

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.01.2017

CORAM

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.M.S.A.No.4 of 2014

V.Govindarajan ...Appellant/Respondent/Respondent

vs

1. R.Chitra
2. S.Shanmugam ... Respondent/Appellant/Petitioner
3. Marialatha
4. Susairasu ...Respondents/Petitioner/Respondent

Since respondents 2 to 4 remained
exparte, notice may be dispensed
with. RR2 to 4 set exparte 15.09.2016

Prayer: Civil Miscellaneous Second Appeal filed under Order 21
r/w Section 100 of the Code of Civil Procedure against the
judgment and decree dated 18.12.2012 passed by the learned XV
Additional Judge, City Civil Court, Chennai in A.S.No.434 of
2012 in confirming the order and decreetal order dated
12.09.2012 passed by the learned X Assistant Judge, City Civil
Court, Chennai in E.A.No.4752 of 2010.

For Appellant : Mr.B.Thanikachalam

For Respondent 1 : Mr.S. Rajendra Kumar
RR2 to 4 set exparte

JUDGMENT

The plaintiff in O.S.No.2618 of 2001, who is the decree
holder, is the appellant. He had filed a suit for delivery of
possession and for damages, as against the respondents 2 to 4
herein, which was decreed exparte and the application to condone
the delay in setting aside the exparte was also dismissed. A
revision was filed against the same and the same was also
dismissed. Subsequently Section 47 application filed by the
Judgment Debtor also met with the same fate. The bailiff
appointed to execute the warrant also has delivered possession.

E.A.No.3092 of 2006 was filed for removal of obstruction against one R.Swaminathan, who is the husband of the claim petitioner/R1 herein. In the E.A. when the evidence was taken, the said Swaminathan has deposed that he has settled the property in the name of his wife, who is the claimant. This was mentioned even in the counter. However, instead of proceeding against the settlor, the case was filed against the said Swaminathan alone. Therefore, application in E.A.No.4888 of 2009 was filed by the said Swaminathan to measure the property with the help of the qualified surveyor, which was rejected by the court. Now the dispute is with respect to a small extent of 54 sq.ft of land.

2. The suit property originally consisted of a large extent of 1.64 acres of land in Survey No.597/1 belonging to one Arumuga Pillai and his wife. The said Arumuga Pillai plotted out and sold the properties. One Dhandapani purchased an extent of 2502 sq.ft. of land on 12.08.1971; the said Dhandapani sold the same on 05.11.1980 to one Kameshwari. The said Kameshwari and her husband sold the same in favour of one Mohandass Reddy. The first respondent's husband Swaminathan purchased an extent of 1098 sq.ft. land along with the building from the said Mohandass Reddy. O.S.No.2618 of 2001 was filed for recovery of 2340 sq.ft. of land in S.No.596 and 705 Sq.ft. of land comprised in S.No.597/1. The appellant, who obtained an exparte decree put the same in execution in E.P.No.888 of 2004.

3. As stated earlier, only the first respondent's husband was made a party and the first respondent was not made a party to the execution proceedings. Therefore, the claim petition was filed by the respondent herein to adjudicate her right, title and interest and to dismiss the E.P.No.888 of 2004 and re-deliver the property measuring and extent of $18 \times 3 = 54$ sq.ft.

4. The same was resisted by the appellant herein as respondent contending that E.A.No.3092 of 2006 was allowed against the husband of the claim petitioner and the appeal against the same in AS No.206 of 2008 and also second appeal in CMSA No.15 of 2009 before this Court were also dismissed.

5. The husband of the first respondent has purchased 1054.5 sq.ft. land, but it is stated that he has settled an excess extent in favour of the claim petitioner/first respondent. Now the dispute is not with the survey number but only with the measurement. Therefore, without valid title for the excess 54 sq.ft., land, the claim petition was sought to be dismissed.

6. The trial court dismissed the claim petition by holding that as the petitioner/first respondent is a transferee pendente lite, she cannot oppose the execution of the decree and not

entitled to re-delivery. The same was appealed in A.S.No.434 of 2012. The Appellate Court also dismissed the appeal. However with a direction to the Executing Court to appoint an Advocate Commissioner along with the surveyor to locate the portion of the property yet to be delivered after measuring the entire property, which was delivered already and then proceed with the execution petition, to meet the ends of justice. Aggrieved by the said direction, the decree holder has filed the present Civil Miscellaneous Second appeal.

