



C.M.A.(MD)No.709 of 2022

WEB COPY

Reserved on : 29.09.2022

Pronounced on : 24.11.2022

CORAM:

THE HON'BLE MR.JUSTICE **K.MURALI SHANKAR**

C.M.A.(MD)No.709 of 2022
and C.M.P.(MD)No.6222 of 2022

M.Rajesh,
S/o.Manak,
Proprietor M.P.Jewellery,
No.32, Periya Theru,
Kumbakonam Town,
Kumbakonam Taluk and Munsif
Thanjavur District.

...Appellant/Appellant/Defendant

Vs.

The Executive Officer,
Arulmigu Someshwarar Swamy Thirukovil,
represented by its
Arulmigu Sarangapani Swamy Thirukovil,
Kumbakonam Town,
Kumbakonam Taluk and Munsif
Thanjavur District.

...Respondent/Respondent/Plaintiff

Prayer : This Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of Civil Procedure Code, to set aside the judgment and decree with regard to remanding portion dated 23.03.2022 made in A.S.No.35 of 2019 on the file of the Principal Sub Court, Kumbakonam remanding the matter in judgment and decree dated 16.11.2018 made in O.S.No.419 of 2014 on the file of the



C.M.A.(MD)No.709 of 2022

Principal District Munsif, Kumbakonam and allow this Civil Miscellaneous Appeal.

For Appellant : Mr.G.Gomathi Sankar

For Respondent : Mr.V.Chandra Sekar

JUDGMENT

The Civil Miscellaneous Appeal is directed against the judgment and decree passed in A.S.No.35 of 2019 dated 23.03.2022 on the file of the Principal Subordinate Court, Kumbakonam.

2. The respondent/plaintiff, who is the Executive Officer of Arulmigu Someswarar Swamy Temple, Kumbakonam, has laid a suit in O.S.No.419 of 2014 against the appellant/defendant claiming the reliefs of permanent injunction restraining the appellant/defendant and his men from in any manner making permanent constructions so as to hide the tower of the Temple and for mandatory injunction directing the appellant/defendant to demolish the constructions made, in such a way, which hide the tower of the Temple.

3. The learned Principal District Munsif, after framing necessary issues, has proceeded with the trial, wherein, the respondent/plaintiff has examined two witnesses as P.W.1 and P.W.2 and exhibited seven documents as Ex.A.1 to



C.M.A.(MD)No.709 of 2022

Ex.A.7 and that the appellant/defendant has examined himself as D.W.1 and adduced no documentary evidence. The Advocate Commissioner's report and plan have been exhibited as Ex.C.1 and Ex.C.2.

4. The learned Principal District Munsif, upon considering the evidence, both oral and documentary and on hearing the arguments of both, had passed the judgment dated 16.11.2018 granting permanent injunction restraining the appellant/defendant and his men from making permanent constructions in the suit property, in such a way, hiding the tower of the Temple and mandatory injunction directing the appellant/defendant to demolish the constructions made violating 9 meters height restrictions shown in the Government Order in G.O.No.22 of 1997 and in such a way, hiding the tower of the Temple within two months from the date of judgment and costs. Aggrieved by the said judgment and decree, the appellant/defendant had preferred an appeal in A.S.No.35 of 2019 and the learned Principal Subordinate Judge, upon considering the evidence on record and on hearing the arguments of both, had passed the impugned judgment dated 23.03.2022 allowing the appeal and thereby, setting aside the judgment and decree dated 16.11.2018 passed in O.S.No.419 of 2014 on the file of the Principal District Munsif Court, Kumbakonam and remitted the matter back to the trial Court for retrial.



C.M.A.(MD)No.709 of 2022

Challenging the remand order, the appellant/defendant has preferred the present Civil Miscellaneous Appeal.

5. The learned counsel appearing for the appellant/defendant would contend that the learned appellate Judge remanded the matter by indirectly permitting the respondent/plaintiff to fill up the lacuna, which is legally unsustainable, that the learned appellate Judge should have decided the matter himself, based on the sufficient evidence available and could not have remanded the matter to the trial Court, that there were no grounds to remand the matter in the appeal suit, and that therefore, the appellant/defendant was constrained to file the present appeal challenging the remand order passed by the appellate Court.

6. Admittedly, the suit property is owned by the appellant/defendant and situated in Town Survey Nos.933 and 937 of Kumbakonam Town and the building bearing Door No.5, Someswarar Sannathi Street, Thanjavur Main Road within the limits of Kumbakonam Municipality, to an extent of 40 feet breadth and 81 feet length situated on the East of Someswarar Temple and compound wall, North of Sannathi, South of Sarangapaniswamy Temple and West of Municipality Lane.



