

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.11.2015

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.2270 of 2015

S.Ponni

.. Appellant/Plaintiff

-Vs-

1. G.Narasimhan
2. G.Santhanam
3. N.Saravana Kumar
4. N.Vinoth Kumar
5. S.Mohan Kumar
6. S.Archana
7. V.Subbiah
8. L.Babu
9. Chitra

.. Respondents/Respondents

Memorandum of Grounds of Civil Miscellaneous Appeal under Order XLIII Rule 1(u) of the Code of Civil Procedure, against the judgment and decree dated 24.2.2015 made in A.S.No.126 of 2014 on the file of the learned II Additional Judge, City Civil Court, Chennai setting aside the Judgment and Decree dated 14.02.2012 made in OS.No.6118/2009 on the file of IInd Assistant Judge, (i/c IVth Assistant Judge) City Civil Court Chennai.

For Appellant :: Mr.A.V.Arun

For Respondents/Caveators:: Mr.P.Jagadeesan
for R1 & R2

JUDGMENT

This civil miscellaneous appeal is directed against the impugned judgment and decree passed in A.S.No.126 of 2014 by the learned II Additional Judge, City Civil Court, Chennai, on the ground that the first appellate Court has committed a serious error in remanding the matter back to the trial Court under Order XLI, Rule 23 of the Civil Procedure Code, inasmuch as the impugned judgment directed the trial Court to give sufficient opportunity for the respondents/defendants to let in evidence on their side, as a result, the appellant/plaintiff would be put to agony and harassment due to the delay in disposal of her suit.

2. Learned counsel for the appellant/plaintiff submitted that the appellant filed a suit in O.S.No.6118 of 2009 praying for a decree of declaration of the settlement deed dated 26.6.2012 is void in law with a consequential relief of permanent injunction restraining the respondents/defendants 1 to 6 herein from interfering with the possession of the property described in the schedule to the plaint and also restraining the defendants from dealing with the property described in the schedule to the plaint either by way of sale, mortgage or otherwise. While so, the respondents/defendants also filed a suit in O.S.No.5401 of 2003 for injunction in respect of the very same suit schedule property. When both the matters were pending for trial, since the parties in both the suits are one and the same and the property is also one and the same, both the parties agreed for a joint trial and accordingly a joint memo was filed praying for a joint trial of both the suits. After recording the same, the respondents/defendants did not take part in the suit filed by the appellant/plaintiff, therefore, they were proceeded ex parte. As against the order proceeding ex parte, they have filed an application under Order IX, Rule 13 of the Code to set aside the ex parte decree passed on 14.2.2012 in O.S.No.6118 of 2009 and permit them to conduct the case on merit. The trial Court, recording its reason that the evidence was also recorded in O.S.No.5401 of 2003 when it was called along with O.S.No.6118 of 2009, but a fully contested judgment was pronounced in O.S.No.6118 of 2009 on 14.2.2012, hence, the application filed by the respondents/defendants under Order IX, Rule 13 cannot be entertained, dismissed the same. Against that order, if the respondents/defendants are aggrieved, they should have filed an appeal against that decretal order. Having not done so, they have to submit themselves. Leaving that option, they cannot challenge the judgment and decree passed in O.S.No.6118 of 2009 dated 14.2.2012. This apart, the learned counsel pleaded that the first appellate Court, while remanding the matter back, has committed yet another mistake in directing the trial Court to give sufficient opportunity to the respondents/defendants to let in evidence on their side, which is also not legally possible, for the reason that once they were proceeded ex parte in O.S.No.6118 of 2009, giving a direction to the trial Court to give sufficient opportunity for the respondents/defendants to let in evidence on their side will amount to fill in the lapses, which is always not permissible. In support of his submissions, he has also cited the judgment of this Court in the case Kannathal and others v. Arulmighu Kanniammal Karuppasamy Thirukoil, Poathanur Chettipalayam, Coimbatore rep.by its Executive Officer and another, 2007 (2) CTC 49. For all these reasons, he sought for setting aside the impugned judgment and decree.

