



C.M.A.(MD)Nos.891 and 892 of 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
14.12.2022	21.12.2022

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.(MD)Nos.891 and 892 of 2008

and

M.P.(MD)Nos.1 and 1 of 2008

1.Ramana Dhandapani, S/o.Krishnan Chettiar
2.Kanaka Subramani, S/o.Krishnan Chettiar
3.R.Subbammal (Died)
[3rd Appellant died, Memo recorded with
U.S.R.No.5340, dated 17.11.2017, vide
Court order dated 14.06.2018]

... Appellants in both the C.M.As.

VS.

1.A.Sundararajan
2.A.Rajaram
3.A.Muralikrishnan
4.A.Poli Krishnan
5.A.Chandrakantham
6.K.Padmavathi
7.S.Makeshwari
8.M.Vimala Devi
9.P.Umarani

... Respondents in both the C.M.As.

Prayer in both the C.M.As. :- Civil Miscellaneous Appeals filed under Order 43 Rule 1 (u) of the Code of Civil Procedure, against the judgment and decree dated 19.03.2008, passed by the learned I Additional Subordinate Judge, Trichy, in A.S.Nos.150 and 151 of 2006, filed against the judgment and decree dated 29.08.2005, passed by the learned District Munsif, Manapparai, in O.S.Nos.211 of 1999 and 30 of 2002.



C.M.A.(MD)Nos.891 and 892 of 2005

For Appellants
in both the C.M.As.

: Mr.Raguvaran Gopalan

For Respondents 1 to 4
in both the C.M.As.

: Ms.J.Maria Roseline

For Respondents 5 to 9
in both the C.M.As.

: No Appearance

COMMON JUDGMENT

These two Civil Miscellaneous Appeals are preferred by the plaintiff in O.S.Nos. 211 of 1999 and 30 of 2002. Both tried together and dismissed by the common judgment, dated 29.08.2005.

2. Aggrieved by that, the appellants preferred First Appeals before the lower Appellate Court alleging that the trial Court has failed to properly appreciate the evidence let in by the plaintiff to substantiate his relief of permanent injunction. The said appeals were heard by the lower Appellate Court, framed points for consideration along with I.A.No.107 of 2008, seeking appointment of Advocate Commissioner to inspect the property of the defendants and submit a report. After considering the facts of the case, the lower Appellate Court allowed the application for appointing the Advocate Commissioner and remanded back the matter to the trial Court for re-trial after receiving the Advocate Commissioner's Report.



3. The said order of remand and re-trial and the order passed to appoint an Advocate Commissioner, is challenged by way of Appeals Against the Order.

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4. The learned counsel appearing for the appellants submitted that the order of remand by the lower Appellate Court is contrary to law and evidence. To fill up the lapse and *lacuna*, the legal heirs of the plaintiff has filed an application to appoint an Advocate Commissioner to measure the land of the defendants and the same has been allowed prejudicial to the interest of the defendants. Ignoring the fact that the plaintiff earlier sought for appointment of Advocate Commissioner to measure his land and the Advocate Commissioner's Report so received has not been objected by him, having lost the suit, make attempt to enlarge the plea by filing an Application to appoint an Advocate Commissioner to measure the land of the defendants, which is not the subject matter of the suit. Without scrapping the earlier Advocate Commissioner's Report, the lower Appellate Court cannot appoint a fresh Advocate Commissioner for the same purpose. When the plaintiff has not objected to the earlier Advocate Commissioner's Report before the trial Court, is estopped from challenging the Advocate Commissioner's Report at the appellate stage. Even if Advocate Commissioner is appointed, it will not ascertain the possession of the property on the western side of the common wall.



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5. Per contra, the learned counsel appearing for the respondents 1 to 4 submitted that the lower Appellate Court after perusing the records and framing point for consideration has come to the right conclusion that in the given case and circumstances, since title to the property in dispute has been derived by sparing parties from a common source and while the plaintiff claims title over the property on the western side, the defendants property is located on the eastern side of the common wall. The damage caused to the northern end of common wall, leading to the alleged encroachment into the land of the plaintiff being the subject matter in both the suits. The measurement of the plaintiff's land by the earlier Advocate Commissioner has not provided enough material to determine the dispute and therefore, the lower Appellate Court has thought fit to allow the application to appoint an Advocate Commissioner to measure the land of the defendants based on the title deed and possession and arrive at a right conclusion and hence, there is no error in the order of remand and allowing the application to appoint an Advocate Commissioner to measure the land of the defendants.

6. The learned counsel appearing for the appellants submitted that the appellants, who have instituted the suit ought to have taken out the present Application in the course of the trial itself. Having failed and lost the suit, just to fill up the lapse and *lacuna*, they have filed I.A.No.107 of 2008 before the lower Appellate Court. The Hon'ble Supreme Court as well as the High Court have



categorically held that the parties cannot make good of their lapse in the appeals by filing applications and order of remand should not facilitate such attempt. While so, when the trial Court has rightly dismissed the plaint for not establishing the possession over the suit property, the same issue cannot be re-agitated by measuring the land of the defendants, which will no way enhance the case of the plaintiff.

7. From the pleadings, it appears that the appellants and the respondents are neighbouring land owners, separated by a common wall constructed by the predecessors of the plaintiff granting permission to the defendants to make use of the common wall for putting up amenities. Now, dispute has cropped up due to the portion of the wall being damaged and there is no clear cut demarcation of boundary between the land of the plaintiff and the defendants. In the said circumstances, based on the title deed, the respective extent and possession sought to be ascertained by the parties, however, the earlier Advocate Commissioner has been issued warrant to measure the land of the plaintiff alone. The land in possession of the defendants *qua* the title deed is now sought to be measured, the order of remand and allowing the Application to appoint Advocate Commissioner facilitate the plaintiff to establish that the defendants are in possession over and above their title deed and that portion, which is already marked as A, B, C and D in the earlier Advocate Commissioner's Report belongs to the plaintiff.



8. As pointed out by the learned counsel appearing for the appellants, this attempt is only to fill up the *lacuna* and lapse. The plaintiff, who has instituted the suit, ought to have taken all steps to prove his case including appointment of the Advocate Commissioner to measure the land of the defendants also. Having failed to do so and lost the suit, to fill up the *lacuna*, he cannot seek for measurement of the defendants' land, which will not enhance the case of the plaintiff, unless and until he on his own has proved that his lands have been attempted to be encroached by the defendants. Furthermore, if the extent of the land in possession can be determined only based on the title deed, then, the plaintiff ought to have filed a suit for declaration and possession, the bare injunction suit is not complete remedy to him. By virtue of the remand order, an undeserved lease of life is given to the litigation, which is not contemplated under Order XLI Rule 21 or 23-A or 25 of C.P.C.

9. For the said reason, this Court finds that the order of the lower Appellate Court, remanding the matter back to the trial Court, is contrary to law and facts, hence, liable to be set aside. Accordingly, the judgment and decree of the lower Appellate Court is set aside. The lower Appellate Court is directed to consider the appeal on merits of the case as available on record and pass appropriate orders, within a period of six months from the date of receipt of a copy of this judgment.



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10. In the result, these Civil Miscellaneous Appeals are allowed. No costs.

Consequently, connected Miscellaneous Petitions are closed.

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Index : Yes / No
Internet : Yes
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21.12.2022

To

- 1.The I Additional Subordinate Judge,
Trichy.
- 2.The District Munsif,
Manapparai.
- 3.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN, J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN
C.M.A.(MD)Nos.891 and 892 of 2008

DATED : 21.12.2022