



CMA(MD).No.307 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 10.04.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.307 of 2012

and

M.P(MD) No.2 of 2012

1. VijayalakshmiAppellant/1st Respondent/
1st Defendant

2. Thanumalayan Appellant/LR of 2nd Respondent/
LR of 2nd Defendant

Vs.

Padmanabha Pillai ... Respondent/Appellant/Plaintiff

PRAYER:- Civil Miscellaneous Appeal filed under Order 43 Rule (1) (u) of C.P.C, against the order and decretal order in A.S.No.43 of 2010, dated 19.11.2010 on the file of the Subordinate Judge, Padmanabhapuram reversing the order in O.S.No.159 of 2005, dated 04.12.2009 on the file of the Additional District Munsif, Eraniel.

For Appellants : Mr.C.Kishore
for Mr.Sree Kumaran Nair

For Respondent : Mr.M.R.Sreenivasan



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CMA(MD).No.307 of 2012

J U D G M E N T

The defendants in a suit for declaration of the plaintiff's right of easement by prescription over the “B” Schedule property and for consequential injunction, are the appellants herein.

2. The respondent herein as plaintiff had filed O.S.No.159 of 2005 on the file of the Additional District Munsif Court, Iraniel for the relief of declaration of his right of easement by prescription over the “B” Schedule property and for a permanent injunction restraining the defendants from obstructing the drawing of water through “B” Schedule property to “A” Schedule property of the plaintiff.

3. According to the plaintiff, he is the owner of “A” Schedule property in S.No.336/1 and is drawing water through a channel which is running on the northern side portion, which carries water from Petchiparai Dam. The said water is drawn by way of an underground PVC pipe line across the Veeravilai Road and thereafter, through a channel running through the property of the first defendant in S.No.335/2



CMA(MD).No.307 of 2012

and through the second defendant's property in S.No.335/5 and thereafter, reaches the plaintiff's "A" Schedule property.

4. According to the plaintiff, the defendants 1 and 2 have razed the said channel in the "B" Schedule property. Therefore, the present suit.

5. The defendants have filed a written statement contending that the said PVC pipe line beneath the road was laid by them for drawing the water to their own property. The defendants have further contended that there is no water course on the eastern side portion of their property viz., S.Nos.335/2 and 335/5. On the other hand, the defendants have contended that there is a water course only on the western side of their property which reaches the plaintiff's property. Therefore, the defendants have contended that the plaintiff does not have any right of easement to draw water over the property of the defendants.

6. Before the Trial Court, a Commissioner was appointed who had filed a report under Ex.C.1. According to the defendants, the Commissioner had visited the property without issuing notice to the



CMA(MD).No.307 of 2012

defendants. Therefore, the said report cannot be relied upon by the Trial Court. Thereafter, warrant was re-issued to the same Commissioner and after issuing notice to both the parties, the Commissioner visited to inspect the suit property and has filed a report under Ex.C2 and rough Plan under Ex.C3. The Commissioner was examined as CW1. Based upon the second Commissioner's report, the trial Court, arrived at a finding that the plaintiff has not proved that there is a water course on the eastern portion of the defendants property. Based upon the said findings, the trial Court had dismissed the suit. The Commissioner who was examined as CW.1 has also clarified that there is a water course only on the western side of the defendants' property.

7. Aggrieved over the same, the plaintiff had filed A.S.No.43 of 2010, before the Sub Court, Padmanabhapuram. The learned Subordinate Judge, after discussing the judgment of the trial Court, has arrived at a finding that the trial Court has not properly discussed and decided. The first appellate Court further found that the Commissioner's report has also not been properly appreciated by the trial Court. Thereafter, the first appellate Court proceeded to remit the matter back to the trial Court



CMA(MD).No.307 of 2012

after framing five issues. This order of remand is under challenge in the present appeal.

8. According to the learned counsel appearing for the appellants/defendants, the plaintiff had claimed declaration of his easement by prescription alone. However, the first appellate Court had framed issue No.5 to the effect that whether the plaintiff has easementary right by necessity or not. The learned counsel appearing for the appellants had further contended that all the issues that were re-framed by the first appellate Court were already framed by the trial Court and they have been answered on the basis of the oral and documentary evidence and also on the basis of the Commissioner's report and plan. There is no necessity whatsoever for remitting the matter back to the trial Court.

