

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.08.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.No.854 of 2009

1. Munusamy (Died)
represented by his next friend &
Brother M.Palanisamy

2. M.Palanisamy ... Appellants/Defendants
[2nd appellant is recorded as
legal representative of the
deceased 1st appellant viz., Munusamy
vide order of Court dated 06.06.2019
made in S.A.No.854 of 2009 as per
memo dated 06.06.2019 is recorded.]

Vs.

1. R.P.Selvaraj (Died)
2.R.P.Gnanamani ... Respondent /Plaintiff
[2nd respondent brought on record
as legal representative of the
deceased 1st respondent viz., R.P.Selvaraj
vide order of Court dated 17.07.2019
made in C.M.P.No.12590 of 2016
in S.A.No.854 of 2009]

Prayer: Second Appeal is filed under Section 100 of code of Civil Procedure against the judgment and decree dated 23.12.2008 passed in A.S.No.62 of 2007 on the file of the Principal Sub-Court, Villupuram reversing the judgment and decree dated 04.04.2007 passed in O.S.No.170 of 2001 before the Principal District Munsif's Court, Villupuram.

For Appellants : Mrs.R.Meenal

For Respondent : No Appearance [R2]

JUDGMENT

The defendants have preferred this appeal. The suit is laid for declaration of plaintiff's title and interest over plaint 'B' and 'C' schedule property. They are shown to be part of 'A' schedule property. 'C' schedule property in effect is a vacant space between the plaintiff and the defendants' property.

2. According to the plaintiff, he is the absolute owner of the entire 'A' schedule property. It lies to the north of the

main road. The defendants owned the property to the east of the plaintiff's property. According to the plaintiff, the defendants attempted to disturb the compound wall that separates the plaintiff's property and the defendants' property and started putting up R.C.Pillars. This is the beginning of the controversy. As the many attempts of the plaintiff to prevent the defendants from going ahead the said construction failed, the suit came to be laid.

3. The quintessence of the allegation in the written statement is that between the properties of the plaintiff and the defendants lies a lane, that the defendants' grand father Vedhachalam Pillai had laid a suit in O.S.No.489 of 1928 against the plaintiff's grand father asserting ownership over the lane, and that Vide a compromise decree dated 07.11.1929, the said lane was agreed to be kept as common lane by both sides. This state of affairs was again affirmed by a decree in O.S.No.332 of 1953. A copy of the decree in this suit is marked as Ext.B5 and this is the second generation litigation between the plaintiff's mother and the defendants' father. While the state of affairs being so, it was the plaintiff who had encroached into this lane. The defendants also denied any alleged construction over the compound wall of the plaintiff.

4. The learned counsel for the appellants/defendants would submit that the trial Court has issued two Commissions:

- a) One at the instance of the plaintiff in I.A.No.708 of 2001. The Commissioner had listed the property and filed the report.
- b) The second report is at the instance of the defendants in I.A.No.182 of 2003.

Here, (in I.A.No.182 of 2003) the same Commissioner has visited the property and has filed the report and the plan. The trial Court has dismissed the suit on the reasoning that no construction was made by the defendants on the existing compound wall. This however came to be reversed by the First Appellate Court on the ground based on the Commissioner's report. The learned counsel for the appellant would submit that of the two Commissioner's report, the first report filed vide order in I.A.No.708 of 2001 was not even marked by the Court below, and only Commissioner's report in I.A.No.182 of 2003 issued at the instance of the defendants alone was taken on record. But, even this was not marked by the Court below. Without the Commissioner's report, which actually forms part of the evidence, the First Appellate Court has relied on one of the two reports alone to arrive at its conclusion. The learned counsel however made clear that the plaintiff does not seek any relief with regard to 'B' schedule property that belongs exclusively to the plaintiff.

5. A dispute that brewed about ninety years ago appears to be perpetuating as this is the third generation litigation between the same set of families over the same property. This Court records its deepest disappointment that parties have not adequately realised the truth that their own lives tell them, that he who fights has a shorter life than the a piece of land for which he fights: The 'C' schedule property continues to exist, but two generations of litigants have died litigating over it.