7. At the time of admission, only notice was directed to be issued to the respondents and no stay also was granted. Therefore, pursuant to the direction given by the first appellate court, the Executing Court appointed a commission in the presence of the appellant and his counsel on 08.04.2013. On 16.08.2013, the commissioner visited the property along with the Taluk Surveyor but it could not be carried out as there were thick under growth. When the bushes were sought to be cleared by the claimant, it was objected to by the appellant. However an interim report was filed by the Commissioner on 19.08.2013. Thereafter the Executing Court re-issued the warrant and ordered directing the commissioner to re-visit the property and file a final report. But in the order by mistake, the first respondent's property details were given instead of the property directed to be measured by the appellate court. The appellant, was participating in all these proceedings and he had knowledge about the same. Challenging the appointment of the Commissioner AS No.393 of 2013 was filed before the II Additional City Civil Court, Chennai. Subsequently, the appellant herein withdrew the same, as not pressed.

8. Heard both sides and perused the records.

9. A perusal of the suit property described in OS No.2618 of 2001, in which the decree was obtained, the Schedule B property is stated to be 705 sq.ft. Whereas going by the measurement on all the four sides, East to West 40 sq.ft on both sides, North to South 16 feet, on the East and 18 feet on the West. But the arithmetical calculation shows only 680 sq.ft. Therefore, the claim of the appellant is in excess of what he is entitled to, which has caused confusion and lead to several proceedings. Having obtained a decree giving a wrong description, the appellant cannot claim what he is not entitled to. Even the challenge to the direction given by the Appellate court was also withdrawn by the appellant, subsequently, for the reasons best known to him.

10. In such circumstances, there is no question of law, much less substantial question of law, involved to be dealt with in this Civil Miscellaneous Second Appeal. In the result, the Civil Miscellaneous Second Appeal fails and the same is dismissed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

vj2

To

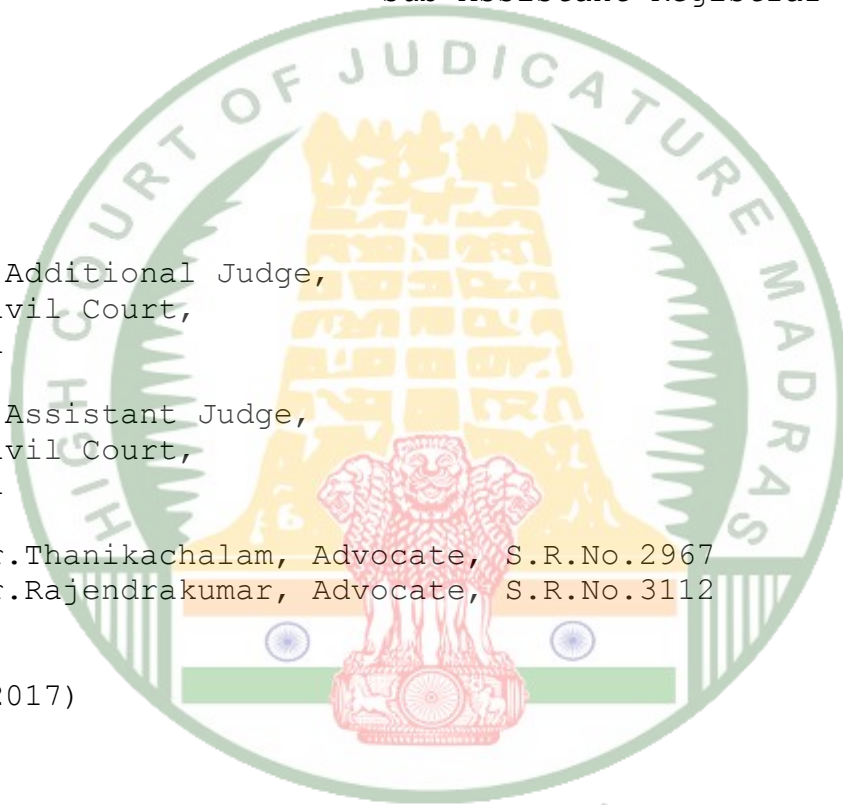
1. The XV Additional Judge,
City Civil Court,
Chennai

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

+1cc to Mr.Thanikachalam, Advocate, S.R.No.2967

+1cc to Mr.Rajendrakumar, Advocate, S.R.No.3112

CA(CO)
RS(07/02/2017)



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