

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.10.2017

CORAM

THE HON'BLE MR. JUSTICE M.DURAI SWAMY

C.M.A.No.1317 of 2015 and
M.P.No.1 of 2015

D.Sivakumar ... Appellant/Appellant/Plaintiff

Vs.

1.Piyari
2.Shathullah
3.Sananiba
4.Sakila
5.Shagheetha
6.Shakria

... Respondents/Respondents/Defendants

Appeal filed under Section 104 read with Order 43 Rule 1 (u) of the Civil Procedure Code against the judgment and decree in A.S.No.15 of 2014 on the file of the Subordinate Court, Tiruvallur dated 30.01.2015 in reversing the judgment and decree in O.S.No.266 of 2008 on the file of the District Munsif Court, Tiruvallur dated 20.12.2013 and thereby remanding the suit for fresh trial.

For Appellant : Mr.V.Raghavachari
For Respondents : Mr.P.B.Balaji

J U D G M E N T

Challenging the judgment and decree passed in A.S.No.15 of 2014 on the file of the Subordinate Court, Tiruvallur remanding the matter to the District Munsif Court, Tiruvallur, the plaintiff in O.S.No.266 of 2008 on the file of the District Munsif Court, Tiruvallur, has filed the above Appeal.

2.The plaintiff filed the suit in O.S.No.266 of 2008 for recovery of possession and for past and future damages.

3.According to the plaintiff, he is the owner of the suit properties having purchased the same from the defendants under a registered Sale Deed dated 06.12.2007 executed by the defendants' Power Agent. Further according to the plaintiff, the defendants received the full Sale Consideration and vacated the premises and delivered possession to him. The plaintiff leased the "A" Schedule property to the tenants and is receiving the

rents. According to the plaintiff, the defendants requested the plaintiff to permit them to reside in the First Floor (i.e.) in the "B" Schedule for two months, free of rent and executed a written Agreement dated 13.01.2008 to vacate the "B" Schedule property. Since the defendants had not vacated the premises on 13.03.2008, the plaintiff has filed the suit for recovery of possession and for damages from 14.03.2008. Further according to the plaintiff, under Section 43 of the Tamil Nadu Court Fees and Suits Valuation Act, the rent includes rent or damages for use and occupation. The defendants filed their written statement and contested the suit.

4.Before the trial Court on the side of the plaintiff, 3 witnesses were examined and 21 documents, Exs.A1 to A21 were marked. On the side of the defendants, D.W.1 was examined and 41 documents, Exs.B1 to B41 were marked.

5.The trial Court, after taking into consideration the oral and documentary evidences of both sides, dismissed the suit. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.15 of 2014 on the file of the Subordinate Court, Tiruvallur and the Lower Appellate Court set aside the judgment and decree of the trial Court and remanded the matter to the trial Court for framing of an issue with respect to the payment of Court fees under Section 43 (2) of the Tamil Nadu Court Fees and Suits Valuation Act and decide the suit in accordance with law. Aggrieved over the order of remand, the plaintiff has filed the above appeal.

6.Heard Mr.V.Raghavachari, learned counsel for the appellant and Mr.P.B.Balaji, learned counsel for the respondents.

7.On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the plaintiff had filed the suit in O.S.No.266 of 2008 for recovery of possession and for past and future damages for the use and occupation of the "B" Schedule property.

8.According to the plaintiff, he purchased the suit properties under Ex.A9 Sale Deed dated 06.12.2007. Further, according to the plaintiff, at the request of the defendants, he permitted them to occupy the "B" Schedule property for a period of two months from 13.01.2008 to 13.03.2008. To that effect, the defendants also executed Ex.A1 Agreement dated 13.01.2008. The plaintiff valued the suit under Section 43 (2) and Section 22 of the Tamil Nadu Court Fees and Suits Valuation Act and paid the Court fees. The defendants, in their written statement, while disputing the averments stated in the plaint, also averred that there is no jural relationship between the plaintiff and the defendants. However, the plaintiff had paid the Court fees under

Section 43 (2) of the Tamil Nadu Court Fees and Suits Valuation Act. But the trial Court has not framed any issue with regard to the payment of the Court fees under Section 43 (2) of the Act. However, the Lower Appellate Court set aside the judgment and decree of the trial Court and remanded the matter to the trial Court for framing of an issue with regard to the payment of the Court fees under Section 43 (2) of the Act and decide the matter in accordance with law. The Lower Appellate Court had set aside the judgment and decree of the trial and remanded the matter only for framing of an issue with regard to the payment of Court fees under Section 43 (2) of the Act. For deciding the issue with regard to the payment of Court fees, the Lower Appellate Court could have itself decided the issue instead of remitting the matter back to the trial Court.

9.The learned counsel appearing for the appellant relied upon an unreported judgment of this Court dated 29.10.2014 made in C.M.A.No.1207 of 2009 [Jayalakshmi Vs. Vaikunda Naicker and another] wherein this Court held as follows:

"....

