



C.M.A.NO.1546 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.07.2023

CORAM :

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

C.M.A.No.1546 of 2023
and C.M.P.No.15662 of 2023

K.G.Padmanabhakurup, ...Appellant/Respondent/Plaintiff

Versus

K.Kalyanasundaram ...Respondent/Appellant/Defendant

PRAYER : Civil Miscellaneous Appeal has been filed under Order 43 R (1) (u) of Civil Procedure Code, against the Judgment and Decree passed by the VII Additional City Civil Court at Chennai in A.S.No.129 of 2018 dated 10.10.2022 setting aside the Judgment and Decree passed by the II Assistant City Civil Court in O.S.No.7698 of 2012 dated 31.10.2017.

For Appellant : Mr.A.C.Rajan
For Respondent : Mr.Sharath Chandran for
M/s.A.Prakash



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JUDGMENT

WEB COPY The above appeal has been preferred against the Judgment and Decree in A.S.No.129 before the VII Additional City Civil Court, Chennai, dated 10.10.2022, of remanding the matter to the Trial Court/II Assistant City Civil Court.

2. The brief facts leading to the above appeal are as follows:-

(a) The appellant/respondent/plaintiff filed a Suit in O.S.No.7698 of 2012 praying for a mandatory injunction restraining the respondent/appellant/defendant to remove fittings and accessories made in the wall of the plaintiff's building in the northern side and also to demolish the second floor wall raised from the wall of plaintiff's building and for permanent injunction restraining the respondent from interfering with the wall of the plaintiff's building.

(b) The Trial Court, after considering the pleadings and the evidence let in held that the appellant was entitled to the Decree as prayed for.

(c) The respondent preferred O.S.No.5567 of 2013, praying for mandatory injunction directing the appellant herein to remove the



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encroachments made by the defendant into the property of the plaintiff by constructing ground, first and second floors on the South Western and South Eastern side of the respondent's property shown in Schedule B of the plaint and for permanent injunction restraining the defendant. The said Suit filed by the respondent herein was dismissed.

(d) The respondent herein filed A.S.No.129 of 2018 challenging the Judgment and Decree in O.S.No.7698 of 2012 filed by the appellant. He had also filed A.S.No.219 of 2018 challenging the dismissal of the Suit in O.S.No.5567 of 2013 before the VII Additional City Civil Court, Chennai. Both appeals were taken up together by the Lower Appellate Court.

(e) The respondent herein contended that the findings in both the Suits were based on the report of the learned Advocate Commissioner, which was submitted in haste; that the learned Advocate Commissioner was appointed on 20.12.2012 and was asked to submit his report on 21.12.2012; that there was no opportunity given to the respondent to explain to the learned Advocate Commissioner about the details of the property; that it was the case of the respondent that the learned Advocate Commissioner did not inspect his property and inspected only the appellant's property; that the



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observations of the learned Advocate Commissioner were not accurate, since he had filed a report only by observing the building from outside; that therefore, the learned Advocate Commissioner's report cannot be accepted and the finding of the Trial Court, based on the said report is erroneous. The respondent further contended that the Trial Court ought to have conducted a joint trial but failed to do so in spite of a memo.

(f) The Appellate Court found that the learned Advocate Commissioner had not visited the respondent's property and, therefore, his report cannot be the basis for making any finding and thus, set aside the Judgments passed in both the Suits. Thus, both appeals were allowed with the direction to the Trial Court for fresh disposal by appointing a new Advocate Commissioner to inspect the properties with the help of a qualified Surveyor and also to permit the parties to adduce additional evidence and then decide the matter in accordance with law on or before 30.06.2023.

3.The appellant, aggrieved by the said order of remand, has preferred the above appeal against the Judgment in A.S.No.129 of 2018.

4. Mr.A.C.Rajan, the learned counsel for the appellant, submitted that



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even if the lower Appellate Court found that the learned Advocate Commissioner did not give sufficient opportunity, the Appellate Court could have appointed an Advocate Commissioner and decided the case on its merits; that it is well settled that an order of remand cannot be passed on mere asking; that the Suit was filed ten years ago and by the order of remand, the litigation is sought to be prolonged and; that therefore, prayed for setting aside the Judgment passed by the Lower Appellate Court.

5. Mr.Sharath Chandran, learned counsel for the respondent and representing the counsel for the Caveator, submitted that the appellant had challenged the Judgment passed in A.S.No.129 of 2018 and had not challenged the Judgment passed in A.S.No.219 of 2018, which emanated from the Suit filed by the respondent. The trial, therefore, proceeded and an Advocate Commissioner was appointed by the Trial Court, and he had noted the physical features. Further, there is a specific direction by the lower Appellate Court to expedite the trial in both suits and to complete it on or before 30.06.2023. Therefore, the learned Counsel submitted that it would be in the interest of justice to allow the parties to adduce evidence and the Suits are tried jointly after the report of the learned Advocate Commissioner.



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6. This Court is conscious of the settled position of law that remand cannot be made ordinarily unless the Trial Court had omitted to decide any issue or failed to frame any material issue. In the instant case, however, the facts disclose that though it was requested that both the Suits have to be decided jointly, the appellant's Suit was initially dismissed for default and, thereafter, tried separately after restoration. The learned Advocate Commissioner had also given his report in a hasty manner without giving sufficient opportunity to the respondent. Further, it is seen that the appellant had not challenged the Judgment passed in A.S.No.219 of 2018, which was filed against the dismissal of the respondent's Suit in O.S.No.5567 of 2013. It is also seen that an Advocate Commissioner has already been appointed in the Suit filed by the respondent pursuant to the order of remand. The issue is primarily between the neighbours with regard to encroachments alleged against each other. It is desirable that both Suits are tried jointly by giving sufficient opportunity to both parties to adduce evidence. Therefore, this Court is of the view that in the light of the above facts, the Judgment passed by the lower Appellate Court cannot be faulted. Further, since the learned Advocate Commissioner has already been appointed in one of the Suits. It is desirable that the Suit filed by the appellant is also remanded.



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7. Therefore, this Court is of the view that no interference is called for in the Judgment passed by the lower Appellate Court/VII Additional City Civil Court, Chennai. Hence, the Civil Miscellaneous Appeal is dismissed.

8. However, the time to dispose of the case given by the Appellate Court had already expired. Hence, this Court directs the Trial Court/II Assistant City Civil Court to complete the trial within a period of two (2) months from the date of receipt of a copy of this order in both the Suits in O.S.No.7698 of 2012 and O.S.No.5567 of 2013.

9. With the above observations, the Civil Miscellaneous Appeal is dismissed. Consequently, the connected Miscellaneous Petition is closed.

28.07.2023

dk

Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

To

1.The VII Additional City Civil Court,
Chennai



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2.The II Assistant City Civil Court
Chennai.

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SUNDER MOHAN, J

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