

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.07.2017

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAM

C.M.A.No.193 of 2014 and

M.P.No.1 of 2014 and M.P.No.1 of 2015

Pachamuthu Udayar ...Appellant/Plaintiff

Vs

Bagyasami through
his Power Agent Lordusami ...Respondent/Defendant

Prayer : Civil Miscellaneous Appeal is filed under Order 43 Rule (I)(u) of Civil Procedure Code to set aside the Judgment and decree dated 30.10.2013 passed in A.S.No.3 of 2011 on the file of Principal Subordinate Judge Virudhachalam and remanding back the said appeal, after setting aside the Judgment and decree dated 28/10/2010 passed in OS.No.581/98, before the Principal District Munsif's Court, Virudhachalam.

For Appellant :Ms. R.Meenal

For Respondent :Mr. D.Shivakumar

J U D G M E N T

This Appeal is filed by the plaintiff in O.S.No.581 of 1998 challenging an order of remand dated 30.10.2013 made in A.S.No.3 of 2011.

2. The facts leading to the appeal are as follows:-

The appellant, as a plaintiff, filed a suit in O.S.No.581 of 1998 seeking declaration of his title with reference to an extent of 4 acres 93 cents of land in Survey No.64/2 A1A, Sathamangalam Village, Virudhachalam Taluk, for recovery of possession of an extent of 3.83 cents and for damages. According to the plaintiff, the defendant encroached upon the said extent of 3.83 cents.

2.The defendant had resisted the suit contending that it is in fact the plaintiff had encroached upon an area of two cents in his land. He had also filed a counter claim to that effect. A Commissioner was appointed pending suit with a direction to take the help of surveyor to demarcate the property and note down the physical features. The Commissioner has filed a report along with his own plan and the plan of the surveyor. The said report and plans were marked as Exs.C.1 to C.3.

4. Not satisfied with the report of the Commissioner, the defendant had filed I.A.No.174 of 2007 seeking re-issue of warrant to the Commissioner. The said application was dismissed and the defendant filed a Civil Revision Petition in C.R.P.(PD) No.2066 of 2007 before this Court, challenging the said dismissal. The said C.R.P. came to be dismissed by this Court on 24.04.2008. Thereafter, by Judgment and Decree dated 28.10.2010, the learned Principal District Munsif, Virudhachalam, who tried the suit, dismissed the suit as well as counter claim holding that the encroachments shown in Commissioner's report are not reflected in the surveyor's plan, which accompanied Commissioner's report.

5. The plaintiff filed an appeal against the said Judgment and decree of the trial Court in A.S.No.3 of 2011. The learned Subordinate Judge concluded that the suit should not have been dismissed. The learned Subordinate Judge, further held that the trial court should have reissued the warrant to the same commissioner directing him to take help of surveyor to enable the surveyor to demarcate the encroached portions. Upon the said finding, the learned subordinate Judge remanded the suit to the trial court with a direction to re-issue the warrant to the same Commissioner with a direction to him to take the help of the surveyor and file a report and plan showing the nature of encroachments. Setting aside the Judgment and decree of the trial court, the suit was remanded with the above direction. Aggrieved against the same, the plaintiff is on appeal.

6. I have heard Mrs.R.Meenal, learned counsel for the appellant and Mr.D.Shivakumar, learned counsel for the respondent.

7. It is a common knowledge that a Advocate Commissioner is directed to take assistance of the surveyor to enable him to demarcate the boundaries of the survey numbers, so that the Commissioner can ascertain the actual encroachment. The surveyor is not expected to show, which portion of the land is encroached by the parties and therefore, it is only report of the Commissioner that would show the actual extent of encroachment. Therefore, the reasoning of the lower appellate court that the surveyor's plan does not show the actual extent of encroachment and hence, there should be a re-issue of warrant to the Commissioner with a direction to him to revisit the property along with the surveyor and find out the encroached portions, cannot be sustained. Once the Commissioner has filed the report after inspecting the property with the assistance of the surveyor and after demarcating the boundaries of survey numbers, it is not for the court to call another report from the surveyor, who is not expected to perform the functions of the Commissioner. Therefore, I am of the view that the order of remand is wholly un-necessary. The order of remand is either under Order 41, Rule 23 or under Order 41, Rule 23-A of Civil Procedure Code, therefore, the order of remand is set aside and the lower appellate court shall decide the matter on merits on the basis of available evidence, commissioner's report and surveyor's plan. In fact, the decision of mine is supported by the Hon'ble Division Bench of this Court in Palanisamy @ Uthayarpalayanthan V. Apparsamy reported in 2002 (4) CTC 232 wherein the Division Bench of this Court has held that it is for the appellate court to decide the question of encroachment and the suit need not be remanded for appointment of commissioner, since the required material is very much available with the lower appellate Court, it should have decided the matter on merits.

8. In fine, the Judgment in A.S.No.3 of 2013 is set aside and the lower appellate court shall restore the appeal in A.S.No.3 of 2013 to its file and dispose of the same in accordance with law, within a period of three months from the date of receipt of copy of this order and shall report such disposal to this Court without fail.

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9. With the above observation, this Civil Miscellaneous Appeal is allowed. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssd

To

1.The Principal Subordinate Judge,
Virudhachalam

2.The Principal District Munsif Court,
Vridhachalam

3.The I Additional District Munsif Court,
Vridhachalam

4.The Section Officer
VR Section High Court Madras

+1 cc to M/s.R.Meenal Advocate sr 4904

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