C.M.A.(MD)No.709 of 2022

7. It is not in dispute that the respondent/plaintiff sent a legal notice dated 21.03.2013 directing the appellant/defendant not to make any constructions, in such a way, to hide the tower of the Temple and in such a way, to obstruct the people from using the portion abutting the Temple compound wall. The appellant/ defendant, having received the said legal notice, has sent a reply notice dated 25.03.2013 admitting his on-going constructions in the suit property and specifically undertakes not to make any constructions, in such a way, to hide the tower of the Temple and not to damage the compound wall of the Temple. The respondent/plaintiff, by alleging that inspite of the undertaking given by the appellant/defendant, he made constructions, in such a way, hiding the tower of the Temple and obstructing the public from proceeding in the way abutting the compound wall and that the request made to the appellant/defendant in person was of no avail, was constrained to file the above suit claiming the permanent injunction and mandatory injunction referred above.

8. The learned appellate Judge, by advancing two reasons, has remanded the matter back to the trial Court, permitting the respondent/plaintiff to amend the plaint and directing the trial Court to frame additional issue and to afford an



C.M.A.(MD)No.709 of 2022

opportunity to both the parties to adduce further evidence and then to decide the suit in accordance with law.

9. The first reason advanced by the appellate Court is that the description of property given in the plaint does not contain the measurements of the building sought to be demolished. The learned appellate Judge has relied on the judgment of this Court in *Palaniammal Vs. Nanjunda Gounder* reported in **2006 (3) TLNJ (Civil) 680**, cited by the learned counsel appearing for the appellant/defendant, wherein, a learned Judge has observed that the suit for mandatory injunction is not maintainable, in the absence of description of property, for which, mandatory injunction is sought for and that if a decree is to be passed for mandatory injunction, which should be executed effectively, without any problem, for that the property, which is sought to be removed, whether it is pipeline or superstructure, as the case may be should be described separately with measurement.

10. The learned counsel appearing for the appellant/defendant would also now contend that the respondent/plaintiff himself has admitted that the suit property was not given properly as per Order 7 Rule 3 of Code of Civil Procedure, that the courts below have failed to see that the respondent/plaintiff



C.M.A.(MD)No.709 of 2022

has not clearly identified the suit property and the portion sought to be demolished, that they have also failed to see that the identification of the property is very much necessary so far as the relief of mandatory injunction is concerned and that the learned appellate Judge ought to have decided that the suit for mandatory injunction itself is not maintainable for want of necessary particulars and measurements of the property.

11. Generally, in a suit for mandatory injunction, the plaintiff has to furnish the particulars of the property including measurements, for which, the relief of mandatory injunction is sought for and the reason is obvious that the property sought to be demolished or removed is to be identified, at the time of executing the decree for mandatory injunction, if granted. In most of the cases, the plaintiff alleging that the defendant had encroached or trespassed into his property and occupied a particular portion of the property and made constructions therein, then the plaintiff being owner of that property is duty bound to furnish all the particulars with regard to the said property and the measurement of the encroached portion and measurement of the constructions, sought to be demolished and removed. There is absolutely no doubt with respect to the above legal position.



C.M.A.(MD)No.709 of 2022

WEB COPY

12. But in the case on hand, admittedly, the appellant/defendant is the owner of the suit property and the constructions now in dispute are in the property of the appellant/defendant. According to the respondent/plaintiff, the appellant/defendant, in utter violation of the Government Order, has constructed his building, in such a way, hiding the tower of the Temple and as such, plaintiff cannot be expected to enter into the property of the appellant/defendant and measure the building and note down the impugned constructions.

13. As already pointed out, the respondent/plaintiff has claimed the mandatory injunction for removal of the entire constructions made in the suit property, in such a way, hiding the tower of the Temple. But, the learned Principal District Munsif, considering the evidence and also taking note of the Government Order referred by the respondent/plaintiff, has not granted the mandatory injunction as prayed for, by the respondent/plaintiff, but on the other hand, restricted relief was granted for removal of the constructions made violating 9 meters height noted in the Government Order, in such a way, hiding the tower of the Temple. The learned appellate Judge, in his judgment, has observed that the trial Court has framed an issue as to whether the respondent/plaintiff is entitled to get mandatory injunction, that the



C.M.A.(MD)No.709 of 2022

respondent/plaintiff has not furnished the particulars about length and breadth of the building sought to be demolished, that a specific issue was not framed and that granting of reliefs by the trial Court, without any pleadings, without any proper issues, without any such prayer and without affording any opportunity to the appellant/defendant, would not be in the interests of justice. The learned appellate Judge, by further observing that since the respondent/plaintiff has not furnished the length and breadth of the building sought to be demolished, the very claim of mandatory injunction is not maintainable, has directed the respondent/plaintiff to make necessary amendments in the plaint.

