

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.09.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.100 of 2020

1. N.Suriyakala

2. M.S.Vijayalakshmi

Appellants

-VS-

G.R.Mahendra Prasad

represented by P.A.Dhanapal

Respondent

Memorandum of Grounds of Civil Miscellaneous Appeal filed under Order XLIII, Rule 1(u) of the Civil Procedure Code, against the judgment and decree dated 22.11.2019 made in A.S.No.127 of 2019 on the file of the learned XV Additional Judge, City Civil Court, Chennai against the judgment and decree dated 31.07.2018 made in O.S.No.2402 of 2017 by the learned XIII Assistant Judge, City Civil Court, Chennai.

For Appellants

::

Mr.C.Ramesh

For Respondent

::

No appearance

JUDGMENT

Heard learned counsel for the appellants through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous appeal has been filed by the appellants/defendants challenging the correctness of the order of remand made by the learned XV Additional Judge, City Civil Court, Chennai in A.S.No.127 of 2019 on 22.11.2019, setting aside the judgment and decree dated 31.07.2018 made in O.S.No.2402 of 2017 by the learned XIII Assistant Judge, City Civil Court, Chennai.

3. Mr.C.Ramesh, learned counsel appearing for the appellants/defendants submitted that when the respondent/plaintiff filed the suit in O.S.No.2402 of 2017 for a bare injunction restraining the appellants/defendants from preventing the respondent/plaintiff from entering upon his own unsold portion situated at Flat No.B2, First Floor, Door No.10/7, Venkatrama Iyer Street, T.Nagar, Chennai and Flat No.B3, First Floor, Door No.10/7, Venkatrama Iyer Street, T.Nagar, Chennai or creating any scenes with the help of Goondas and also to pay the cost of the suit, the trial Court, considering the issues framed and answered by both parties, dismissed the same giving a finding that the respondent/plaintiff did not establish his right towards the claim, that the respondent/plaintiff did not establish his exclusive possession and enjoyment over the suit property and that the respondent/plaintiff is not in the exclusive possession over the suit property, along with the finding in favour of the appellants/defendants that the

appellants are in continuous possession and in long usage of the suit property and thereby they had obtained perfected title by open continuous and long usage of the property. Aggrieved thereby, the respondent/plaintiff filed appeal in A.S.No.127 of 2019 before the learned XV Additional Judge, City Civil Court, Chennai. It was the claim of the respondent/plaintiff that the suit property along with other properties being vacant land having an extent of 4808 sq.ft., inclusive of the share having an extent of 776 sq.ft., in the common passage comprised in T.S.No.8564, Plot No.113, Flat Nos.B2 & B3 being part of Door No.10, Venkatrama Iyer Street, T.Nagar, Chennai belonging to the respondent/plaintiff. After the death of his father on 8.2.90, the respondent/plaintiff got the suit property by way of a Will executed by his father that was also probated before this Court in O.P.No.366 of 1991 and thereby the respondent/plaintiff executed a registered power of attorney as Document No.263 of 1996. It was also further claimed that on receipt of the power of attorney, when the respondent/plaintiff sold Flat No.B2 portion in favour of the first appellant/first defendant to an extent of 950 sq.ft., which is exclusive of common built up area of 776 sq.ft., for a sale consideration of Rs.3,32,500/- with undivided share 294 sq.ft. In addition thereto, it was also further claimed that the respondent/plaintiff sold one another flat bearing Flat No.B3 having a super built up area of 1250 sq.ft., which is exclusive of common built up area of 776 sq.ft., and therefore both the sale deeds were registered, which would clearly show that

the properties sold to the first and second defendants are in respect of 950 and 1200 sq.ft., only. The respondent/plaintiff also executed two other sale deeds in favour of the appellants/defendants in respect of undivided share, which were also registered as Document Nos.1704 and 1709, retaining 225 sq.ft., of plinth area in and out of 1175 sq.ft., and 200 sq.ft., plinth area in 1450 sq.ft., in T.S.No.8564 and undivided share 4808 sq.ft., out of 776 sq.ft., and also undivided share 4808 out of 776 sq.ft. On this basis, it was pleaded that the appellants/defendants are in illegal possession of the same and thereupon refusing the respondent/plaintiff to enter into his own building. When the respondent/plaintiff tried to take possession of the unsold portion, the appellants/defendants prevented the respondent/plaintiff from entering into his own premises.

