



C.M.A.(MD).No.340 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.06.2023

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.(MD).No.340 of 2022

R.Bothumani

... Appellant

Vs.

1.A.Chandra

2.S.A.Ramdoss

... Respondents

PRAYER: The Civil Miscellaneous Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 19.02.2010 made in A.S.No.148 of 2008 on the file of the Subordinate Court, Theni, reversing the judgment and decree dated 30.06.2008 made in O.S.No.35 of 2004 on the file of the District Munsif cum Judicial Magistrate Court, Bodinayakanur.

For Appellant : Mr.N.Kalifullah

For Respondents : No appearance

J U D G M E N T

This appeal has been filed against the order of remand passed by the first appellate Court in A.S.No.148 of 2008, dated 19.02.2010.



C.M.A.(MD).No.340 of 2022

WEB COPY

2. The suit in O.S.No.35 of 2004 has been filed for permanent injunction.

The first defendant has agreed to sell 500 sq.ft. of land to the plaintiff and received a sum of Rs.50,000/- as advance. Since the parties are relatives, the agreement was oral. However, no agreement was executed and panchayat was convened by the elders. Since the first defendant was attempted to alienate the suit property, the suit has been filed for injunction restraining the first defendant from executing any document of alienation to the second defendant. The defendants took a stand that there is no sale agreement between the parties as alleged by the plaintiff. The trial Court has framed five issues and answered the main issue that in the absence of prayer for specific performance, the relief of permanent injunction cannot be granted under Section 41(h) of the Specific Relief Act and the connected issues also answered. However, the first appellate Court has remanded the matter back to the trial Court on the ground that the issues have not been answered. Challenging the same, the present appeal has been filed.

3. Heard the learned counsel for the appellant and there is no representation for the respondents.



C.M.A.(MD).No.340 of 2022

WEB COPY

4. According to the learned counsel for the appellant, the approach of the first appellate Court remanding the matter by setting aside the entire judgment is not according to law. When the substantial issue has already been answered by the trial Court, the observation of the first appellate Court that the issues have not been answered by the trial Court is not correct in the eye of law.

5. In the light of the above submissions, now the point for consideration in this appeal is whether the first appellate Court is right in remanding the matter, when the main relief itself was decided by the trial Court?

6. The suit itself is filed for injunction restraining the defendants from alienating the property, based on the oral sale agreement. It is to be noted that when a person sought for a relief on the basis of the agreement for sale, any such agreement can be used only as a shield and cannot be used as a sword. Even part performance could be invoked only as a shield not as a sword. It is well settled position of law that once the plaintiff claims to be in possession on the basis of the oral agreement and without seeking the relief of specific performance, based on such oral sale, the very relief of injunction itself barred under law.



C.M.A.(MD).No.340 of 2022

WEB COPY

7. In such a view of the matter, the trial Court has rightly rejected the suit and other connected issues also answered, whereas the first appellate Court has simply set aside the decree and judgment and remanded the entire issue to the trial Court. The first appellate Court has not even framed the point for consideration in the appeal.

8. In such a view of the matter, this Court is of the view that the remand order passed by the first appellate Court is necessarily to be set aside. The first appellate Court ought to have decided the suit on its own merits. The order of remand is possible only the circumstances under Order 41 Rules 23 to 25 of C.P.C.

9. In the result, the Civil Miscellaneous Appeal is allowed and the order of the first appellate Court in A.S.No.148 of 2008, dated 19.02.2010, is set aside and the first appellate Court is directed to dispose the appeal on its own merits, within a period of three months from the date of receipt of a copy of this judgment. No costs.

14.06.2023

akv



C.M.A.(MD).No.340 of 2022

WEB COPY

To

- 1.The Subordinate Court,
Theni.
- 2.The District Munsif cum Judicial Magistrate Court,
Bodinayakanur.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



C.M.A.(MD).No.340 of 2022

N.SATHISH KUMAR,J.

akv

C.M.A.(MD).No.340 of 2022

14.06.2023