

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2018

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

CMA.No.1864 of 2012

MP.No.1 of 2012

Venkatesan

... Appellant

Versus

Deivanayakam

... Respondent

Prayer:

This Civil Miscellaneous Appeal is filed, under Order 43 Rule 1(v) of Civil Procedure Code, to set aside the Judgement and Decree, dated 14.03.2012 made in A.S.No.22 of 2011, on the file of the Additional Sub-Court, Vridhachalam, against the Judgement and Decree, dated 25.01.2011 made in O.S.No.294 of 2004, on the file of the Additional District Munsif's Court, Tittagudi.

For Appellant : Mrs.R.Meenal

For Respondent : M/s. R.Mahamandra Rajalakshmi
for Mr.J.Ramakrishnan

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the Plaintiff to set aside the Judgment and Decree, dated 14.03.2012 passed by the Additional Sub Court, Vridhachalam in AS.No.22 of 2011 and to restore the order dated 25.01.2011, passed in OS.No.294 of 2004 by the learned Additional District Munsif, Tittagudi.

2. The case of the Plaintiff, in a nutshell, as set out in the plaint is as follows:-

(a) The suit property, measuring an extent of 26.35 acres originally belonged to one Santhan and the suit property was the ancestral property of Santhan. The said Santhan died intestate 20 years back, leaving behind his four sons, namely, (1) Murugan, (2) Chinnasamy, who is the 2nd defendant, (3)

Deivanayakam, who is the 3rd defendant and (4) Vadivelu and after the demise of Santhan, the said legal heirs have been in possession and enjoyment of the suit property.

(b) While so, the Plaintiff had purchased the suit property from the fourth son of Santhan, namely, Vadivelu, by a registered sale deed dated 26.7.1997. Even though it is stated in the said sale deed that the suit property is a common property, the plaintiff has been enjoying the suit property. Thereafter, in the oral partition effected on 26.8.1996, while partitioning the properties of Santhan among his four sons, the suit property was allotted to the plaintiff and a joint patta was issued in favour of the plaintiff in respect of the suit property, by including the name of the Plaintiff. Since then, the Plaintiff took possession of the suit property and has been enjoying the same, till date.

(c) After the demise of first son, namely, Murugan 17 years back, his son, Mani, who is the 1st defendant, in collusion with the defendants 2 and 3, demanded the plaintiff to sell the suit property to them. Since the Plaintiff refused to sell, the defendants colluded together and have been attempting to trespass into the suit property and one such attempt was made on 20.07.2004. The defendants have no right, title or interest in respect of the suit property. Since the seller, Vadivelu had 1/4th interest in the suit property, the sale deed was executed in favour of the plaintiff, in respect of the suit property is valid in the eye of law. In such circumstances, the suit has been filed, seeking declaration and permanent injunction, in respect of the suit property.

3. In the suit, the 3rd defendant has filed a written statement stating that the averments as stated in the plaint have to be proved by the plaintiff. However, it is stated by the 3rd defendant that the suit property belonged to the 3rd defendant and his brothers. Even before 40 years, the 3rd defendant had entered into the suit property which belonged to the Government and after putting up a house, he had been paying house tax and other taxes to the Government and had been in possession and enjoyment of the same uninterruptedly. Based on such possession and enjoyment, Patta was also issued in his favour by the concerned Revenue Authorities. Since the demand of the 3rd defendant, to sell the suit property to him was refused by the Plaintiff, in such circumstances, the suit is liable to be dismissed.

4. Before the Trial Court, on the side of the Plaintiff, three witnesses were examined as PW.1 to PW.3 and Ex.P1 to Ex.P3 were marked. On the side of the defendants, DW.1 to DW.3 were examined and Ex.D1 and Ex.D2 were marked. After considering the

oral and documentary evidence, the Trial Court decreed the suit as prayed for, in favour of the plaintiff. As against the same, the 3rd defendant has filed the appeal in A.S.No.22 of 2011 before the lower Appellate Court.

5. Before the lower Appellate Court, the 3rd defendant had filed IA.Nos.16 and 38 of 2011 for receiving additional documents and the said applications were allowed. The Trial Court, after hearing the parties, remanded the matter to the Trial Court. Aggrieved against the said Judgment, the plaintiff has preferred the present appeal.

6. This Court heard the submissions of the learned counsel on either side and also perused the materials available on record.

7. The learned counsel for the appellant would submit that the appellant herein is the plaintiff in the Original Suit before the Trial Court and the lower Appellate Court ought to have passed a Judgment on the available evidence, instead of remanding the matter to the Trial Court. The learned counsel would further submit that the lower Appellate Court failed to note that the additional documents filed by the respondent has no relevance to the facts of the case. The said documents were not filed at the earliest point of time and were produced only before the Lower Appellate Court and the lower Appellate Court ought not to have received such additional documents.

8. The learned Counsel for the Appellant would further submit that the lower Appellate Court ought not to have passed the Judgment and decree based upon the additional documents. The lower Appellate Court erred in overlooking that Ex.B2 house tax receipts produced by the respondent was with respect to the vacant site and not to the respondent's house, in which the appellant has not raised any claim. The lower appellate Court also failed to note that joint patta was issued to the appellant only after proper enquiry and that the respondent had not taken any steps to cancel the Patta before the concerned Revenue Authorities. The lower Appellate Court ought not to have decided the issue against the appellant, erroneously holding that the property was not the joint family property of Santhan and his sons, when it was the admitted case of the respondent himself. The lower Appellate Court did not adhere to the provisions of Order 41 Rule 23 A of CPC for remanding the matter to the lower Court.

