



C.M.A.(MD).Nos.363 and 51 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)Nos.363 of 2020
and
C.M.A.(MD) No.51 of 2020
and C.M.P(MD) No.817 of 2020

C.M.A(MD) No.363 of 2020:

C.Ramalingam	Appellant/1 st Respondent/1 st defendant
	-vs-
1. Vijaya Mayan	 1 st Respondent/Appellant/Plaintiff
2. Asaithambi	
3. Elango	
4. Ramanathan	
5. Palavesam	
6. Chandra Backiyalakshmi	 Respondents 2 to 6 / Respondents 2 to 6
	Defendants 2 to 6

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of CPC., against the judgment and decree of the lower appellate Court, dated 25.11.2019 passed in A.S.No.7 of 2016 on the file of the IV Additional District Judge, Madurai, remanding the suit in O.S.No.531 of 2004 on the file of the II Additional Sub Judge, Madurai, for fresh disposal.

For Appellant : Mr.M.Saravanan

For Respondents : Mr.S.Palanivelayutham- for R1
: No appearance – for R2 to R6



C.M.A.(MD).Nos.363 and 51 of 2020

C.M.A(MD) No.51 of 2020:

WEB COPY

Chandra Packialakshmi

.....Appellant/ 6th Respondent/
6th Defendant

-VS-

.... 1st Respondent/Appellant/Plaintiff

1. Vijaya Mayan
2. C.Ramalingam
3. Asaithambi
4. Ilangovan
5. Ramanathan
6. Palavesam

.... Respondents 2 to 6 / Respondents 1 to 5
Defendants 1 to 5

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of CPC., against the judgment and decree made in A.S.No.7 of 2016, dated 25.11.2019 passed by the learned IV Additional District Judge, Madurai by setting aside the judgment and decree made in O.S.No.531/2004, dated 24.11.2015 on the file of learned II Additional Subordinate Court, Madurai, and remanded back the matter for further adjudication.

For Appellant : Mr.Veera Kathiravan
Senior Counsel
for M/s.Veera Associates
Mr.S.Ramasundarvijayraj

For Respondents : Mr.S.Palanivelayutham- for R1
: Mr.M.Saravanan
and Mr.R.Subramanian – For R2

: No appearance – For R3 to R6



C.M.A.(MD).Nos.363 and 51 of 2020

COMMON JUDGMENT

WEB COPY

Both the appeals have been filed challenging the order of remand passed by the IV Additional District Court, Madurai, in A.S.No.7 of 2016. C.M.A(MD) No.363 of 2020 has been filed by the first defendant in the suit and C.M.A.(MD) No. 51 of 2020 has been filed by the sixth defendant in the suit.

2. The first respondent/plaintiff has filed O.S.No.531 of 2004 on the file of the II Additional Sub Court, Madurai, for the relief of declaration of title, recovery of possession and for mandatory injunction for removal of illegal encroachments made by the defendants. According to the plaintiff, he is the owner of 6798 square feet land in Plot No.3 in old survey No.29/8B1B which is correlated to resurvey No.29/8A3. The plaintiff had claimed title and possession of the property based upon Ex.A2 and Ex.A7, sale deeds.

3. The defendants have filed a written statement contending that the old Survey No.29/8B1B is not correlating to R.S.No.29/8A3. The defendants have further contended that the defendants have purchased R.S.No.29/8A3 by way of Ex.B1. The Trial Court, after going through the oral and documentary



C.M.A.(MD).Nos.363 and 51 of 2020

evidence, arrived at a finding that the plaintiff has not established his case and dismissed the suit. The plaintiff had filed A.S.No.7 of 2016 on the file of IV Additional District Court, Madurai. Pending the first appeal, the plaintiff had filed I.A.No.969 of 2018 for appointment of an Advocate Commissioner along with a Surveyor to note down the old boundaries with the help of the Surveyor. The first appellate Court did not pass any orders in the said application.

4. The first appellate Court had arrived at a finding that there is a dispute with regard to the correct survey number of the suit property. Therefore, the said fact has to be established by way of Revenue documents and by the examination of the officials from the Revenue Departments. Apart from that, the Commissioner has to be appointed along with the Senior Surveyor to identify the suit schedule property with the help of boundary stones. For the said purpose, the first appellate Court had remitted the matter back to the trial Court. This order of remand is under challenge by the first and sixth defendants in the suit.

5. The learned Senior Counsel appearing for the appellant in C.M.A. (MD) No.51 of 2020 had contended that an Advocate Commissioner was



C.M.A.(MD).Nos.363 and 51 of 2020

appointed before the trial Court and he has also filed a Report and Plan which were marked as Ex.C.1 and C.2. The second application for appointment of an Advocate Commissioner was filed by the plaintiff before the trial Court in I.A.No. 663 of 2012 and the said application was dismissed by the trial Court. The dismissal of the said application was not challenged. Therefore, the third application filed before the first appellate Court in I.A.No.969 of 2018 is not maintainable. The first appellate Court, without passing any orders in the said Interlocutory Application, remitted the matter back to the trial Court to consider the said application also on merits.