3. Per contra, the learned counsel for the respondents/defendants, drawing the attention of this Court to

paragraph 10 of the impugned judgment, submitted that when both the parties viz., the appellant and the respondents have filed two separate suits, one by the appellant for declaration of the settlement deed dated 26.6.2012 is void with a consequential relief of permanent injunction and another suit by the defendants for a bare injunction and considering the fact that the parties are one and the same and the property is also one and the same, they decided to take up both the suits together for a common trial. Accordingly, they also filed a joint memo signed by both the counsels for the plaintiff and defendants before the trial Court praying for a joint trial of the suit O.S.No.6118 of 2009 and O.S.No.5401 of 2003. Though the trial Court has recorded the memo as prayed for, but in its diary it has allowed the memo but ordered for separate trial, therefore, the first appellate Court has rightly set aside the impugned judgment passed by the trial Court, which is not in conformity with law on the facts of the case, and remanded the matter back to the trial Court for a joint trial along with the pending suit in O.S.No.5401 of 2003. Since the order of remand passed is in conformity with the joint memo signed by both the counsels for the defendants and the plaintiff for a common trial, since both the parties are one and the same and the property is also one and the same in both the suits, interfering with the impugned order is absolutely uncalled for, he pleaded.

4. This Court finds merits in the submissions of the learned counsel for the respondents/defendants. When the parties in both the suits, as mentioned above, are one and the same and the property is also one and the same, both the parties by signing a joint memo moved the trial Court for a joint trial of both the suits in O.S.No.5401 of 2003 and O.S.No.6118 of 2009. After allowing the memo, it is not known how the trial Court has de-linked both the suits, therefore, the impugned order of remand is perfectly in order. Accordingly, the impugned order of the first appellate Court is affirmed. Since the direction given by the first appellate Court to complete the trial within three months time is found reasonable, the trial Court is directed to dispose of both the suits, O.S.Nos.5401 of 2003 & 6118 of 2009 within a period of three months from the date of receipt of a copy of this order. With this direction, the civil miscellaneous appeal is dismissed. Consequently, M.P.No.1 of 2015 is also dismissed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The II Additional Judge
City Civil Court
Chennai

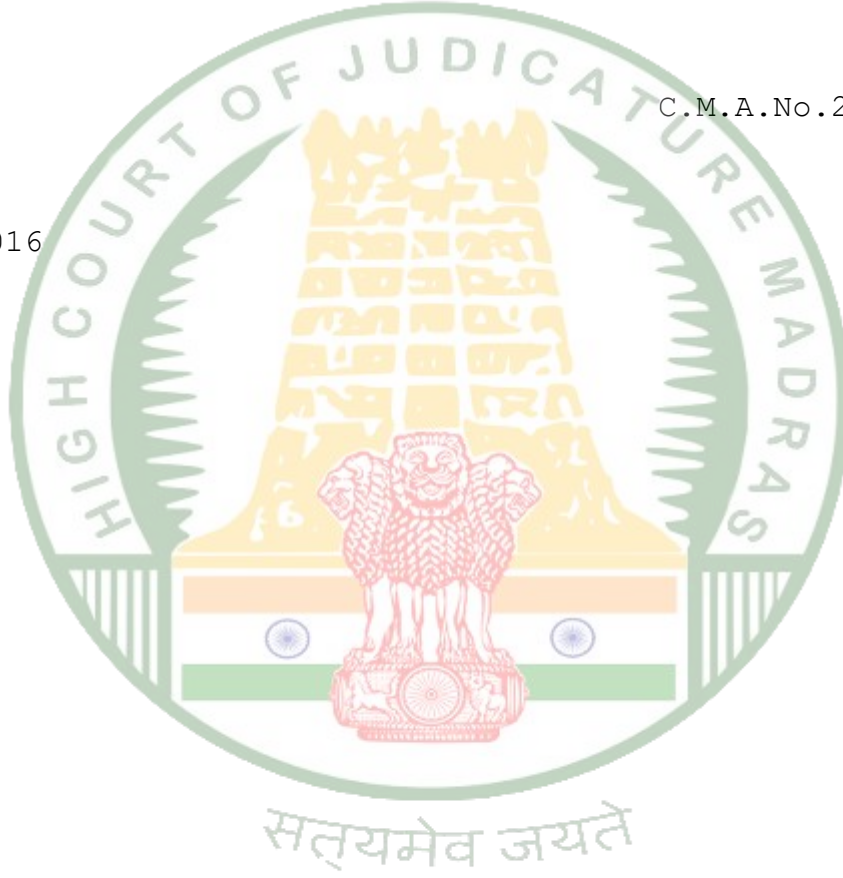
2. The II Assistant Judge
i/c IV Assistant Judge
City Civil Court
Chennai

+1 cc to M/s.K.Ganesan Advocate sr.63865

+1 cc to M/s.P.Jagadeesan Advocate sr.63863

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