9. Before the lower Appellate Court, the respondent had filed two interlocutory applications for receiving the additional documents relating to OS.No.99 of 1998, which had been filed against the plaintiff's father, Venkatesan, before

the District Munsif Cum Judicial Magistrate Court, Tittagudi and the said suit was decided on 17.09.1998. The lower Appellate Court, after hearing the parties, had allowed the said interlocutory applications and taken the said additional documents on file. However, the lower Appellate Court, stating there are discrepancies in the oral evidence, in order to consider the decision taken against the plaintiff's father in the earlier suit and in order to give a justifiable decision, remanded the matter back to the lower Court to decide the issues afresh, after giving sufficient opportunity to either side.

10. The contention of the learned counsel for the appellant is that the additional documents are only the judgment and decree passed in OS.No.99 of 1998 filed by the 3rd defendant as against the father of the plaintiff and the same was decided on 17.09.1998 and no other material has been filed before the lower Appellate Court and hence, there is no necessity to remit the matter back to the Trial Court. Instead, the lower Appellate Court ought to have decided the issues and passed a judgment and decree. Even though the additional documents were filed at a later point of time, the lower Appellate Court can decide the issues by offering opportunity to the parties concerned. The lower Appellate Court failed to follow the provisions under Order 41 Rule 23A of CPC.

11. When the Lower Appellate Court failed to give reasons under what circumstances the documents have been accepted by the Appellate Court and when the additional documents have been allowed to be produced the Lower Appellate Court itself could have taken such evidence and then could have passed a Judgment by re-appreciating the documents. Accordingly, the Lower Appellate Court could have framed issues and decided the issues on its own, when the matter has been pending for a long time. The appeal was decided within five months from the date of its institution.

12. In the above said circumstances, this Court is of the view that if the matter is remitted back to the Trial Court, it will consume more time and in order to meet the ends of justice, this Court is of the opinion that the Lower Appellate Court itself can decide the issue with the available documents and to pass a Judgment and decree expeditiously. If the Lower Appellate Court is of the opinion that any further evidence has to be adduced it can do so by affording an opportunity to both parties concerned and shall decide the appeal on merits within a period of four months from the date of receipt of a copy of this Judgment. The Lower Appellate Court is at liberty to take up the appeal on day to day basis. The parties are directed to co-operate with the Lower Appellate Court for speedy disposal.

13. With the above observations and directions, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

klr

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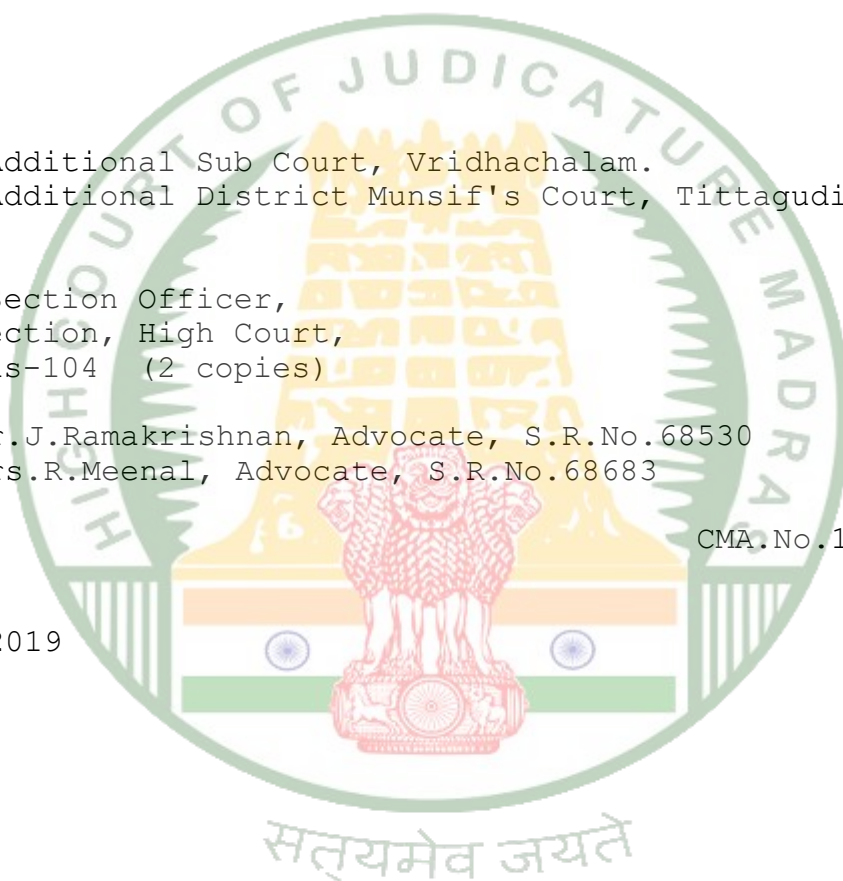
1. The Additional Sub Court, Vridhachalam.
2. The Additional District Munsif's Court, Tittagudi.

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+lcc to Mr.J.Ramakrishnan, Advocate, S.R.No.68530
+lcc to Mrs.R.Meenal, Advocate, S.R.No.68683

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