

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2019

CORAM:

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1106 of 2004

1.U.Sadasivam
2.U.Kalyanasundaram
3.U.Pasupathy ..Appellants/ Plaintiffs

Vs.

1.C.Kanakasabapathy @ Kanagiah (Died)
..Respondent/ Defendant

C.Gomathy (Died)
2.M.Chidambara Vadivelu
3.T.Meenkashi Kalyani
4.Dr.K.Chidambaram (Died)
5.K.Kanthimathinathan
6.Nagajothi
7.Vijaya Kanagamathinathan ..Respondents/LR's of the Defendant

(Respondents 2 to 5 are brought on record as legal representatives of the deceased sole respondent/defendant Vide order dated 15.09.2005 made in CMP.No.13637/2005)

(Respondents 6 and 7 are brought on record as LRS of the deceased R4 viz., Dr.K.Chidambaram Vide order of Court dated 27.06.2019 made in CMP.No.10756 to 10758/2018 in SA.No.1106/2004)

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 16.09.2002 passed in A.S.No.194 of 2000 on the file of the learned V Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 26.02.1999 passed in O.S.No.6507 of 1987 on the file of the learned XVIII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.J.R.K.Bhavanantham
for Mr.P.B.Ramanujam
For Respondents : Mr.D.Nellaiappan [R3, R5, R6 & R7]
R1 & R4 - Died

JUDGMENT

The plaintiffs, who have lost their suit for recovery of possession and for mandatory injunction in removing the construction put up by the defendant in the suit property, both before the trial Court and also before the first appellate Court, have preferred this appeal. Parties would be referred to by their rank before the trial Court.

2. The facts are substantially admitted. The defendant herein owned a certain block of lands. These properties are stated to be spread in T.S.Nos.34, 35 and 36/2. Out of these, he sold an extent of 2,264 sq.ft. in Survey Nos.35 and 36/2 to the plaintiffs Vide Ext.A-3 sale deed dated 27.01.1982. According to the plaintiffs, even though the sale deed purports to transfer 2,264 sq.ft., on lie, the plaintiffs have only an extent of 44x49 sq.ft. = 2,156 sq.ft. While so, in 1986, the defendant began construction in his property and in the process, he had encroached into a portion of the property sold to the plaintiffs. The plaintiffs have issued suit notice, to which, the defendant came out with a reply containing untenable allegations. Hence, the suit.

3. The defendant in his written statement would allege that the plaintiffs had encroached into his property and that the plaintiffs are in enjoyment of more than 2,264 sq.ft. of land conveyed by him, and he denied that he had never encroached into the portion sold under Ext.A-3.

4. The dispute went for trial and both sides adduced oral and documentary evidences, based on which, both the Courts find that the plaintiffs cannot establish their case and dismissed the suit. Hence, the plaintiffs have preferred this appeal.

5. This appeal is admitted on the following substantial questions of law :

- (1) Has not the courts below erred in not putting the burden on the respondent, who was originally owner of the contiguous plot No.9 (suit property) and No.10, of which he sold plot No.9 to the appellants on 27.01.1982 under Ext.A-3'with only total measurements, to furnish the measurement of the sides, which would establish that he had not encroached on the suit property?
- (2) Has not the Courts below erred in not giving any cogent reasons for rejecting the first report of the Commissioner which is in conformity of plaintiffs / appellants' case?

6.1 The learned counsel for the appellants argued that at the instance of the plaintiffs', a Commission was appointed and he had filed his report and plan, marked as Exts.C-1 and C-2 respectively. Later, this report was sought to be rejected by the defendant on the ground that the Commissioner had visited the property without notice to him. Therefore, the Court directed the same Commissioner to revisit the property, pursuant to which, the Commissioner had made a local inspection of the suit property and has filed Ext.C-3 report and Ext.C-4 plan.

6.2 The learned counsel would argue that in Ext.C-1, the Commissioner had stated that the intention of the parties is to sell the plot of 2,264 sq.ft. in T.S.No.35. The property reserved by the defendant for himself fall in T.S.No.34. After measuring the property with the assistance of the Surveyor, the Commissioner has found that the plaintiffs have encroached into an area measuring 7 ½ ft. on the north and 5 ft. on the south. However, when the Commissioner had gone to the property on the second occasion, but without the assistance of the Surveyor, he finds that the total extent available under plaintiff's enjoyment is 2,284 sq.ft. implying thereby that the plaintiff is in excess enjoyment of 20 sq.ft. He submitted that the Courts below have not adverted to the fact that when the Commissioner had visited the property the second time, no surveyor had accompanied him.

7. Per contra, the learned counsel for the respondents would argue that the plaintiffs' case is uncertain even from their point of perception, in that, they had issued Ext.A-1 suit notice alleging that the defendant had encroached an extent of 276 sq.ft. whereas in the plaint they had alleged that same defendant had encroached only 195 sq.ft. Secondly Ext.A-3, sale deed does not provide any side measurements, but only refers to an extent of 2,264 sq.ft. Therefore, the plaintiffs would not be entitled to anything more than 2,264 sq.ft. Turning to the Commissioner's report, the learned counsel submitted that the commission was issued at the instance of the plaintiffs, but they had not chosen to cross-examine the commissioner to impeach its credibility and reliability.

