



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.04.2019

CORAM

THE HONOURABLE MRS. JUSTICE NISHA BANU

SECOND APPEAL (MD) No.44 of 2019

1. Roman Catholic Mission Palayamkottai,
rep. through its Procurator,
Post Box No.108,
Palayamkottai,
Tirunelveli District.
 2. Child Jesus Church,
represented through its Parist Priest,
Santhinagar,
Palayamkottai,
Tirunelveli District.
- ... Appellants / Appellants /
Plaintiffs

Vs.

P.Chelladurai

... Respondent / Respondent /
Defendant

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 28.04.2018, passed in A.S.No.20 of 2011 by the Additional Subordinate Judge, Tirunelveli, confirming the judgment and decree, dated 05.10.2010 passed in O.S.No.42 of 2007 by the II-Additional District Munsif, Tirunelveli.

For appellants

... Mr.V.Meenakshisundaram

For respondent

... Mr.R.Vijayakumar

JUDGMENT

This second appeal has been filed by the appellants/plaintiffs challenging the judgment and decree passed by the first appellate Court in A.S.No.20 of 2011, whereby and whereunder the first appellate Court confirmed the judgment and decree passed by the trial Court in O.S.No.42 of 2007.

2.The appellants filed the suit in O.S.No.42 of 2007 for removal of encroachment made by the respondent/defendant in the suit second schedule property. It is



stated by the appellants/plaintiffs in the plaint that the respondent/defendant encroached a triangular size portion in a space immediately after the eastern side compound wall. The respondent/defendant denied the said encroachment and opposed the suit on the ground that without the prayer of declaration, the suit is not maintainable and that the appellants/plaintiffs have not pleaded the correct measurements of the alleged encroachment. The trial Court, after trial, has dismissed the suit. Aggrieved by the same, the appellants/plaintiffs filed appeal suit in A.S.No.20 of 2007. During the pendency of the said appeal, they filed an application in I.A.No.11 of 2012 under Order 6 Rule 17 of C.P.C. seeking to amend the plaint by adding the relief of declaration of title and also the alternative prayer for recovery of possession. The said application was allowed by the first appellate Court by an order dated 06.04.2012. Challenging the said order, the respondent/defendant filed C.R.P.(MD).No.2674 of 2012. This Court has dismissed the said revision, confirming the order passed by the first appellate Court. Thereafter, the respondent/defendant has filed his additional written statement in respect of the amended pleadings in the plaint.

3. By judgment and decree dated 30.06.2014, the first appellate Court remanded the matter to the trial Court for denova trial. Challenging the said judgment, the respondent/defendant preferred an appeal in C.M.A.No.174 of 2015 before this Court. This Court, by judgment dated 27.03.2015, disposed of the appeal by setting the order of remand and directing the first appellate Court to dispose of the appeal by reframing the issues particularly in view of the amendment made to the plaint, within a period of nine months from the date of receipt of judgment. The first appellate Court, by judgment dated 28.04.2018, dismissed the appeal suit, without considering the amendment made in the plaint by adding the relief of declaration at the appellate stage. Hence, challenging the said judgment, the appellants/plaintiffs filed this second appeal.

4. This second appeal is admitted on the following substantial questions of law:

"1) When the plaint was amended and the prayer of declaration with the alternative prayer of recovery of possession was allowed in the first appellate stage and confirmed by this Court in C.R.P.(MD).No.2674 of 2012, whether the First Appellate Court is correct in dismissing A.S.No.20 of 2011 as it is a suit for mandatory injunction without the prayer of declaration?

2) Whether the judgment and decree of the First Appellate Court in A.S.No.20 of 2011 is in consonance with the directions issued in the order dated 27.03.2015 in C.M.A.(MD).No.174 of 2015 on the file of this Court?



5. Heard the learned counsel appearing for both sides and perused the records carefully.

6. A bare perusal of the judgment passed by the first appellate Court shows that the first appellate Court, without considering the amendment petition ordered in I.A.No.11 of 2012, which was confirmed in C.R.P.(MD).No.2674 of 2012 by this Court and also without considering the directions issued by this Court in C.M.A.(MD).No.174 of 2015, has erroneously dismissed the appeal and confirmed the judgment and decree of the trial Court. It is seen from the record that after the judgment passed in C.M.A.(MD).No.174 of 2015, an Advocate Commissioner was appointed and he filed his report and plan and thereafter, both the appellants and the respondent have also filed their respective objections to the same. The first appellate Court has not even considered the same. It seems that the first appellate Court, without even perusing the records and without application of mind, has hurriedly passed the judgment. The above act of the first appellate is inappreciable.

7. In view of the above, this Court is inclined to remand the matter to the first appellate Court, without going into the merits of the case. Thus, the substantial questions of law are answered in favour of the appellants/plaintiffs

8. In the result, this second appeal is allowed and the judgment and decree passed by the first appellate Court, dated 28.04.2018, in A.S.No.20 of 2011 are set aside and the appeal suit is remanded to the file of the first appellate Court for fresh disposal after following the directions issued by this Court in C.M.A.(MD).No.174 of 2015, by judgment dated 27.03.2015. Considering the fact that the appeal suit has been pending for a long time, the first appellate Court is directed to dispose of the appeal suit within a period of four months from the date of receipt of a copy of this judgment. No costs.

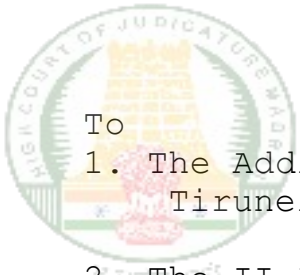
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Assistant Registrar (CS-II)

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Sub Assistant Registrar (CS)

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To

1. The Additional Subordinate Judge,
Tirunelveli.

2. The II-Additional District Munsif,
Tirunelveli.

3. The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.D.Nallathambi, ADVOCATE IN SR No.61643

+ 1 CC TO Mr.R.Vijayakumar, ADVOCATE IN SR No.61356

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