

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.No.52 of 2013

and

M.P.No.1 of 2013

1. Selvaraj (Died)
2. Padmini
3. Natarajan
4. Anbalagan
5. Sivagamasundari
6. Thiagarajan

(Appellants 2 to 6 brought on record as legal heirs of the deceased sole appellant vide order dated 28.11.2018 made in M.P.No.3 of 2014)

... Appellants/LRs of the 3rd defendant

Vs.

1. C.Shanmugam
2. Kamalabal
3. Arumai Gunanidi
4. Revathi
5. Ambika
6. Vanitha

... Respondents/Plaintiff & Defendants 2, 4 to 7

Civil Miscellaneous Second Appeal is filed under Section 47 read with under Section 100 of the Civil Procedure Code, to set aside the Judgment and Decree dated 06.09.2012 made in A.S.No.78 of 2011 on the file of the Subordinate Judge, Nagapattinam and confirming the Judgment and Decree dated 10.04.2011 made in I.A.No.216 of 2010 in O.S.No.200 of 2006 on the file of the District Munsif, Nagapattinam.

For Appellants : Mr.D.Bharatha Chakravarthy
For M/s.Sai, Bharath & Ilan

For R1 : Mr.T.A.Shagul Hameed
For M/s.Razhaq Associates

For R2 to R6 : Served
No Appearance

Judgment

This Civil Miscellaneous Second Appeal has been filed to set aside the Judgment and Decree dated 06.09.2012 made in A.S.No.78 of 2011 on the file of the Subordinate Judge, Nagapattinam, confirming the Judgment and Decree dated 10.04.2011 made in I.A.No.216 of 2010 in O.S.No.200 of 2006 on the file of the District Munsif, Nagapattinam.

2. Originally, the suit in O.S.No.200 of 2006 was filed by the first respondent/plaintiff, which was dismissed by the learned District Munsif, Nagapattinam. Against which, an appeal was preferred by the first respondent/plaintiff in A.S.No.58 of 2008 before the Sub Judge, Nagapattinam, which was partly allowed with regard to preliminary decree of partition and partly dismissed with regard to mandatory injunction sought for by the first respondent/plaintiff in the suit. Against which, no second appeal has been preferred by the parties and consequently, an Interlocutory Application in I.A.No.216 of 2010 in O.S.No.200 of 2006 was preferred by the first respondent/plaintiff seeking for grant of final decree and the same was dismissed by the learned District Munsif, Nagapattinam.

3. Aggrieved by the order of the learned District Munsif, Nagapattinam, the first respondent/plaintiff has preferred an appeal in A.S.No.78 of 2011 before the learned Sub Judge, Nagapattinam, and the learned Sub Judge after perusing the materials on record has found that three Advocate Commissioners were appointed by the learned District Munsif, Nagapattinam and out of them, two Advocate Commissioners had returned their warrant stating that the first respondent/plaintiff is not cooperating for executing the warrants and is not producing the relevant documents to fix the boundaries. When the same was questioned by the learned Sub Judge, Nagapattinam, the learned counsel then appearing for the first respondent/plaintiff has regretted for the conduct of the first respondent and he has also given an undertaking for production of the necessary documents and for extending the cooperation of the first respondent. After considering the order passed by the learned District Munsif, Nagapattinam and based on the undertaking given by the learned counsel for the first respondent/plaintiff, the learned Sub Judge, Nagapattinam, in order to meet the ends of justice and in order to give one more opportunity to the first respondent/appellant, allowed the appeal with the following directions :-

"1. The appellant shall submit the copies of delivery note, delivery athatchi, commissioners plan and all other connected records filed in E.P.No.210/80 in O.S.No.97/66, and in this suit to

the trial court with a memo, and if any of the document is not available with him, he shall apply for certified copies of the same and submit it to the trial court after getting the same.

2. The learned District Munsif, Nagapattinam is hereby directed either to appoint the same Commissioner or to appoint any other commissioner to execute the warrant in this case.

3. The learned District Munsif is directed to utilise the assistance of police and Surveyor if necessary and take all necessary lawful steps to execute the warrant.

4. The appellant is directed not to make any wordy quarrel either with the commissioner or with the counsels, accompanying with the commissioner.

5. If the appellant wants to make any submission or point to the commissioner, he shall make his points through his counsel.

6. The appellant is further directed to extend his fullest cooperation to the Commissioner in executing his warrant without any further delay."

Aggrieved by the order of the learned Sub Judge, Nagapattinam, the present appeal has been filed before this Court.

4. On perusal of the records, it is seen that after the Appeal Suit in A.S.No.58 of 2008 was partly allowed by the learned Sub Judge, Nagapattinam, the said order was not challenged by the appellants and no reasons have been stated by the appellants why they have not challenged the same. Without challenging the said order, the appellants have directly come forward to set aside the order passed in the Appeal Suit in A.S.No.78 of 2011 which was filed by the first respondent against the dismissal order passed in I.A.No.216 of 2010. Further, it is seen that even though the I.A.No.216 of 2010 filed by the first respondent came to be dismissed by the learned District Munsif as the first respondent was not cooperating to the Advocate Commissioner for execution of warrant, the first respondent has regretted for the same before the learned Sub Judge and he has also given an undertaking that he would produce necessary documents and would cooperate with the Advocate Commissioner for execution of warrant, and therefore, the learned Sub Judge has given him one more opportunity and allowed the said appeal suit in A.S.No.78 of

2011. Hence, this Court is not inclined to modify the findings and directions issued.

5. The Advocate Commissioner who is going to be appointed afresh to demarcate the property is hereby directed to issue notice to the parties concerned well in advance, and the parties are hereby directed to cooperate with the Advocate Commissioner and produce all the relevant documents to him to proceed further to execute the warrant issued by the Court well in advance.

6. Accordingly, this Civil Miscellaneous Second Appeal is dismissed, confirming the Judgment and Decree dated 06.09.2012 made in A.S.No.78 of 2011 on the file of the Subordinate Judge, Nagapattinam. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

raja

To

1. The Subordinate Judge,
Nagapattinam.
2. The District Munsif,
Nagapattinam.

Copy To

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

+1cc to Mr.Sai & Bharath, Advocate, S.R.No. 95261
+1cc to Mr.Razhaq Associates, Advocate, S.R.No. 95271

C.M.S.A.No.52 of 2013
and
M.P.No.1 of 2013

PA(CO)
GN(09/09/2020)