14. As already pointed out, such a finding recorded by the appellate Court is not proper and is not in accordance with law.

15. Now turning to the second reason assigned by the appellate Court for remanding is that there is no pleadings with regard to the Government Order in G.O.No.22 of 1997 in the plaint, that the appellant/defendant was not given any opportunity to take a defence with respect to the said Government Order, that the trial Court has not framed any issue and thereby, the appellant/respondent



C.M.A.(MD)No.709 of 2022

was not given any chance to adduce any evidence and that therefore the decision of the trial Court in granting the mandatory injunction, on the basis of the said Government Order is not sustainable.

16. The learned counsel appearing for the appellant/defendant would submit that there was no pleadings with regard to Government Order in G.O.No. 22 of 1997 and without any pleadings and without framing any issue with regard to Government Order, the trial Court granted the relief of mandatory injunction, which is legally unsustainable, that the Advocate Commissioner appointed before the trial Court has filed a report stating that the appellant/defendant left out 3 feet space between the Temple compound wall and his building and that the trial Court, without considering the Advocate Commissioner's report, has decreed the suit and the same is against law and unsustainable. He would further submit that the courts below have failed to see that there was no mention about the encroachment of the Temple property and construction of the building in violation of G.O.No.22 of 1997 in the plaint and that they have given findings without any evidence as to the encroachment of the Temple property and the constructions made therein and thereby, the Temple tower was concealed.



C.M.A.(MD)No.709 of 2022

WEB COPY

17. No doubt, as rightly pointed out by the learned counsel appearing for the appellant/defendant, the respondent/plaintiff in their plaint has nowhere whispered about the Government Order in G.O.No.22 of 1997.

18. During trial, the learned counsel appearing for the respondent/plaintiff has brought the Government Order to the notice of the learned Principal District Munsif and the learned Principal District Munsif, in his judgment, has specifically observed that in pursuance of his power under Section 57 of Indian Evidence Act, he downloaded the copy of the Government Order in G.O.No.22 of 1997 dated 30.01.1997 and wherein, a condition was imposed for the buildings to be constructed within 1 kilometer of the perimeter of the ancient Temple shall not exceed 9 meters in height and in the said Government Order, they have listed out 38 towns or cities, in which, the said restriction/condition is applicable. As rightly pointed out by the learned trial Judge, Kumbakonam finds place in the said Government Order in Serial No.8.

19. In jurisprudence, *ignorantia juris non excusat* (“ignorance of the law excuses not”) or *ignorantia legis neminem excusat* (“ignorance of law excuses no one”) is a basic legal principle holding that a person, who is unaware of a law, may not escape liability for violating that law merely by being unaware of



C.M.A.(MD)No.709 of 2022

its content. To put it in other way, presumed knowledge of the law is the principle in jurisprudence that one is bound by a law even if one does not know of it and it can also be called as the prohibition of ignorance of the law.

20. In the words of Oliver Wendell Holmes, “Ignorance of the law is no excuse for breaking it. This substantive principle is sometimes put in the form of a rule of evidence, that every one is presumed to know the law.”

21. Considering the above, there is no dispute about the position of law that the ignorance of law is no excuse and no one can escape from the liability for breaking the law by taking a defence that he is not aware of the said law.

22. It is pertinent to note that any Government Order, which is published in the Official Gazette takes the characteristics of a law. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***State of A.P. and others Vs. Twin City Jewellers Assn. and others*** reported in (2005) 13 SCC 552 and the relevant passages are extracted hereunder:-

“8. It could not be denied that GO No.303 dated 15-4-1997 was published in the Official Gazette on 23-4-1997. It is settled law that once publication in the Official Gazette takes place, it is deemed to be known to all. Ignorance of law



C.M.A.(MD)No.709 of 2022

WEB COPY

can be no excuse. Once the GO was published, from the date it was published, it became effective. As it became effective from that date, the tax was leviable at the rate of 4%. If some assessing officers, due to their own ignorance or laxity accepted returns at the rate of 2% it did not permit the High Court to ignore the law and continue such laxity to prevail. It must be remembered that the assessing officer, who had assessed wrongly, could always reopen the assessment.

....

11. It was also submitted that since there was a lot of confusion and that number of parties including assessing officers were not clear as to what was the rate of tax, this Court should not interfere with the judgment of the High Court which has been passed on equitable basis. We see no substance in this submission. If the law is clear then it must be given effect to. Merely because the parties were unaware of the law does not mean that courts can ignore the law and provide to the contrary.”