4. Opposing the above prayer, a detailed written statement was filed by the first appellant/first defendant that was adopted by the second appellant/second defendant, taking a stand that the claim of the respondent/plaintiff was barred by limitation, since the sale deeds were executed in favour of the appellants/defendants in the year 1997 and possession also was delivered, that the plaintiff cannot file the suit in the year 2017 after a long lapse of time. Moreover, the second defendant also purchased undivided share of land to an extent of 363/4808 from the said power of attorney, namely, Mr.Dhanapal

by a sale deed dated 10.9.97 as Document No.1703 of 1997. The said Dhanapal also conveyed the flat in the first floor having super built up area of 1250 sq.ft., by the sale deed dated 22.9.97, which is exclusive of common built up area of 200 sq.ft., in favour of the second appellant/second defendant herein. It was the counter claim of the appellants/defendants that the respondent/plaintiff has not set out as to how he has claimed title in the undivided share of land towards the defendants alone, because as per the recitals in the sale deeds, the respondent/plaintiff has conveyed the flats in the first floor without retaining any right over the flat.

5. Based on the above pleadings, the trial Court has framed five issues, which are as follows:-

- (i) Whether the plaintiff is in possession and enjoyment of the suit schedule property?
- (ii) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?
- (iii) Whether the claim of the plaintiff is barred by limitation?
- (iv) Whether the defendants have perfected title by open continuous and long usage of the property?
- (v) To what such other reliefs the plaintiff is entitled to?

6. After perusing the entire evidence, the trial Court came to the conclusion that

the respondent/plaintiff was not entitled to get the relief of permanent injunction and thereby dismissed the suit. Aggrieved thereby, when the matter was taken to the lower appellate Court, the lower appellate Court also has framed the following issues:-

- (i) Whether the appellant/plaintiff is entitled to get the relief of permanent injunction restraining the defendants from preventing the plaintiff from entering upon his unsold portion?
- (ii) Whether the decree and judgment of the trial Court is correct?
- (iii) Whether the appeal is to be allowed?

7. After framing the above issues, the lower appellate Court, finding that the trial Court has not appreciated the evidence on one aspect and has wrongly proceeded in a way as if the respondent/plaintiff was seeking the relief of injunction that the defendants are to be prevented from entering into the unsold area, simply should have decided the case from the available records and the evidences by rehearing arguments of both sides. But the lower appellate Court has remanded the matter back to the trial Court after setting aside the judgment of the trial Court. Hence the present appeal.

8. Mr.C.Ramesh, learned counsel appearing for the appellants/defendants,

assailing the reasoning given for remanding the matter back to the trial Court, pleaded that the lower appellate Court has failed to follow the principles set out under Order XLI, Rule 31 of the Code of Civil Procedure. Referring to Order XLI, Rule 31, he has further argued that if the lower appellate Court is of the view that the trial Court had committed a serious error warranting remand and thereupon to rehear the case, the lower appellate Court should state the points for determination, besides the reasons for the decision, where the decree appealed from is reversed or varied and top of all, the relief to which the plaintiff is entitled to. But in the present case, when the trial Court, after framing five important issues, has found that no answer can be given in favour of the respondent/plaintiff and the trial Court has also opined that the respondent/plaintiff has been trying to make an attempt by claiming exclusive right over the undivided common area and facilities, which is against the provision of Section 6(2) of the Tamil Nadu Apartment Ownership Act, 1994. It has also further given its reason that the plaintiff did not make his claim properly with necessary particulars. Moreover, when the reasons given by the trial Court would clearly show that the respondent/plaintiff did not say anything about when and how the cause of action has arisen, more particularly, when the properties were sold to the appellants/defendants in the year 1997 and from that day onwards they are in continuous possession of the property purchased by them and that the appellants/defendants are in possession and enjoyment of the common built

up area along with other apartment owners, the respondent/plaintiff cannot claim after a period of 20 years, because the prayer of the respondent/plaintiff was time barred as per the Limitation Act and the lower appellate Court, without even considering whether the claim in the suit has been barred by limitation, has held that the trial Court has not appreciated the evidence on one aspect whether the plaintiff, who is the owner of the unsold common area, can be prevented by the defendants from entering into the premises. That issue also has been decided by the trial Court vividly in paragraphs 10 & 11 of its judgment. Therefore, the matter does not call for remand. Hence, the impugned order of remand is liable to be set aside.

