

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.11.2017

Coram

THE HON'BLE MR. JUSTICE M.DURAI SWAMY

C.M.A.No.171 of 2015 &
M.P.No.1 of 2015

1.Parvathi @ Dhanalakshmi
2.K.M.Raj
3.K.R.Dhanapal
4.K.R.Duraisamy

... Appellants/Respondents/
Plaintiffs

v.

1.Rathinam @ Rathnambal
2.Palanisamy

... Respondents/Appellants/
Defendants

Civil Miscellaneous Appeal filed under Order 43 Rule 1(v) of the Civil Procedure Code against the judgment and decree dated 28.02.2014 made in A.S.No.54 of 2012 on the file of the I Additional Subordinate Judge, Erode in reversing and remanding the judgment and decree dated 11.04.2012 made in O.S.No.99 of 2009 on the file of the Principal District Munsif Court, Erode.

For Appellants : Ms.R.Shase,
for M. Guruprasad
For Respondents : Mr. S.Dhanasekaran

J U D G M E N T

Challenging the judgment and decree passed in A.S.No.54 of 2012 on the file of I Additional Subordinate Court, Erode reversing the Judgment and Decree passed in O.S.No.99 of 2009 on the file of the Principal District Munsif Court, Erode and remanding the matter back to the Trial Court for fresh consideration, the plaintiffs have filed the above appeal

2. The plaintiff filed the suit in O.S.No.99 of 2009 for permanent injunction. The defendants filed their written statement and contested the suit.

3. Before the Trial Court, on the side of the plaintiffs, 2 witnesses were examined and 8 documents, Exs.P-1 to P-8 were marked and on the side of the defendants, 4 witnesses were examined and 11 documents, Exs.B-1 to B11 were marked. The

Advocate Commissioner's report and plan were marked as Exs.C1 and C2.

4. The Trial Court, taking into consideration the oral and documentary evidences let in by both sides, decreed the suit.

5. Aggrieved over the judgment and decree passed by the Trial Court, the defendants preferred an appeal in A.S.No.54 of 2012.

6. The Lower Appellate Court, took into consideration the evidence of D.W.3 and also the Advocate Commissioner's report and plan marked as Exs.C1 and C2 before the Trial Court, found that the Commissioner's report and plan did not reflect the real position of the suit properties, in view of the evidence let in by D.W.3, the Surveyor. Further, the Lower Appellate Court found that the Trial Court has not framed an issue with regard to non-joinder of necessary party raised by the defendants. In these circumstances, the Lower Appellate Court set aside the judgment and decree of the Trial Court and remitted the matter back to the Trial Court for fresh consideration and also directed the Trial Court to appoint an Advocate Commissioner either by suo motu or by the application filed by the parties and also gave liberty to the plaintiffs to make necessary amendment in the plaint if necessary and also by framing necessary issues, the Trial Court was directed to dispose of the suit afresh.

7. It is settled position that a plaintiff cannot make amendment as he likes, when the Trial Court had taken into consideration the available pleadings, oral and documentary evidences and decreed the suit. The reasoning given by the Lower Appellate Court for remitting the matter back to the Trial court cannot be accepted.

8. The plaintiffs have filed the suit for bare injunction and the only issue that has to be decided in the suit for bare injunction is with regard to possession of the parties.

9. It is also brought to the notice of this court that the defendants have not filed their objections to the Advocate Commissioner's report and plan, which was marked as Exs.C1 and C1. In the absence of any objections filed by the defendants, the Lower Appellate Court, cannot take into consideration the evidence of D.W.3 and say that the Commissioner's report and plan do not reflect the real position of the suit properties. If the defendants are really aggrieved over the report and plan, they should have filed objections before the Trial Court. In the absence of any objections by the defendants, the Lower Appellate Court should not have ventured

into the correctness of the Advocate Commissioner's report and plan on behalf of the defendants.

10. The Lower Appellate Court, remanding the matter to the Trial Court for fresh consideration and giving liberty to the plaintiffs to amend the pleadings and also directing the Trial court to appoint any Advocate Commissioner, are unwarranted. The Lower Appellate court should have decided the matter with the available pleadings, evidences and documents. Absolutely, there is no necessity for remitting the matter back to the Trial Court for fresh consideration.

11. In these circumstances, the reasoning given by the Lower Appellate Court for setting aside and remanding the matter to the Trial Court cannot be accepted and is liable to be set aside. Accordingly, the judgment and decree passed by the Lower Appellate Court remanding the matter to the Trial Court are set aside. The I Additional Subordinate Court, Erode is directed to decide the appeal in A.S. No.54 of 2012 afresh, on merits and in accordance with law, uninfluenced by any of the observations given in the judgment dated 28.02.2014 passed in A.S.No.54 of 2012 and by this Court in this appeal, within a period of three months, from the date of receipt of a copy of this judgment.

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

Sd/-
Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Rj

To

1. I Additional Subordinate Judge, Erode

2. The Principal District Munsif Court,
Erode.

Copy to: The Record Keeper, Vr Section,
High Court, Madras.

+ 1 cc to MR. M. Guruprasad, Advocate Sr.83110

+ 1 cc to Mr. S. Dhanasekaran, Advocate SR.82535

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CA (CO)

EU(29/12/2017)