



C.M.A(MD)No.1423 of 2012

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **29.03.2023**

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THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1423 of 2012

Sarangapani ... Appellant/Respondent/Plaintiff

Vs.

1.Rajaguru

2.Chellaiah

... Respondents/Appellants/
Defendants

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1 (u) of Code of Civil Procedure, to set aside the judgment and decree dated 13.07.2012 in A.S.No.91 of 2011 on the file of Subordinate Judge, Sankarankovil in remanding and setting aside the judgment and decree, dated 15.07.2011 passed in O.S.No.7 of 2010 on the file of the Principal District Munsif, Sankarankovil.

For Appellant : Mr.F.X.Eugene

For R1 : Mr.D.Nallathambi

For R2 : No Appearance



C.M.A(MD)No.1423 of 2012

JUDGEMENT

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The plaintiff in a suit for declaration of title and permanent injunction has filed the present appeal challenging an order of remand passed by the first appellate Court.

2. The plaintiff had filed O.S.No.7 of 2010 on the file of Principal District Munsif Court, Sankarankovil for the relief of declaration of title and permanent injunction with regard to 0.59.5 hectares of land in Survey No.194/1. After full-fledged trial, the suit was decreed by the trial Court on 15.07.2011. The defendant had filed A.S.No.91 of 2011 before Sub Court, Sankarankovil. The main contention of the defendants in the appeal was that the property purchased by the 2nd defendant and the plaintiff are different and the both the properties are not over lapping properties, but only adjacent properties. Unless an Advocate Commissioner is appointed, the actual identification of the property cannot be made out. Therefore, the defendants/appellants have filed I.A.No.84 of 2010 before the first appellate Court for appointment of an Advocate Commissioner to note down the physical features of the property with the help of a surveyor. No orders were passed in the said application.



C.M.A(MD)No.1423 of 2012

WEB COPY

3. The first appellate Court arrived at a finding that unless an Advocate Commissioner is appointed and the properties of the plaintiff and the defendant are identified, the suit cannot be decided. The first appellate Court has also arrived at a finding that the plaintiff as well as the defendants have agreed for appointment of an Advocate Commissioner in order to identify the suit property. After arriving at such a finding, the first appellate Court has set aside all the findings of the trial Court and has remitted the matter back to the trial Court only for the purpose of appointment of an Advocate Commissioner. This order of remand is under challenge in the present appeal.

4. According to the learned counsel appearing for the defendants/appellants, they have already filed an application in I.A.No. 84 of 2010 for appointment of an Advocate Commissioner and the said application should have been allowed by the first appellate Court, especially when there is no objection on the side of the plaintiff. Without allowing the said application and appointing an advocate commissioner to identify the suit schedule property, the first appellate Court has erroneously remitted the matter back to the trial Court.



C.M.A(MD)No.1423 of 2012

WEB COPY

5. Per contra, the learned counsel appearing for the respondent/plaintiff had contended that originally the said application for appointment of advocate commissioner was opposed by them, but later, it was found that an appointment of Advocate Commissioner would reduce the oral and documentary evidence and it would be helpful for the Court to reach the correct conclusion. Therefore, they have also agreed for an appointment of Advocate Commissioner. However, the first appellate Court has remitted the matter back to the trial Court, so that the report of the commissioner could be brought on record.

6. I have carefully considered the submissions made on either side.

7. It is settled position of law that if the first appellate Court arrives at a conclusion that an Advocate Commissioner has to be appointed for identifying the suit schedule property, it is within the powers of the first appellate Court to appoint an Advocate Commissioner. Simply for the purpose of appointment of advocate commissioner, an appeal cannot be remitted back to the trial Court. Whenever first appellate Court remits the matter back to the trial Court, the first appellate Court has to set aside all the findings of the trial Court.



C.M.A(MD)No.1423 of 2012

Without setting aside the findings of the trial Court, the first appellate Court cannot remand the matter back to the trial Court. In the present case, the first appellate Court without setting aside any of the findings of the trial court, has proceeded to remand it back to the trial court. That apart, the order of remand is not restricted for the appointment of Advocate Commissioner alone. The first appellate Court has permitted both the parties to let in oral and documentary evidence on all aspects. Therefore, viewed from any angle, the order of remand passed by the first appellate Court is not legally sustainable.

8. In view of the above said facts, the order of remand passed by the first appellate Court is hereby set aside and the matter is remitted back to the file of the first appellate Court. The first appellate Court shall consider I.A.No.84 of 2010 on merits and in accordance with law and pass orders. Since both the parties have agreed for the appointment of an Advocate Commissioner, the first appellate Court is directed to appoint an Advocate Commissioner to inspect the suit schedule properties for the purpose of identifying the suit schedule properties with the help of a Surveyor relying upon the sale deeds of both the parties. After receiving the report of the Commissioner and the objections, if any, from either side, the first appellate Court is directed to proceed with the final hearing



C.M.A(MD)No.1423 of 2012

of the first appeal. The first appellate Court is directed to dispose of the appeal on or before 31.12.2023.

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

29.03.2023

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

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To

- 1.The Subordinate Judge,
Sankarankovil.
- 2.The Principal District Munsif,
Sankarankovil.
- 3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.M.A(MD)No.1423 of 2012

R.VIJAYAKUMAR ,J.

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Order made in
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