9. Again referring to Order XLI, Rule 23 and Rule 24 of the Code of Civil Procedure, Mr.Ramesh explained the distinction between these two provisions. Under Order XLI, Rule 23, where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and that decree is reversed in appeal, the lower appellate Court may, if it thinks fit, by order can remand the case. Whereas in the present case, the entire matter has been decided not on the preliminary point. Therefore, Order XLI, Rule 23 is inapplicable to the present case. Coming to Order XLI, Rule 23A, Mr.Ramesh also further argued that where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree

is reversed in appeal and a retrial is considered necessary, the lower appellate Court shall have the same powers as it has under Rule 23. However, taking reliance from Order XLI, Rule 24, he has argued that where the evidence on record is sufficient to enable the lower appellate Court to pronounce the judgment, after resettling the issues, finally the issues ought to be decided by the lower appellate Court. Therefore, in the present case, when the trial Court was clear and decided all the issues including the plea of limitation raised by the defendants and in addition to the point of limitation, the issues on the merit of the claim were also properly decided, there is no need for the lower appellate Court to remand the matter back to the trial Court.

10. When the matter came to be listed on the last three occasions, namely, 17.07.2020, 21.07.2020, 04.08.2020, after service of notice on the respondent, the respondent has not chosen to enter appearance. Even today, he has not chosen to appear before the Court. That shows that the respondent is not interested in defending the case.

11. I also find merits on the submissions made by the learned counsel appearing for the appellants/defendants. The reason being that when the trial Court has decided both the issues, namely, plea of limitation and also the merits of the case on the available records, the lower appellate Court after considering the case in appeal, has

wrongly reached its conclusion that the trial Court has decided the case by clubbing all the issue nos.1 to 5 as a single discussion. Although the trial Court has decided the issue nos.1 to 5 with the answers given therein, as mentioned above, the plea of limitation has been discussed separately, particularly, the prayer as to how the respondent/plaintiff is not entitled to the relief of permanent injunction in respect of Flat Nos.B2 & B3 also has been decided independently. Hence, the lower appellate Court in not following the mandate under Order XLI, Rule 31 of the Code of Civil Procedure ought not to have remanded the case. When the suit was filed in the year 1997, it was claimed that the defendants have purchased the land in question in the year 1997. Therefore, the issue raised in the appeal suit being an old issue, the lower appellate Court should have avoided remanding the matter back to the trial Court. Moreover, the lower appellate Court has directed the trial Court to decide the case from the available records. But that exercise could have been carried out easily by the lower appellate Court for which the parties ought not to have been relegated back to the trial Court.

12. For all the aforementioned reasons, the civil miscellaneous appeal stands allowed and the impugned judgment and decree of the lower appellate Court are set aside. The lower appellate Court is directed to dispose of the case expeditiously, preferably within a period of four months from the date of receipt of a copy of this

order, after hearing the parties. Consequently, C.M.P.No.705 of 2020 is closed. No costs.

