



C.M.A.(MD).No.1516 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 05.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1516 of 2013

and

M.P(MD) No.1 of 2013

Ashokan

.....Appellant/Respondent/Plaintiff

-vs-

1. Pushpanathan (died)

2. Philomina Mary

3. Victoria

4. Josephin Sagayarani

5. Gracy Lourdhu Mary

6. Francies Raja

.... Respondents/Appellants/Defendants

.... Proposed Respondents 3 to 6

(Respondents 3 to 6 are brought on record as the LR's of the deceased 1st respondent vide order dated 30.02.2018 made in C.M.P(MD) No.8050 of 2018 in C.M.A(MD) No.1516 of 2013)

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of C.P.C., against the order of remand made by the judgment and decree, dated 05.02.2013, made in A.S.No.36 of 2010, on the file of the Principal District Judge, Tiruchirappalli, reversing the judgment and decree, dated 11.11.2009, made in O.S.No.250 of 1998 on the file of the District Munsif Court, Musiri.



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For Appellant : Mr.G.Sridharan

For Respondents : Mrs.Maria Roseline
for R2, R3, R5 and R6
: No appearance – For R4

J U D G M E N T

The plaintiff in a suit for permanent injunction with regard to “A” Schedule property and mandatory injunction with regard to “B” Schedule property, has filed the present appeal challenging the order of remand passed by the first appellate Court.

2. The present appellant had filed O.S.No.250 of 1998, on the file of District Munsif Court, Musiri, for the relief of permanent injunction not to disturb the possession and for a mandatory injunction to remove the stair case wall and building portion put up by the defendants in the “B” Schedule Property.

3. According to the plaintiff, “B” schedule property forms part of “A” schedule property. Before the trial Court, two Advocate Commissioners were appointed to note down the physical features of the property and their report



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and plan have been marked as Ex.C1 to Ex.C.4. The Surveyor's sketch has been marked as Ex.C.5. The trial Court, after considering the oral and documentary evidence, has decreed the suit as prayed for.

4. Challenging the above said judgement and decree, the defendants had filed A.S.No.36 of 2010, on the file of the Principal District Court, Tiruchirappalli. Pending appeal, the defendants/appellants had filed I.A.No. 23 of 2013 with the prayer for re-issuance of warrant to the Advocate Commissioners to measure the actual measurement of the plaintiff's property and the defendants property with reference to the title deeds and old survey sketch of the property with the help of a Surveyor.

5. The first appellate Court had arrived at a finding that originally, the plaintiff has not claimed mandatory injunction by filing the suit. Only on the basis of the Commissioner's Report, the plaintiff's had amended the suit prayer and introduced the prayer for mandatory injunction. The encroached portion has been fixed by the plaintiff only on the basis of the Commissioner's Report. However, the encroachments have not been ascertained on the basis of the sale deeds of either parties. Therefore, the first appellate Court felt that the Commissioner has to be appointed to ascertain whether the stair case/



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constructions put up by the defendants are well within their own limits or constructed by encroaching upon the plaintiff's property. The first appellate Court further felt that the measurements have to be made with reference to the old survey numbers and the corresponding new survey number. For the purpose of appointment of an Advocate Commissioner, the first appellate Court had remitted the matter back to the trial Court. This order of remand is under challenge in the present Civil Miscellaneous Appeal.

6. According to the learned counsel appearing for the appellant, for the purpose of re-issuance of warrant to an Advocate Commissioner, it is not necessary to remit the matter back to the trial Court. He further contended that the defendants who had an opportunity before the trial Court to file such an application had not exercised such a right. Therefore, the defendants cannot be permitted to file such an application before the first appellate Court. The defendants having lost an opportunity before the trial Court, cannot make a second attempt before the first appellate Court.

7. The learned counsel appearing for the appellant had further contended that the first appellate Court remitted the matter back to the trial Court without setting aside any one of the findings of the trial Court.



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Therefore, he prayed for allowing the appeal and to set aside the order of remand.

8. Per contra, the learned counsel appearing for the respondents had contended that originally, the plaintiff had filed only a suit for permanent injunction. Only after filing the Commissioner's report, wisdom dawned upon the plaintiff that some portion of the property has been encroached upon by the defendant and thereafter, the plaint was amended to include the prayer for mandatory injunction. The said prayer is solely based upon the Commissioner's report. The trial Court has only relied upon the Commissioner's report and has granted the prayer for mandatory injunction without properly appreciating the sale deeds of either of the parties.

9. The learned counsel appearing for the respondent had further contended that the constructions were not of recent origin and hence, the introduction of mandatory injunction prayer itself is barred by limitation. However, the said issue was not properly appreciated by the first appellate Court. Hence, she contended that the order of remand for the purpose of appointment of an Advocate Commissioner is perfectly valid and she prayed for sustaining the order of remand.



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

11. A perusal of the judgment of the first appellate Court makes it clear that the plaintiff has introduced a prayer for mandatory injunction after filing of the Commissioner's Report. The first appellate Court had felt that the Commissioner has to re-visit the property and measure the property with reference to the old and new survey numbers on the basis of the sale deeds of the either of the parties. The said exercise could very well be carried out by the first appellate Court itself. Paragraph Nos.14 and 15 of the order of the first appellate Court would indicate that the trial Court was directed to consider the I.A.No.23 of 2013, and to re-issue the warrant to the Advocate Commissioner directing him to inspect the property with the help of a qualified Surveyor and to measure the property of both parties with reference to the old and corresponding new survey numbers and after receipt of the Commissioner's report and objections, if any, to the report, the Court shall decide the matter afresh.



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12. The above direction issued by the Appellate Court clearly indicates that the order of remand has been passed only for the purpose of re-issuance of warrant to the Advocate Commissioner. I.A.No.23 of 2013 cannot be remitted by the first appellate Court. Therefore, the order of remand passed by the first appellate Court is hereby set aside. The first appellate Court is directed to consider the I.A.No.23 of 2013 on merits and in accordance with law. In case, if the Court arrives at a finding that the re-issue of warrant to the Advocate Commissioner, is necessary, the same can be ordered by the first appellate Court itself. After receiving the report and the objection for the Advocate Commissioner's Report, the first appellate Court can do well to proceed to hear the appeal on merits.

13. With the above said observations, this Civil Miscellaneous Appeal stands allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

05.04.2023

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

1. The Principal District Judge,
Tiruchirappalli.
2. The District Munsif Court,
Musiri.
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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