

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 10-11-2017

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.224 OF 2012

1.Selvaraj

2.Latha

...

Appellants/Defendants

-VS-

U.M.Ramasamy

...

Respondent/Plaintiff

Appeal against the judgment and decree, dated 30.06.2011, passed in A.S.No.33 of 2010 on the file of Principal Subordinate Court, Erode reversing the Judgment and decree of District Munsif cum Judicial Magistrate Court at Kodumudi dated 25/01/2010 in OS.No. 14/2008.

For appellants : Mr.P.Valliappan

For respondent : Mr.A.Sundaravadhanan

JUDGMENT

Aggrieved over the remand order passed by the Principal Subordinate Court, Erode, appellants/defendants are before this Court.

2. Respondent has filed a suit for permanent injunction, restraining the appellants/defendants from demolishing the suit wall and interfering with the peaceful possession and enjoyment of the same. Appellants too have filed a counter claim, claiming injunction not to interfere with their peaceful possession of the suit wall. An Advocate Commissioner was appointed and he has reported that there are two walls in the suit property, having two different natures of construction. The trial Court has found that the plaintiff does not have any title to the suit wall and, at the same time, considering the prima facie case and balance of convenience, granted permanent injunction, restraining the defendants from demolishing the wall. Consequently, the counter claim raised by the appellants/defendants was also dismissed, as they have not proved their title over the suit wall, by giving clear evidence that they have purchased the property along with the wall.

3. Aggrieved over the order passed by the trial Court,

appellants/defendants have preferred an appeal before Sub-Court, Erode. During the pendency of the said appeal, the respondent filed an application for appointment of an advocate commissioner and the same was dismissed, on the ground that measurement of the suit properties was not necessary at that point of time. Thereafter, the lower appellate Court has decided the appeal and held that the trial Court has failed to consider the measurements of the property as found in Exs.A-1 and A-6 and, without deciding the rights of the parties over the wall, has dismissed the suit. The lower appellate Court was of the opinion that the issue of right over the wall shall be decided as an issue and, thereafter only, further consequential relief would be granted. For the purpose of deciding that issue, the first appellate Court has remanded the matter with a direction to re-appoint the Commissioner and to measure the properties as per Exs.A-1 and A-6 sale deeds, and to decide the issue, after affording an opportunity to both the parties. Aggrieved over the said order of remand and a further direction to re-appoint the Commissioner, appellants are before this Court.

4. The grievance of the appellants is that when a Commissioner was already appointed and that he submitted his report as to the nature of construction and the number of walls and also that a finding as to the right of the parties over the wall is already decided by the trial Court, the lower appellate Court ought not to have remanded the matter to the trial Court. According to them, if the matter is remanded and a Commissioner appointed, it will pave way for filling up of lacuna, which may cause disadvantage to them. On the other hand, the respondent would contend that the remand order will not prejudice either of the parties and, if necessary, he will file a suit for declaration also, in order to give a quietus to the issue by finding out as to who is the title holder of the suit wall.

5. I have considered the rival contentions and also gone through the records.

6. Admittedly, the trial Court has given a categorical finding that both the parties have not proved any title over the suit wall of the property. As already stated, considering the balance of convenience, the trial Court has granted permanent injunction, in favour of the respondent/plaintiff. In so far as the issue regarding injunction is concerned, there is enough material before the lower appellate Court to come to the conclusion. If at all the parties prefer to adduce additional evidence to decide the issue, the lower appellate Court is empowered to get additional evidence from both the parties and decide the issue by itself. Only for the purpose of letting in additional evidence by the parties, the matter need not be remanded. Therefore, it is the contention of the appellants

that when the material particulars are available, the lower appellate Court itself can decide the issues, without remanding the matter to the trial Court. In this regard, the learned counsel for the appellant has relied upon a decision of this Court in Arockiaprakash v. Rangasamy, 2007 (3) CTC 383. It is also the contention of the appellants that the issue regarding right over the wall can be decided by taking additional evidence and, for that purpose, the matter need not be remanded, as held by this Court in Thangavelu v. Sampooram and Others, 2010 (3) CTC 512, hereunder :

9. But, in the instant case, on a perusal of the order of remand, I find that no valid reason has been assigned by the Lower Appellate Court for remand of the matter except for the reason of marking the document through witnesses. As contended by the learned counsel appearing for the appellant, the Appeal proceedings is a continuation of the original proceedings. Under such circumstances, the Lower Appellate Court itself ought to have allowed the parties concerned to mark the additional document by examining the witnesses and also by affording opportunity to cross-examine by the other side. Therefore, I am of the opinion that the order of remand passed by the Lower Appellate Court is liable to be set aside and accordingly, the order of remand dated 30.06.2009 in A.S.No.326 of 2002 passed by the Additional District Judge, Fast Track Court, Namakkal is hereby set aside and the matter is remitted to the Lower Appellate Court with a direction to permit the first respondent to mark the document by examining the witnesses, affording an opportunity to the appellant herein to cross-examine the witnesses and decide the case afresh in the Appeal once for all. No costs. Consequently, connected M.P.is closed."

7. It is also the contention of the learned counsel for the appellants that once the interlocutory application is decided on merits and no appeal filed against the same, it becomes final, and, unless there is a change in circumstance or further development, a fresh application is not maintainable. In the instant case, the Commissioner has already been appointed and, therefore, it is contended that the second Commissioner need not be appointed. As for this appeal is concerned, it is seen, that necessary materials are available before the lower appellate Court. If it requires further clarification, it is always open for the said Court to direct the parties to let in

additional evidence to decide the issues. In such an event, remand of the matter is not necessary. Therefore, the lower appellate Court is directed to decide the issue, if required, by getting additional evidence in the manner known to law, including the issue of appointment of Commissioner, in the light of the decision reported in Thangavelu's case, cited supra. It is also open to the respondent to file applications, if any, in accordance with law. In any event, the Court shall decide the appeal on merits and in accordance with law within a period of three months from the date of receipt of a copy of this order.

8. Civil Miscellaneous Appeal is disposed of accordingly. No costs. Consequently, the connected M.P.No.1 of 2012 is closed.

Sd/-
Assistant Registrar(CS III)

//True copy//

Sub Assistant Registrar

dixit

To

- 1.The Principal Subordinate Judge,
Erode.
- 2.The District Munsif cum Judicial Magistrate,
Kodumudi.

Copy TO

The Section Officer,
VR Section, High Court, सत्यमेव जयते
Madras.

+lcc to Mr.P.Valliappan, Advocate SR.No.80052
+lcc to Mr.A.Sundaravadhanan, Advocate SR.No.80680

C.M.A.No.224 OF 2012

MP (CO)
GN(24/04/2018)