The provisions of O.41, Rr.23 and 25 of the Code in my opinion does not authorise the appellate Court to remand a suit on such a ground. When a case had been decided on merits, the judgment rendered should not be reversed on such technical ground. I am of the view that the Lower Appellate Court ought to have decided the issue in its entirety instead of remanding the matter. Eventhough Mr.V.Raghavachari has taken a plea that with regard to payment of insufficient Court-fee, no plea was raised by the defendants in the suit, the learned counsel for the defendants drew the attention of this Court to paragraph No.11 of the written statement. Though paragraph No.11 does not convey any meaning, but, a reading of the said paragraph clearly shows that proper Court-fee has been paid. In any event, this is only a legal submission, which may be raised at any stage. If such a point is raised, the Lower Appellate Court should decide the issue and not remand the matter. Hence, I am of the view that the judgment and decree passed in A.S.No.33 of 2008 dated 30.01.2009 cannot stand in the eye of law and the same is set aside. A.S.No.33 of 2008 is remitted back to the Lower Appellate Court to decide the same afresh within a period of three months from the date of receipt of a copy of this order. The Civil Miscellaneous Appeal is disposed of accordingly. No costs. Connected M.P. is closed."

10.The ratio laid down in the judgment relied upon by the learned counsel for the appellant squarely applies to the present case. The issue of payment of Court fees can be decided

by the Lower Appellate Court itself. For this purpose, no remand is required.

11.The learned counsel appearing for the appellant submitted that the appellant is willing to pay the Court fees under Section 30 of the Tamil Nadu Court Fees and Suits Valuation Act.

12.Mr.P.B.Balaji, learned counsel appearing for the respondents fairly submitted that the appellant/plaintiff may be permitted to pay the Court fees under Section 30 of the Act and the Lower Appellate Court may be directed to decide the appeal on merits and in accordance with law, after payment of the Court fees.

13.In view of the submissions made by the learned counsel on either side, the judgment and decree passed in A.S.No.15 of 2014 are set aside. The appellant/plaintiff is directed to pay the Court fees under Section 30 of the Tamil Nadu Court Fees and Suits Valuation Act within ten days from the date of receipt of a copy of this order. On payment of the Court fees under Section 30, the Subordinate Judge, Tiruvallur is directed to decide the appeal in A.S.No.15 of 2014 on merits and in accordance with law and dispose of the same within a period of three months from the date of payment of the Court fees by the appellant/plaintiff.

14.With these observations, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1.The Sub Judge,
Tiruvallur.

2.The District Munsif Court,
Tiruvallur.

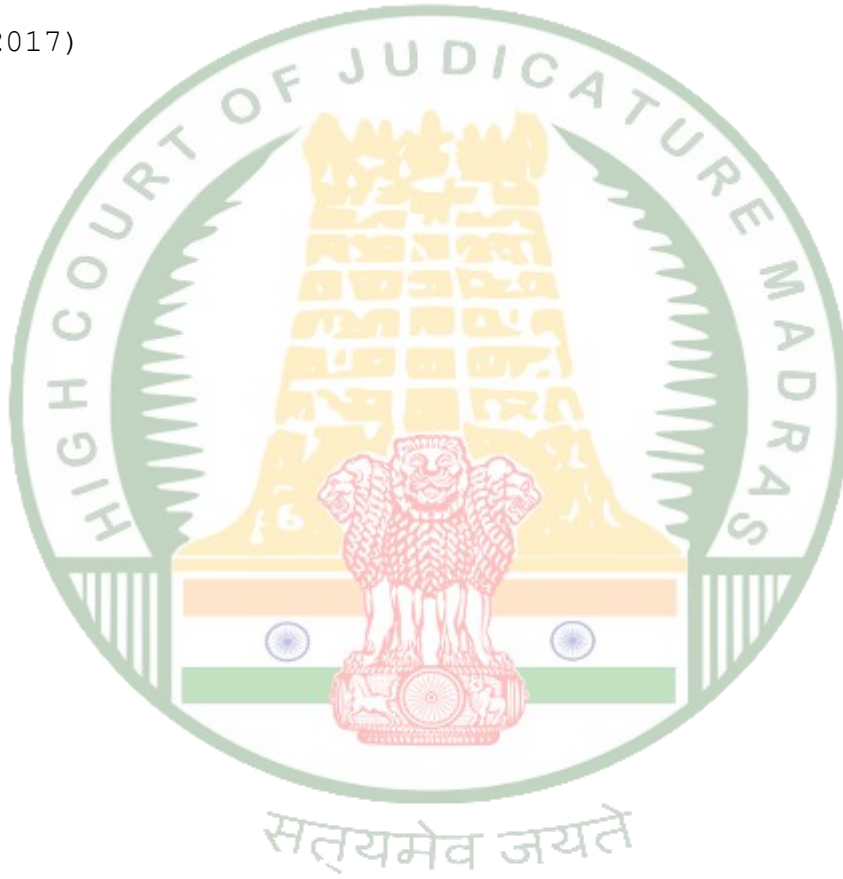
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3. The Section Officer,
V.R.Section,
High Court, Madras

+1cc to M/S.V.Raghavachari, Advocate SR. 75847

C.M.A.No.1317 of 2015 and
M.P.No.1 of 2015

GP (CO)
VR (27/10/2017)



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