

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.06.2019

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.785 of 2005
and
C.M.P.No.10951 of 2005

Saraswathy ... Appellant/Appellant/Defendant

versus

1. Navaneetham (Deceased)
2. Kuppusamy ... Respondents/Respondents/Plaintiffs 2 & 3

(R2 is recorded as legal representative of the deceased 1st respondent vide order of Court dated 19.02.2019 made in S.A.No.785 of 2005 as per memo dated 19.02.2019 are recorded.)

Prayer: Second Appeal is filed under Section 100 of code of Civil Procedure against the judgment and decree dated 20.01.2005 passed in A.S.No.47 of 2004 on the file of the Principal District Judge at Pondicherry in confirming the judgment and decree dated 30.06.2004 passed in O.S.No.278 of 2000 on the file of the Principal District Munsif, Pondicherry.

For Appellant : Mr.V.Raghavachari

For 2nd Respondent : Mr.V.V.Sairam

JUDGMENT

1.1 The dispute in this appeal revolves around a title to three trees. S.No.120/77 has a larger extent of which appellant has title to an extent of 1078 sq.ft., and this came to be declared in O.S.No.294 of 1983. Subsequently, it became the turn of the respondent to institute the suit O.S.No.383 of 1992 for bare injunction on the allegation that the appellant herein attempts to interfere with his possession. In O.S.No.383 of 1992, the respondent had scheduled 4 items of properties as seen from Ext.B-5 decree passed in the said suit.

1.2 It appears that there was a violation of the decree of permanent injunction passed in O.S.No.383 of 1992 which resulted in the respondent filing E.P.No.109 of 1996. The nature of violation alleged in the execution petition was that the defendant had chopped some of the branches of the trees now described in the B-schedule is hereto. The Execution Court, however, has held that inasmuch as the suit property in Ext.B-5 decree does not refer to the trees now referred to in the B-schedule, it chose not to entertain the same. Now, it became imperative for the respondent to institute a suit for declaration of his title over both A-schedule item of property along with trees described in the B-schedule and for consequential injunction.

2. In the written statement, the appellant had contended that the respondent has encroached over an extent of 8' X 80' into his plot whose title was declared in her favour in O.S.No.294 of 1983. Secondly, she alleged that inasmuch as the plaintiff has already obtained the decree in O.S.No.383 of 1992, the same operates as res-judicata in the present suit.

3. On appreciating the evidence, the trial Court decreed the suit. For supporting its finding, the trial Court drew considerable support from the report of the Advocate Commissioner, who in his report has pointed out that there were four trees standing about the demarcation-line between the properties of the rival parties, and has reported that three trees stand exclusively in the property of the respondent, and one tree 'Velikaathan' fall on the other side of the line dividing both the properties. Having stated thus, the Commissioner proceeded to say that the defendant is in excess of 186.7 sq.ft., than his declared entitlement of 1,078 sq.ft. The trial Court has taken this qualificatory statement as to the alleged excess possession by the appellant and has held that any possession in excess of 1,078 sq.ft., to which the title was declared in O.S.No.294 of 1983 could not be countenanced and held that all the trees standing within the property of the respondent. This decree of the trial Court came to be confirmed by the first appellate Court.

4. The appeal was admitted on the following substantial questions of law:

'1. Whether the present suit is not hit by the principles of res judicata and Order 2 Rule 2 C.P.C., when the plaintiff had failing to seek relief in respect of the same property in O.S.No.383 of 1992 on the file of the District Munsif, Pondicherry?

2. Whether the orders of the Courts below are not

against the provisions of Sections 100 to 104 of the Evidence Act?

3. Whether the findings of the Courts below are not premature insofar as the Judgment in O.S.No.294 of 1983 has not become final and conclusive?

4. When the execution petition (E.P.No.109 of 1996) filed in O.S.No.383 of 1992, had been dismissed for want of proper description, whether a new suit on the same cause of action could be entertained?

5. Whether the Courts below were right in allowing the plaintiff to escape the consequences of Order 2 Rule 2 CPC by ingenious drafting of the pleading?''

5.1 Arguing for the appellant, the learned counsel submitted that the cause of action for the suit was found on the decision of the Execution Court in O.S.No.383 of 1992 by which, it had held that no decree was obtained for the trees in B-schedule property (now described in B-schedule) and hence, the present suit is hit by Order II Rule 2 CPC. So far as this argument goes, this Court only intends to record that execution Court is convenient under the maxim quicquid plantatur solo solo cedit, and ought to have held that if B-schedule property had fallen within the property of the respondent as per the decree in O.S.No.383 of 1992, and if that decree is violated in ought to have proceeded with the execution. The situation herein is not created by the respondent but by the Court and for this mistake of the Execution Court, the respondent shall not be punished. Unnecessarily, he was driven to file the present suit. This Court does not consider that neither res-judicata nor Order II Rule 2 CPC will apply to the factual situation of the present case, and if at all res-judicata applies it will only enure to the benefit of the respondent and in no way will it affect the rights of the respondent.