Speaking/Non speaking order

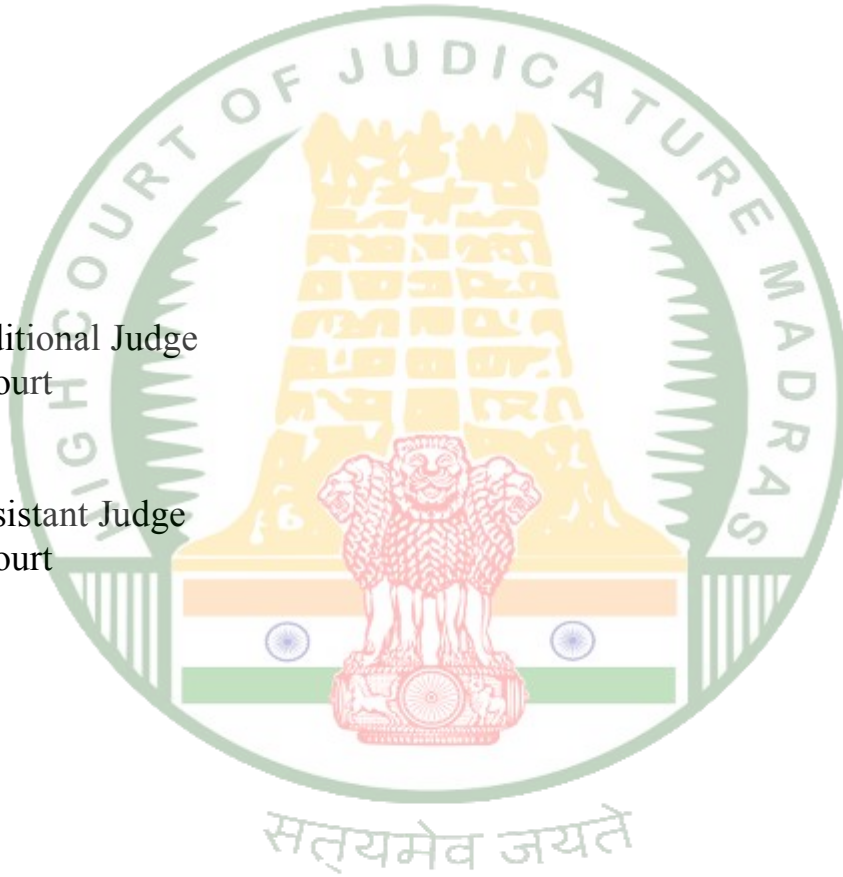
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Index : yes/no

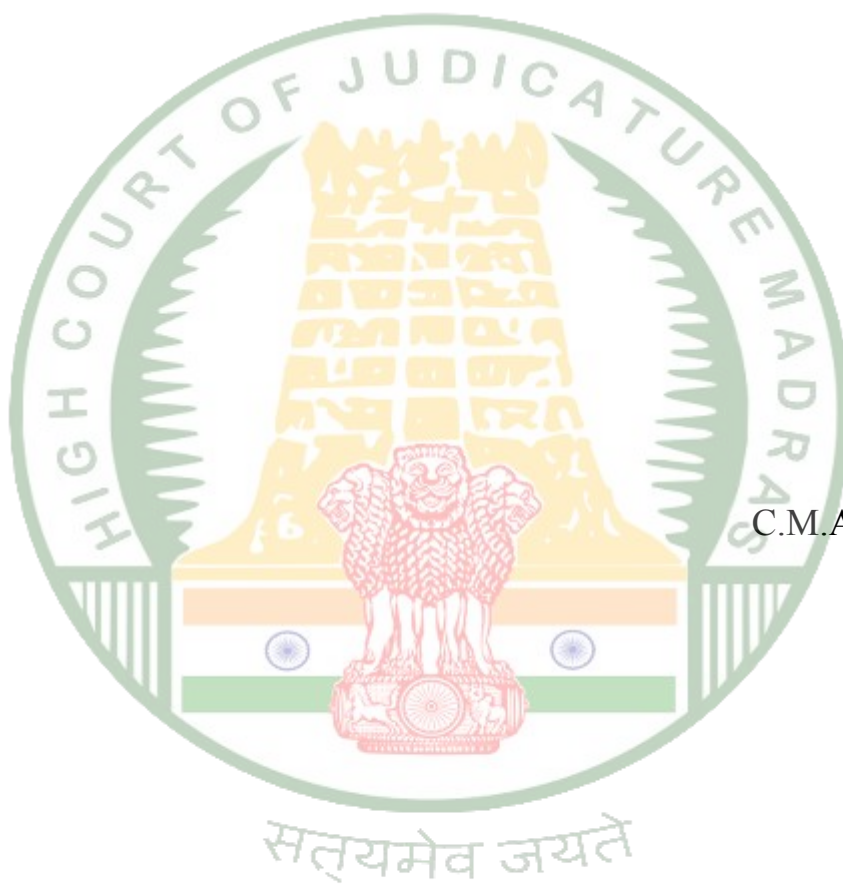
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To

1. The XV Additional Judge
City Civil Court
Chennai
2. The XIII Assistant Judge
City Civil Court
Chennai



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