

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2017

CORAM

THE HON'BLE MR. JUSTICE M.DURAISWAMY

C.M.A.No.956 of 2015 &
M.P.No.1 of 2015

1.S.D.Praburajan
2.G.Rani

... Appellants/Defendants

vs

G.Balaji

... Respondent/Plaintiff

Civil Miscellaneous Appeal filed under Order 43 Rule 1u of Code of Civil Procedure against the judgment and decree in A.S.31 of 2012 on the file of Principal Subordinate Judge, Salem dated 25.02.2015 in reversing the judgment and decree in OS.No.1111/2009 on the file of the Principal District Munsif Judge, Salem, dated 21.12.2011.

For Appellants : Mr.V.Lakshminarayanan
For Respondent : Mr.A.L.Gandhimathi

O R D E R

Challenging the judgment and decree passed in AS.No.31 of 2012 on the file of Principle Subordinate Court, Salem, the respondents in the appeal have filed the above Civil Miscellaneous Petition.

2. The respondent/plaintiff filed the suit in O.S.No.1111 of 2009 on the file of Principle District Munsif Court, Salem, for declaration, recovery of possession and for mandatory injunction.

3. After contest, the Trial Court dismissed the suit. Aggrieved over the judgment and decree of the Trial Court, the plaintiff preferred an appeal in AS.No.31 of 2012 on the file of Principle Subordinate Court, Salem.

4. Though the learned counsel appearing for the appellant before the Lower Appellate Court was not present and made his submissions, the Lower Appellate Court proceeded with the matter and allowed the same and also Suo Motu marked the Commissioner's report and plan as Exs.X1 and X2 and the Town Survey Plan as Ex.X3.

5. The Lower Appellate Court framed points for consideration wherein, the first point for consideration was "Whether the finding of the Trial Court that the plaintiff had failed to prove the encroachment by way of appointing the Commissioner, is correct". For the said point, the answer given by the Lower Appellate Court was that the non appointment of commissioner is fatal to the case of plaintiff, is correct.

6. The Trial Court had dismissed the suit finding that the plaintiff failed to prove the encroachment and the plaintiff failed to file the application seeking for Advocate Commissioner to prove his encroachment. When that finding was confirmed by the Appellate Court, on an erroneous approach, the Lower Appellate Court remitted the matter back to the Trial Court to adduce the additional oral and documentary evidences in respect of the Commissioner's report and plan marked as Exs.X1 to X3 and directed the Trial Court to dispose of the suit within a period of three months.

7. It is pertinent to note that the Advocate Commissioner was appointed before the Lower Appellate Court in I.A.No.78 of 2012 in AS.No.31 of 2012 to measure the suit property and note down the encroachment portion. However, the Commissioner's report and the plan were not marked before the Lower Appellate Court.

8. As already stated, the counsel for the appellant was also not present in the Court and hence, not made any submission before the Lower Appellate Court. In Paragraph No.9 of the judgment, the Lower Appellate Court has stated that the counsel for appellant did not turn up to argue the matter and did not take steps to mark the Commissioner's report and plan. Contrary to the findings in Paragraph No.9, the Lower Appellate Court in Paragraph No.10 has stated that the learned counsel for appellant argued that the photo was marked as Ex.B1.

9. On a reading of the judgment of the Lower Appellate Court, it is clear that the Lower Appellate Court was not clear in observing whether the counsel for the appellant has argued the matter or not. After marking Exs.X1 to X3, the Lower Appellate Court set aside the judgment and decree of the Trial Court and remanded the matter back to the Trial Court to adduce the additional evidence in respect of the Commissioner's report and plan.

10. In the absence of any submission made by the learned counsel for appellant, the Lower Appellate Court should have dismissed the appeal for non prosecution instead of allowing the appeal and suo motu marking the Commissioner's report and plan.

11. In these circumstances, I am of the firm view that the judgment and decree of the Lower Appellate Court are liable to be set aside.

12. Mr.A.L.Gandhimathi, learned counsel appearing for the respondent submitted that an opportunity may be given to the respondent / plaintiff to file an application under Order 41 Rule 27 before Lower Appellate Court seeking to produce additional documents and in the event of the respondent filing such application, the same may be decided by the Lower Appellate Court on merits and in accordance with law.

13. In these circumstances, the judgment and decree passed in AS.No.31 of 2012, dated 25.02.2015 are set aside and the matter is remanded back to the Principle Subordinate Court, Salem for fresh consideration. The Principle Subordinate Court, Salem, is directed to decide the matter afresh after giving opportunity of hearing to both the counsels on merits and in accordance with law.

With these observations, the appeal is allowed. No costs. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge,
Salem
2. The Principal District Munsif Judge,
Salem

+1cc to Mr.A.L.Gandhimathi, Advocate, S.R.No.75098
+1cc to Mr.V.Raghavachari, Advocate, S.R.No.74892

CMA.No.956 of 2015

SJ(CO)
CS/24/11/17