5.2 So far burden of proof is concerned, which occupies second substantial question of law, the respondent indeed had proved not only his earlier decree before the Court but also the Advocate Commissioner's report backing it. Fourth substantial question of law is covered by the earlier question. So far as the third question is concerned even now it is not made clear what happened to the second appeal alleged to have been filed.

6. So far as the appreciation of evidence in this case is concerned, the only allegation on which the appellant resisted the suit is that the plaintiff/respondent had encroached on the western portion of the property to an extent of 8' X 80'. But, the Commissioner has found that the appellant was in excess

possession to an extent of 186.7 sq.ft. It is settled law that Commissioner is not here to enter a finding on possession but all it indicates is that the appellant apparently claims title to certain extent which is declared to be part of respondent's property. Curiously enough here the defendant/appellant who had pleaded that the respondent had encroached into her plot of 8' X 80' has not chosen either to file any counter claim or cross suit against him.

7. Given the circumstances, this Court has little option to confirm the decrees passed by the trial court. At this juncture, the learned counsel for the appellant has submitted that even as per the Commissioner's report, the branches of the trees in B-schedule property spread over the aerial space on the appellant's property and it was when the appellant chose to chop off the branches of the tree in her space, the Execution Petition in O.S.No.383 of 1992 came to be filed. She insisted that while the respondent can have the trunk of the tree in his property, the appellant is least interested in having those branches spread over her plot of land.

8. If any part of branches of the respondent's property protrude into the air space of the appellant's property, necessarily appellant can take exception to the same. In a civil litigation, this Court is required to go as per the civil rights of the parties in the manner that law recognises. However, having stated it, this Court now appeals to the environmental conscience of the appellant to spare the branches at least till such time, she might not require that airspace for her enjoyment.

9. In conclusion, this Court does not find any merit in this appeal and the same is dismissed and the judgment and decree of the Courts below are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

ssn

To

1. The Principal District Judge,
Pondicherry.

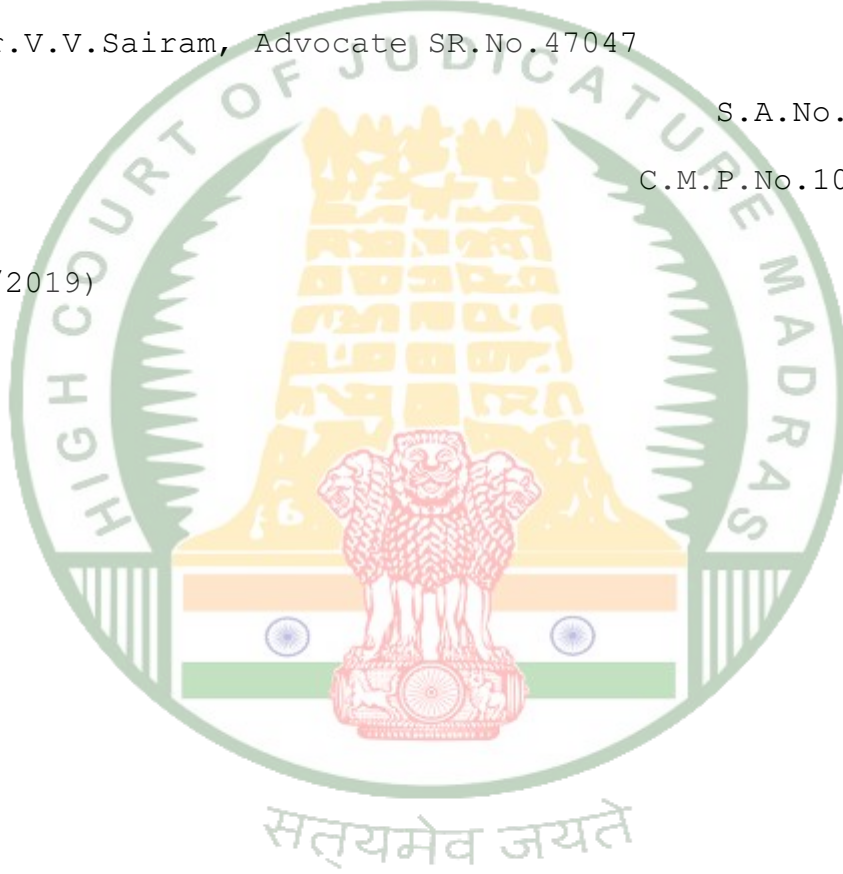
2. The Principal District Munsif,
Pondicherry.

Copy To
The Section Officer,
VR Section, High Court,
Madras

+1cc to Mr.V.V.Sairam, Advocate SR.No.47047

S.A.No.785 of 2005
and
C.M.P.No.10951 of 2005

RJI (CO)
GMY (24/07/2019)



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