9. Per contra, the learned counsel appearing for the respondent had contended that Ex.C.1 – Commissioner's Report reflects that there is a water course on the eastern side of the defendants' property. However, when the same Commissioner visited for the second time, he had filed a report to the effect that there is no water course on the eastern side of the



CMA(MD).No.307 of 2012

defendants' property, but, there is a water course only on the western side of the defendants' property. Therefore, there is a contradiction between the first Commissioner's report and the second Commissioner's report. When, there is a contradiction between two reports, the first appellate Court was right in remitting the matter back to the trial Court. The plaintiff/appellant had filed I.A.No.137 of 2010 before the first appellate Court for appointment of an Advocate Commissioner and the said application was also allowed by the first appellate Court. Therefore, for filing of the Commissioner's report, receiving objections and for marking the said Commissioner's Report, naturally, the matter has to be remitted back to the trial Court. Hence, he prayed for sustaining the order of remand passed by the first appellate Court.

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

11. Admittedly, an Commissioner was appointed by the trial Court to note down the physical features of the property in a suit for declaration and permanent injunction. The Commissioner has filed a report Ex.C.1



CMA(MD).No.307 of 2012

and the said report is said to have been filed without notice to the defendants. Therefore, the warrant was re-issued to the same Commissioner who had inspected the property in the presence of both the parties and filed a report under Ex.C.2 and the Plan Ex.C.3. The Commissioner was also examined as CW-1. The trial Court has chosen to accept Ex.C2 and Ex.C.3 and had dismissed the suit on the ground that the plaintiff has not established his easementary right over the “B”schedule property.

12. It is the case of the plaintiff/appellant before the first appellate Court that unless a fresh Commissioner is appointed, the issue cannot be resolved. The plaintiff had also filed I.A.No.137 of 2010. After allowing the said application, the first appellate Court ought not to have remitted the matter back to the trial Court. The first appellate Court should have received Commissioner's report and called for objections and based upon the said report and objections, should have proceeded to decide the first appellate Court.



CMA(MD).No.307 of 2012

13. The first appellate Court should always invoke Order 41 Rules 24 to 28 C.P.C, to see that without remanding the appeal, whether the appeal can be disposed off. Only in case whether the first appellate Court arrives at a finding that even after invoking Order 41 Rules 24 to 28 C.P.C., the first appellate Court is not in a position to arrive at a conclusion, then only Order 41 Rule 23 C.P.C, can be invoked and the matter can be remitted back to the trial Court.

14. In the present case, the first appellate Court has arrived at a finding that the report of the Commissioner is insufficient, to arrive at a particular conclusion. In such a case, the first appellate Court ought to have invoked Order 41 Rule 27 C.P.C, for appointment of an Advocate Commissioner and to receive the additional evidence, so that, the issue could be decided by the first appellate Court itself. For the said purpose, it cannot remit back to the trial Court. It is the settled position of law, that whenever the Commissioner's report is lacking in any material particular, the first appellate Court is empowered to appoint an Advocate Commissioner, call for report and objections and thereafter, ought to have proceeded to decide the appeal. In the present case, only for the



CMA(MD).No.307 of 2012

purpose of appointment of an Advocate Commissioner, the appeal has been remanded back to the trial Court.

15. In view of the said deliberations, the order of remand passed by the first appellate Court is hereby set aside and the matter is remitted back to the first appellate Court. The first appellate Court is directed to appoint an Advocate Commissioner as per the order in I.A.No.137 of 2010. The Advocate Commissioner shall file his report within a period of four weeks from the date of receipt of warrant. The first appellate Court is directed to dispose of the appeal on or before **31.12.2023**, after affording an opportunity to both the parties.

16. With the above said observations, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

10.04.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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CMA(MD).No.307 of 2012

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To

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



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CMA(MD).No.307 of 2012

R.VIJAYAKUMAR,J.

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Judgement made in
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