plaintiff or his predecessor-in-interest, as though it is a common

wall and this acquiescence must be considered to be a factor indicative of the wall and the Courts below committed an error in coming to a

contrary conclusion. I am afraid I cannot countenance such a plea. Notwithstanding the fact that the wall is the exclusive wall of the plaintiff, the

defendant may have certain easementary rights and the fact that the defendant was allowed to enjoy certain right by putting up any construction on

his side by drawing assistance or support from the dividing wall, by itself cannot confer any right of common ownership in the wall. Such

unobstructed or unobjectionable user which has been allowed to be made, or any acts of acquiescence by the plaintiff in respect of such user by the

defendant of the wall may, at best, only justify the claim for an easementary right so as to protect the extent and nature of user already enjoyed by

the defendant and except to that extent, it is not open to the defendant to assert any right of ownership in the wall itself. The ownership of the wall

is one thing and the right of easement in the defendant in respect of such a wall is altogether a different aspect and the claim of the defendant in

trying to draw an inference in his favour, of joint ownership from the nature of user allowed to be made of the wall in a manner suggestive of mere

assertion of only easementary rights can have no basis or merit of acceptance in law.

20. Consequently, I see no merit in this second appeal except clarifying the position with reference to the right of easement in the defendant in

respect of the Wall.

21. The second appeal fails and shall stand dismissed. No costs.