



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 20.12.2017
CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WEB COPY

C.M.A.(MD)No.307 of 2016
and
C.M.P(MD)No.4356 of 2016

1.Udayasooriyan
2.Parvathy

... Appellants

Vs.

Jesintha Selvaraj (Died)

1.Jegan Britto
2.Jegathees
3.Jeyanth Peter
4.Jenith Nirmal
5.Jepitha Vanimalar
6.Jerlin Mary

... Respondents

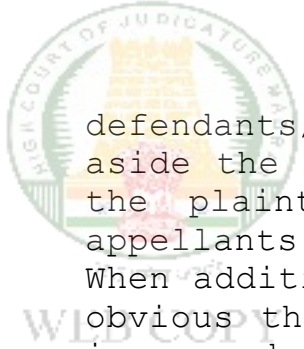
Prayer: This Civil Miscellaneous Appeal is filed under Section Order 43 Rule 1(4) of Civil Procedure Code, to allow the Civil Miscellaneous Appeal by setting aside the Judgment and Decree order passed in A.S.No.2 of 2014 on the file of the Principal District Court, Tirunelveli, dated 25.07.2015 remanding the judgment and decree in O.S.No.20 of 2009 on the file of the Principal Sub Court, Ambasamudram, dated 23.01.2013.

For Appellants	: Mr.S.Meenakshi Sundaram Senior Counsel for Mr.R.T.Arivukumar
For Respondents	: Mr.H.Arumugam

JUDGMENT

Heard the learned counsel on either side.

2.The defendant in the suit is the appellant in this Civil Miscellaneous Appeal. The suit is one for declaration and for recovery of possession. The appellants herein filed their written statement contesting the description of the property. The suit was strongly contested and the trial Court agreeing with the stand of the defendants, dismissed the suit by judgment and decree dated 23.01.2013. Aggrieved by the same, the plaintiffs filed A.S.No.2 of 2014, before the first appellate Court. The plaintiffs filed I.A.Nos.246 and 255 of 2014, for reception of additional evidence. Subsequently, the plaintiffs also filed I.A.No.278 of 2014, for amending the plaint schedule. The said Interlocutory Application was allowed exparte on 07.01.2015. It appears that the



defendants/appellants herein took out an application for setting aside the said order. But the same was not pressed. Thereafter, the plaint schedule itself was allowed to be amended. The appellants herein also filed their additional written statement. When additional pleading has been allowed to come on record, it is obvious that there must be a chance for framing of an additional issue and there must be a finding on the same. Otherwise, there is no point in filing additional pleadings. When the appeal was taken up for final disposal, the lower Appellate Court allowed both the Interlocutory Applications filed under Order 41 Rule 27 of Civil Procedure Code. Thereafter, the Lower Appellate Court chose to set aside the judgment and decree of the Trial Court and remanded the matter, so as to enable the reception of the additional documents subject to proof. Aggrieved by the order of remand, this appeal has been filed by the defendants.

3.The learned Senior counsel appearing for the appellants/defendants herein contended that the documents now sought to be received by way of an additional evidence, were very much available, when the matter was pending at the trial stage. He would place reliance on a decision of the Hon'ble Supreme Court reported in **2012 (4) LW 359-(Union of India Vs. Ibrahim Uddin & Another)** to canvas the proposition that additional evidence should not be admitted in appeal as a party guilty of remissness in the lower Court is not entitled to any indulgence of being allowed to give further evidence under this rule. In this case, the plaintiffs had ample opportunity to produce the said evidence in the lower court. Therefore, the applications filed under Order 41 Rule 27 of the Civil Procedure Code ought to have been dismissed.

4.Per contra, the learned counsel appearing for the plaintiffs/respondents herein pointed out that in this case the plaint itself was allowed to be amended as early as on 07.01.2015 and pursuant to the same, the appellant herein had earlier filed their additional written statement. The suit schedule itself has now been amended. Therefore, according to him, the appellate court rightly received the additional evidence which pertained to the property immediately adjacent to the suit schedule. Since the whole issue turns on the measurement and identity of the suit schedule property, definitely the documents pertaining to the adjacent land will have a bearing.

5.This Court is of the view that the lower appellate court rightly allowed the application for reception of additional evidence. The defendants had allowed the plaint to be amended and they have filed their additional written statement. When additional pleadings had come on record, it is the duty of the Court to frame additional issues thereon. Since the additional evidence has been received by the lower appellate court, I am of the view that, considering the facts and circumstances of this case, the power of the appellate court available under Order 41 Rule 25 deserves to be invoked. The first appellate Court has



not really given any convincing reason as to why the decision of the trial court should be reversed.

6. Therefore, the judgment and decree of the lower appellate court stands set aside. The first appeal shall be kept pending. The lower appellate court shall invoke its power under Order 41 Rule 25 of Civil Procedure Code by framing necessary issues and referring the same to the trial court. The additional evidence that is now permitted to be received shall be marked subject to proof and relevancy. The trial court shall return its findings on the issues to be framed by the lower appellate court within a period of three months.

7. The order dated 25.07.2015 in A.S.No.2 of 2014 on the file of the Principal District Court, Tirunelveli is set aside.

8. This Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (RTI)

/True Copy/

Sub Assistant Registrar

To

1. The Principal District Judge,
Tirunelveli.
2. The Principal Sub ordinate Judge,
Ambasamudram.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+ 1 cc TO Mr.H.Arumugam , Advocate in SR No. 94037
+ 1 cc TO Mr.R.T.Arivu Kumar , Advocate in SR No. 94027

tsg

AE/SKN RSK/SAR3/25.06.2018/3P/7C

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