6. Turning to the allegation, the learned counsel would submit that the entire cause of action for the suit is founded on the plaintiff's allegation that the defendants had disturbed plaintiff's compound wall and put up a R.C.Pillar. Of this, neither of the Commissioner's report was categorical.

7. While this appeal is not admitted, this Court finds it is apparent that the First Appellate Court has addressed the issues on the basis of the document not taken on record. This Court therefore, frames the following substantial question of law:

1. Whether the First Appellate Court was correct in granting a decree to the plaintiff based on the evidence not on record.

8. For the reasons stated above, this Second Appeal is allowed and the judgment and decree dated 23.12.2008 passed in A.S.No.62 of 2007 on the file of the Principal Sub-Court, Villupuram is set aside and the matter is remanded back to the First Appellate Court. The first appellate court will now re-appraise the evidence, after bringing on to record the two Commissioner's reports, and after affording opportunities to the parties to produce contra evidence. The first appellate court is also at liberty to issue a fresh Commission to ascertain any points not covered by any of the earlier reports if the same is necessary to decide the issue on facts conclusively with a view stop the propensity of the parties to litigate. Parties are directed to appear before the First Appellate Court on 03-10-2019. No costs. The learned First Appellate Judge is requested to dispose of the matter expeditiously.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal Subordinate Judge,
Villupuram.

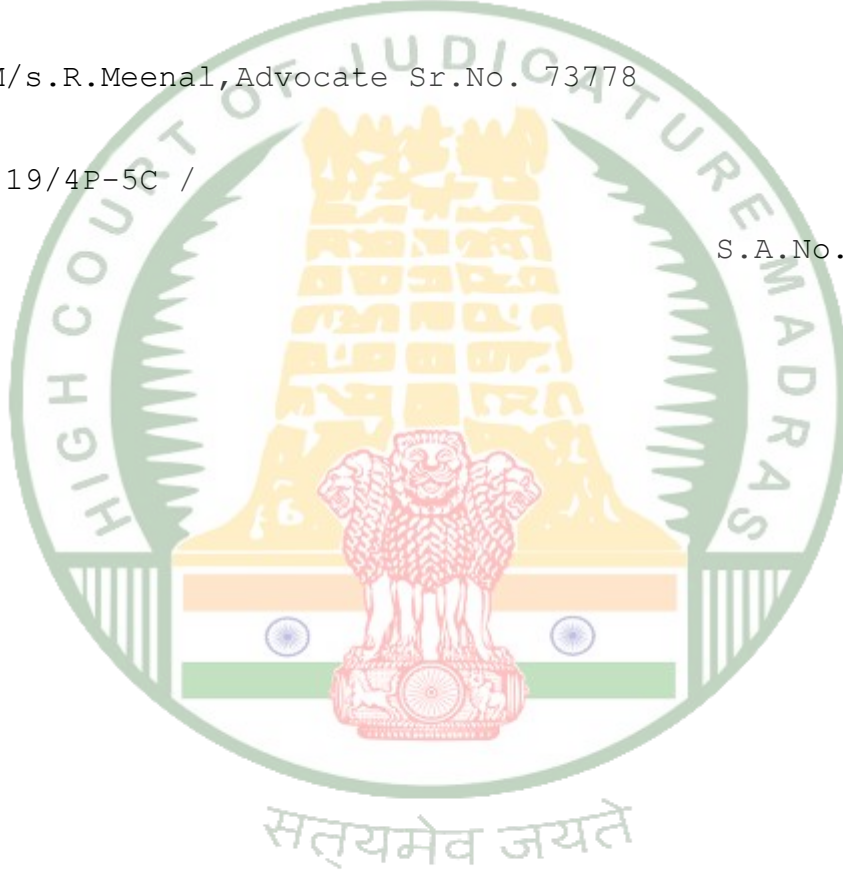
2. The Principal District Munsif,
Villupuram.

Copy to : The Section Officer, V.R.Section,
High Court, Madras.

+1 cc to M/s.R.Meenal, Advocate Sr.No. 73778

AKM/30.09.19/4P-5C /

S.A.No.854 of 2009



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