23. A Division Bench of this Court in ***A.P.Suryaprakasam Vs. State of Tamil Nadu, represented by its Secretary, Civil Supply Department and others*** reported in ***2020 SCC OnLine Mad 5981*** by relying on the legal maxim “*Ignorantia legis neminem excusat*”, has specifically observed that even a common man cannot plead that he is ignorant of law of the Government.



C.M.A.(MD)No.709 of 2022

24. In the present case, the learned Principal District Munsif, after coming to know about the Government Order, has downloaded the Government Order and used it for deciding the case on hand.

25. It is not the specific case of the appellant/ defendant that there was no such Government Order or that the said Government Order has already been cancelled or revoked or recalled. Since the Government Order is the law of the State Government, the appellant/defendant cannot plead ignorance of the same. It is fundamental that legal pleas can be taken at any time and the concept that any amount of evidence without pleadings, is of no use, is not applicable. Hence, the observation of the learned appellate Judge that the plea with regard to Government Order ought to have been pleaded in the plaint and the appellant/ defendant should have been given an opportunity to defend the same, is not proper and unacceptable.

26. The learned counsel appearing for the appellant/defendant would strongly contend that the appellant/defendant has made constructions in the suit property with the approval and plan of the Municipality authorities and that he does not violate any rules against the building approval given by the Municipality. But, admittedly, as rightly observed by the learned trial Judge, the



C.M.A.(MD)No.709 of 2022

appellant/defendant has not produced the approval or the permission alleged to have been obtained by him for making the said constructions.

27. As already pointed out, the appellant/defendant, except examining himself, has adduced no other evidence. Since the appellant/defendant has taken a specific stand that he has constructed the buildings only as per the permission or approval granted by the Municipality authorities and that he has not violated any Order or Rule of the Government, he is duty bound to produce the necessary documents to substantiate his defence. Though such a plea was raised before the appellate Court as well as before this Court, the appellant/defendant has not chosen to produce the said documents and he has also not offered any reason or explanation for non-production of the same.

28. It is evident from the records that the Advocate Commissioner appointed by the trial Court has inspected the suit property and filed a report and plan under Ex.C.1 and Ex.C.2 respectively.

29. As rightly contended by the learned counsel appearing for the respondent/plaintiff, the trial Court, by observing that the appellant/defendant has not raised any objections, has relied on the Ex.C.1 and Ex.C.2 and gave his findings.



C.M.A.(MD)No.709 of 2022

30. Considering the above, the reasons/grounds assigned by the learned appellate Judge in remanding the matter back to the trial Court for fresh consideration are not in accordance with law and as such, consequently, the judgment and decree of the appellate Court are liable to be set aside.

31. As rightly contended by the learned counsel appearing for the appellant/defendant, though the judgment and decree of the appellate Court was only in favour of the appellant/defendant, as the appellate Court has set aside the judgment and decree granted in favour of the respondent/plaintiff by the trial Court, this Court is at loss to understand the purpose and intention behind the filing of the present appeal. But whatever it is, since the amendment of the plaint as directed by the appellate Court is not necessary, the appellate Court is to be directed to proceed with the hearing of the appeal and dispose of the same. Since the appellant/defendant has taken a stand even before this Court that they are having necessary approval and permission from the Municipality authorities for making the constructions in the suit property, they are at liberty to produce the same by invoking Order 41 Rule 27 of Code of Civil Procedure.

32. Considering the facts and circumstances of the case, this Court further decides that the appellant/defendant is to be directed to pay the costs of the appeal to the respondent/plaintiff.



C.M.A.(MD)No.709 of 2022

WEB COPY

33. In the result, this Civil Miscellaneous Appeal is allowed and the impugned judgment and decree passed in A.S.No.35 of 2019 dated 23.03.2022 on the file of the Principal Subordinate Court, Kumbakonam is set aside. The appellant/defendant is at liberty to adduce additional evidence invoking Order 41 Rule 27 of Code of Civil Procedure. The learned appellate Judge is directed to consider the pleadings and evidence already on record and the additional evidence to be adduced, if any and to hear the parties and pass a judgment in accordance with law within a period of one month from the date of a receipt of a copy of this judgment. The appellant/defendant is directed to pay the costs of the appeal to the respondent/plaintiff. Consequently, connected miscellaneous petition is closed.

24.11.2022

Index :yes/No

Internet:yes/No

csm

To

1. The Principal Subordinate Court,
Kumbakonam.
2. The Principal District Munsif,
Kumbakonam.



WEB COPY



C.M.A.(MD)No.709 of 2022

K.MURALI SHANKAR,J.

csn

Pre-Delivery Order made in
C.M.A.(MD)No.709 of 2022
and C.M.P.(MD)No.6222 of 2022

24.11.2022