



CMA(MD).No.1137 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 11.04.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1137 of 2011

1. Rajmohan(died)Appellant/1st Respondent/Plaintiff
 2. Vedam
 3. P. Lakshmi
 4. R.Rajamanickam
 5. Karthikeyan
 6. Siva Bakiya Appellants
- (Appellants 2 to 6 are brought on record as
LRS of the deceased sole appellant vide
order of this Court dated 05.07.2022 made in
C.M.P(MD) Nos.5176 and 5178 of 2022 in
C.M.A (MD) No. 1137 of 2011)

Vs.

1. Selvaraj (died) 1st Respondent/Appellant/1st Defendant
 2. The Sub Registrar,
Thiruvidadaimaruthur 2nd Respondent/2nd Respondent/2nd Defendant
 3. Pattammal
 4. Renuka
 5. Radhika ... Respondents 3 to 5
- Respondents 3 to 5 are brought on record as
LRS of the deceased 1st Respondent vide
order of this Court dated 02.02.2022 made in
C.M.P(MD) Nos. 8046 to 8048 of 2018
in C.M.A.(MD) No.1137 of 2011)



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PRAYER:- Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of C.P.C., against the order of remand in A.S.No.89 of 2010, dated 23.03.2011 on the file of the Principal Sub-Court, Kumbakonam reversing the judgment and decree passed in O.S.No.271 of 2009 on the file of the Principal District Munsif, Kumbakonam, dated 23.11.2010.

For Appellants : Mr.K.Guhan

For Respondents : Mr.N.G.A.Natraj
Government Advocate – for R2
: Mr.M.R.S.Prabhu
for R3 to R5

J U D G M E N T

The present Civil Miscellaneous Appeal has been filed challenging the order of remand passed by the first appellate Court.

2. The appellant herein, as plaintiff, had filed a suit O.S.No.271 of 2009, before the Principal District Munsif, Kumbakonam for the relief of permanent injunction not to disturb his possession or not to create any incumbrance over the suit schedule property excluding “A, E, F, G, H I” portion.



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3. According to the plaintiff, he is the owner of the suit schedule property and out of the said suit schedule property, a portion viz., A, E, F, G, H, I is in occupation of the defendants. Admitting the said occupation, the plaintiff had filed a suit for permanent injunction not to disturb his possession excluding the portion that is in possession of the defendants.

4. The first defendant has filed a written statement disputing the title and a possession of the plaintiff for the remaining portion also.

5. The Trial Court, after considering the oral and documentary evidence, had decreed the suit as prayed for. Challenging the same, the first defendant had filed A.S.No.89 of 2010, before the Principal Sub-Court, Kumbakonam. The learned Subordinate Judge, after considering the oral and documentary evidence, arrived at a finding that unless an Advocate Commissioner is appointed, the portion that is in possession of the defendant cannot be ascertained. The first appellate Court, in paragraph No.12 of the judgment has arrived at a finding that an



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Advocate Commissioner should be appointed and he should inspect the suit property with the help of a Surveyor and he should file a report. Thereafter, the parties will be permitted to let in additional oral and documentary evidence. For the said purpose, the order of remand was passed by the trial Court. The said order of remand is under challenge in the present appeal.

6. According to the learned counsel appearing for the appellant/plaintiff, if the first appellate Court is of the opinion that unless an Advocate Commissioner is appointed, the issue cannot be resolved, the first appellate Court itself could have very well appointed an Advocate Commissioner along with a Surveyor and obtained a report. For the said purpose, the entire suit need not been remanded back to the trial Court.

7. Per contra, the learned counsel appearing for the respondents/defendants had contended that the plaintiff has specifically excluded some portion of the suit schedule property on the ground that the defendants are in possession of the property. Therefore, unless an Advocate Commissioner is appointed with the help of the Surveyor, the



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Court cannot decide the issue with regard to the extent of the property that is allegedly in possession of the plaintiff. Hence, he prayed that the order of remand may be sustainable.

8. I have carefully considered the submissions made by the learned counsel on either side.

9. The Plaintiff had filed a suit for permanent injunction with regard to the suit schedule property after excluding some portion of the suit schedule property on the ground that the first defendant is in possession of the said portion of the property. Therefore, it is clear that the Court should first arrive at a finding that which portion of the suit schedule property is actually in possession of the first defendant and which portion of the property is in possession of the plaintiff. Therefore, the appointment of an Advocate Commissioner to earmark the A, E, F, G, H, I is required. That apart, he can note down the physical features of the property, which are alleged by the either parties. The Commissioner could be appointed by the first appellate Court itself and after receiving objection from the either parties, the first appellate Court can decide the



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appeal on merits. For the appointment of an Advocate Commissioner, the suit ought not to have been remanded back to the trial Court.

10. In view of the above said deliberations, the order of remand passed by the first appellate Court is hereby set aside, the respondents/defendants hereby undertakes to file an application for appointment of an Advocate Commissioner to note down the physical features of the suit property along with a Surveyor. If any, such application is filed the same may be considered on merits and in accordance with law. After considering the objections, filed by the parties to the Advocate Commissioner's Report, the appeal shall be decided on merits, after giving opportunity to both the parties. The Commissioner shall note down the physical features of the suit property and measure the same with the help of a Surveyor on the basis of the documents produced by both the parties.



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11. With the above said observations, this Civil Miscellaneous Appeal is allowed. No costs.

11.04.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

- 1.The Principal Sub-Court,
Kumbakonam.
2. The Principal District Munsif,
Kumbakonam
- 3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Judgement made in
C.M.A(MD)No.1137 of 2011

11.04.2023