



WEB COPY

IN THE HIGH COURT OF JUDICATUE AT MADRAS

DATED 07.06.2018

CORAM

THE HONOURABLE Mrs.JUSTICE S.RAMATHILAGAM

C.M.S.A.No.28 of 2004
and
C.M.P.No.11528 of 2004

Kandasamy

.. Appellant/Appellant

Versus

1. Subbaraya Gounder
2. Narayanasamy
3. Nagarathinam

(R-3 exparte in the courts below

and hence given up) .. Respondents/Respondents

Civil Miscellaneous Second Appeal filed under Section 104 (i) CPC against the Judgment and Decree of the learned First Additional District Judge, Coimbatore in A.S.No.62 of 2003 dated 20.11.2003 confirming the fair and final order of the learned Sub Judge, Tiruppur in E.A.No.41/2000 in E.P.No.163 of 1994 in O.S.No.411 of 1990 dated 19.09.2002.

For Appellant : Mr.S.Kaithamalai Kumaran

For Respondents : Mr.V.P.Sengottuvel for R1 and R2

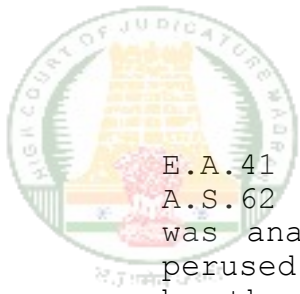
Respondent No.3 : exparte

JUDGMENT

The appellant has not appeared and the counsel reported no instructions. However, the matter cannot be dismissed for the absence of the appellant and the same has to be disposed of on merits.

2. This C.M.S.A 28 of 2004 has been preferred by the appellant against the Judgment in A.S.No.62 of 2003 dated 20.11.2003 confirming the fair and final order in E.A.No.41 of 2000 in E.P.No.163 of 1994 in O.S.No.411 of 1990.

3. Originally, the suit in O.S.No.411 of 1990 was filed by the plaintiff for relief of Specific Performance and the suit was decreed. Based on the decree, the plaintiff in that suit, filed E.P.163 of 1994 for execution of the said decree. The Execution petition filed by the plaintiff was also allowed and possession was taken by the decree holder in the year 2005 itself, but, it could not to be recorded because of the



E.A.41 of 2000 was filed by the present appellant herein. A.S.62 of 2003 was filed by the Objector and the said appeal was analysed by the Appellate Court and the Appellate Court perused the entire proceedings. The execution petitions filed by the decree holder, and the Appellate Court discussed the entire facts and has given a finding which was in the year 2000.

4. On perusal of records and also from the arguments, it is learnt that the the objector, who is the petitioner is E.A.No.41 of 2000 has filed a separate suit and obtained an ex-parte decree in collusion with the defendant. The Counter Statement filed by the respondent herein who are the decree holders have stated that already a decree was passed for the relief of specific performance and based on the decree the E.P was filed and possession was also taken on 05.01.2000. It is also observed that only after possession was taken over by the decree holder, the appellant herein as objector filed an E.A.No.41 of 2009 to stay the proceedings in the E.P. The interim stay obtained by the appellant herein in CMP.No.1528 of 2004 also got expired in September 2004. The fact that the appellant in this CMSA is not possession of the suit property and this fact is recorded by the Trial Court, because of this CMSA, the E.P.Proceedings are pending before the Executing Court.

5. The arguments advanced by the respondent reveals the fact that the appellant herein has received notice in the execution proceedings and only with motive of delaying the right of the respondent, he has filed the E.A. as objector. The grievance of the appellant has stated in the grounds of appeal are that the application filed under Order 21 Rule 98 CPC is not properly tried by the Trial Court and the said application has been given as a summary disposal instead of trying the same as unit. The further grounds in the appeal is that Exs.A.1 to A4 is not properly considered by the lower Appellate Court.

6.On perusal of the entire records and also the argument advanced by the respondent, it is observed that the E.A filed by the appellant herein was properly tried before the concerned court and the first appellate court has also considered the same. When the grievance of the appellant is that he is in possession of the property was not proved before the Trial Court, the records clearly proved that after a decree obtained by the respondent, this appellant has filed the petition and obtained an ex-parte decree with regard to the same property.

7. When the fact, evidence, documents clearly prove the proceedings prevailed between the parties and the respondent obtained a decree in 1992 and this appellant obtained an ex-parte decree in the year 1996, which shows the ill motive of the appellant, and the E.A filed by the appellant is also the



outcome of the illmotive.

8. In view of the above, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The First Additional District Judge,
Coimbatore.
2. The Subordinate Judge,
Tiruppur.
3. The Section Officer, VR Section,
High Court, Madras.(2 copies)

+1 CC to Mr. V.P.SENGOTTUVEL, Advocate SR.NO.35401

C.M.S.A.No.28 of 2013

GN(16.11.2018)