



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 27.11.2017
CORAM :
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CMA(MD)No.11 of 2016
and
C.M.P (MD)No.122 & 123 of 2016

M.S.Subburaj ... Appellant/Respondent/Plaintiff
Vs.
Baskara Sethupathi ... Respondent/Appellant/Defendant

Prayer : Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of CPC, against the judgment and decree passed by the learned Subordinate Judge, Sivakasi in A.S.No.8 of 2013 dated 28/05/2015 reversing the judgment and decree of the learned District Munsif, Sivakasi in O.S.No.37 of 2009 dated 17.08.2012.

For Appellant : Mr.D.Srinivasaraghvan
For Respondent : Mr.A.Sivaji

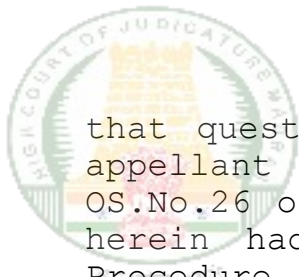
JUDGMENT

The appellant herein is the plaintiff in OS.No.37 of 2009 on the file of District Munsif Court, Sivakasi. It is a suit for permanent injunction. The subject matter of suit pertains to running of business of Angaala Eswari Fire Works Industries, Sivakasi.

2.The first defendant Gurusamy is the brother of the plaintiff. The second defendant Baskara Sethupathi is the son of the said Gurusamy and nephew of the appellant herein. The suit was filed on 25.02.2009. The suit came to be decreed on 17.08.2012. Questioning the same, the defendant filed AS.No.8 of 2013 before the Sub Court, Sivakasi. The defendant Baskara Seuthupathi filed I.A.No.5 of 2015 for adducing additional evidence. The First Appellate Court by order dated 28.08.2015 set aside the judgment and decree of the Trial Court and remitted the matter to the file of the Trial Court. Aggrieved by the said order of remand, the plaintiff in OS.No.37 of 2009 has filed this Civil Miscellaneous Appeal.

3.It is seen that the father of the respondent herein Gurusamy filed OS.No.26 of 2009 before the Sub Court, Sivakasi on 15.04.2009 seeking the relief of a permanent injunction in respect of the suit business.

4.It is submitted by the learned counsel appearing on either side that interim injunction was granted in OS.No.26 of 2009 and



that questioning the same CMA No.8 of 2009 was filed. Since the appellant herein had earlier filed a suit in OS.No.37 of 2009 and OS.No.26 of 2009 was filed in a later point of time, the appellant herein had filed I.A.No.184 of 2009 under Section 10 of Civil Procedure Code and the said I.A was also allowed on 29.01.2010. Therefore, as on date, proceedings in O.S.No.26 of 2009 on the file of Sub Court, Sivakasi stand stayed.

5.It is fairly conceded by the learned counsel appearing for the respondent herein that the said order passed under Section 10 of CPC has not been stayed and that it has become final. Therefore, the only issue is whether the First Appellate Court was justified in passing the order of remand.

6.In this case, the respondent herein had taken up an application under Order 41 Rule 27 of CPC. The First Appellate Court had taken up the said IA.No.5 of 2015 filed by the respondent along with the main appeal. But, it is seen that the said documents were not even marked. The First Appellate Court ought to have dismissed the said application for adducing additional evidence.

7.The approach adopted by the First Appellate Court is not in consonance with the statutory scheme set out under Order 41 of the CPC. Therefore, this Court is constrained to interfere with the order under challenge in this appeal. The order dated 28.08.2015 made in A.S.No.8 of 2013 is set aside. The matter is remitted to the file of the First Appellate Court. It is for the First Appellate Court to adopt an appropriate approach in accordance with law. It is made clear that all the issues are left open. It is open to the First Appellate Court to invoke the power available under Order 41 Rule 25 of CPC also.

8.This Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(Writs)

/True copy/

Sub Assistant Registrar

To

1.The Subordinate Judge, Sivakasi.

2.The District Munsif, Sivakasi.

Copy to:

The Record Keeper, Vernacular Section,

Madurai Bench of Madras High Court, Madurai. (2 Copies)

+1cc to Mr.D.SRINIVASARAGAVAN,Advocate,SR. 89748

+1cc to Mr.A.SIVAJI,Advocate,SR.89586

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