8. The contention of learned counsel for the appellants is that, anything that falls within Survey No.T.S.35 should be the plaintiffs', since the survey number of the defendant is 34. In other words, he brings an element of ambiguity to the description of the property in Ext.A-3. He raises a contention as to whether the survey number will prevail over the extent indicated in Ext.A-3 or vice-versa.

9.1 While credit may have to be granted to the ingenuity of the learned counsel for the appellants, it has to be recorded that the plaint does not make a case for resolving the ambiguity in the document. The tenor of the plaint allegation is that the plaintiffs have purchased a plot measuring 2,264 sq.ft. and it harps much on the extent encroached without a reference to any survey field. Here, the plaintiffs itself is seen oscillating as to the exact extent that the defendant had encroached. In a suit notice, they say that the area encroached is 276 sq.ft., whereas in the plaint they bring it down to 195 sq.ft. And, the Commissioner once he visited the property after issuing notice to both sides find only that it is not the defendants, but the plaintiffs are in possession of some 20 sq.ft. more than the latter's entitlement.

9.2. Turning to the argument of the appellants' counsel, that the Commissioner in the second instance had not taken the assistance of the Surveyor is concerned, it may have to be stated that the plaintiffs had not chosen to cross-examine the Commissioner. Turning to Ext.C-1 Commissioner's report, based on which, the plaintiffs want to project the case of encroachment, Ext.C-2 plan shows that the plaintiffs property has the shape of a quadrilateral. In case of measuring the quadrilateral, it is important to go for a triangulation, but the same has not been done even by the Surveyor, who assisted the Commissioner then. Therefore, with or without the Surveyor's evidence on record, it does not take forward the plaintiffs' case in any positive direction.

10. It is needless to emphasis that the initial burden of proving the case lies on the plaintiffs, and here is seen struggling on a slippery wicket. In conclusion, this Court finds no merit in this appeal and it is dismissed. The judgment and decree dated 16.09.2002 passed in A.S.No.194 of 2000 on the file of the learned V Additional Judge, City Civil Court, Chennai, is hereby confirmed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

1. The V Additional Judge,
City Civil Court, Chennai

2. The XVIII Assistant Judge,
City Civil Court, Chennai.

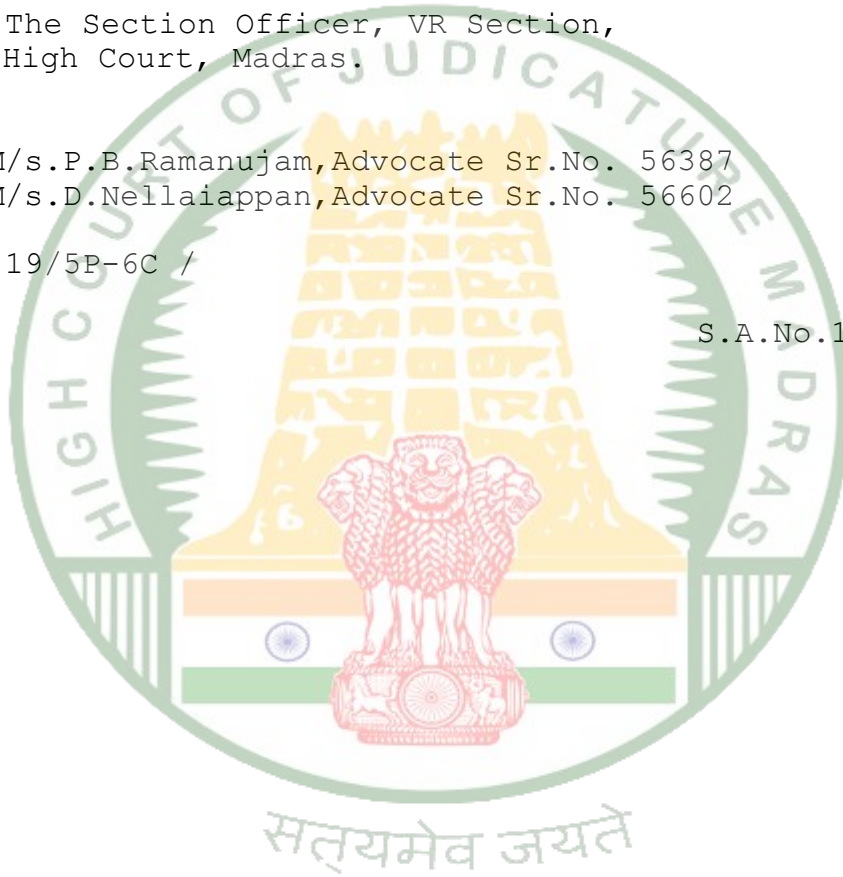
Copy to : The Section Officer, VR Section,
High Court, Madras.

+1 cc to M/s.P.B.Ramanujam, Advocate Sr.No. 56387

+1 cc to M/s.D.Nellaiappan, Advocate Sr.No. 56602

AKM/16.12.19/5P-6C /

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