6. The learned Senior Counsel appearing for the appellant had further contended that when the plaintiff has failed to establish the title and right of possession over the property, a second chance cannot be afforded to the plaintiff by way of the order of remand. He further contended that the plaintiff was permitted to examine two witnesses on his side and he had marked Ex.A1 to Ex.A13. At the instance of plaintiff, an Advocate Commissioner was appointed and he has filed a report and plan - Ex.C1 and Ex.C.2. The learned Senior Counsel further contended that before the trial Court, the plaintiff had not filed any objection to the Commissioner's Report. Therefore, the second application for appointment of an Advocate Commissioner was also

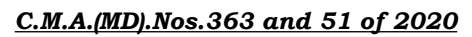


C.M.A.(MD).Nos.363 and 51 of 2020

dismissed. Now, a third attempt is made by the plaintiff for appointment of an Advocate Commissioner which is not maintainable in the eye of law.

7. The learned Senior Counsel further contended that without setting aside the first Advocate Commissioner's report, the second and third Advocate Commissioners cannot be appointed. He further contended that the plaintiff had claimed that the old Survey No.29/8B1B is correlated to Resurvey No.29/8A3. Therefore, the entire burden is upon the plaintiff to establish the fact that the old survey number is correlated to re-survey number. However, though several opportunities were granted to the plaintiff he has not chosen to correlate the same before the trial Court. When there is a lacuna on the part of the plaintiff, the matter cannot be remitted back to the trial Court, so that, the plaintiff can fill up the lacuna. Hence, he prayed for allowing the appeal and to set aside the order of remand passed by the first appellate Court. The learned counsel appearing for the appellant in C.M.A(MD) No.363 of 2020 has adopted the arguments of the learned Senior Counsel.

8. Per contra, the learned counsel appearing for the respondent/plaintiff had contented that the main dispute between the parties is with regard to the



9. The first appellate Court, ultimately, found that the Commissioner's report is not helpful in arriving at a conclusion. In view of Order 41 Rule 23 C.P.C., to the effect that the existing evidence on record is not helpful to arrive at a conclusion, the first appellate Court set aside the findings of the trial Court. He further pointed out that the first appellate Court ought to have rendered a finding on the Commissioner's application. He further contended that the first appellate Court has given a finding that the dispute could be resolved only by examination of the revenue authorities and the revenue documents, apart from the report of the Advocate Commissioner. Based upon the correlation report, the first appellate Court cannot conduct the mini trial. Hence, the order of remand has been passed, so that, the trial Court can



C.M.A.(MD).Nos.363 and 51 of 2020

examine the revenue officials and receive documents from either parties to correlate the old survey number with new survey number. 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 and perused the records.

11. It is the specific case of the plaintiff that his property is located in old survey No.29/8B1B, which is correlated to R.S.No.29/8A3. However, the case of the defendants is that the old S.No.29/8B1B is no way connected with R.S.No.29/8A3. As far as the title deeds of the plaintiff are concerned, they reflected old S.No.29/8B1B and title deeds of the defendants reflected R.S.No.29/8A3. Therefore, it is clear that based upon the sale deeds of either parties, this Court cannot arrive at a finding whether the suit property is in any way connected with the property of the defendants or not.

12. Since the plaintiff claims that the old Survey No.29/8B1B is correlated to R.S.No.29/8A3, the entire burden is upon the plaintiff to establish the same. The plaintiff has to produce the Correlation Certificate from the Revenue officials to correlate to old survey number with the new



C.M.A.(MD).Nos.363 and 51 of 2020

survey number. If the Court arrives at a finding that even after, the correlation Certificate, the Court is not in a position to identify the suit schedule property, the first appellate Court can very well appoint an Advocate Commissioner to identify the old survey number with the new survey number with the help of the Surveyor and the Revenue Officials. For the said purpose, the appeals need not be remitted back to the trial Court and thereby, totally, all the issues are opened up.

13. In view of the above said deliberations, this Court passes the following order:

(i) C.M.A.(MD) No.51 of 2020 and CM.A(MD) No.363 of 2020 are hereby allowed and the order of remand passed by the IV Additional District Court, Madurai, in A.S.No.7 of 2016, on 25.11.2019 is hereby set aside;

(ii) The plaintiff is at liberty to obtain a Correlation Certificate from the Revenue officials and produce the same before the first appellate Court on or before **31.08.2023**;

(iii) If the first appellate Court feels that an Advocate Commissioner has to be appointed to



C.M.A.(MD).Nos.363 and 51 of 2020

identify the said property with the help of the Surveyor, the same can be undertaken by the first appellate Court after giving due opportunity to both the parties; and

(iv) The first appeal shall be disposed of on or before **31.01.2024**.

14. With the above said observations, these appeals are allowed to the extent as stated above. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

24.04.2023

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

To

1. The IV Additional District Court,
Madurai.
2. The II Additional Sub Court,
Madurai.
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



C.M.A.(MD).Nos.363 and 51 of 2020

R.VIJAYAKUMAR,J.

ebsi

C.M.A(MD)Nos.363 and 51 of 2020

24.04.2023