



C.M.A.(MD).No.100 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.100 of 2014

and

M.P(MD) No.1 of 2014

Illayaperumal

... Appellant/Respondent/
Defendant

-vs-

Natesan

... Respondent/Appellant/
Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule (1) (u) of the Civil Procedure Code, against the order passed by the learned Additional Subordinate Judge, Kumbakonam, in A.S.No.34 of 2012, dated 26.08.2013, remanding back the decree and judgment passed by the learned I Additional District Munsif, Kumbakonam in O.S.No.190 of 2008, dated 09.11.2012.

For Appellant : Mr.B.Anandan

For Respondent : Mr.K.Govindarajan

J U D G M E N T

The defendant in a suit for permanent injunction has filed the present appeal challenging the order of remand passed by the first appellate Court.



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2. The respondent herein had filed a suit for permanent injunction claiming injunction for 9 cents (27 Kuzhis) in R.S.No.46/6. The defendant has resisted the said claim by filing a detailed written statement disputing the title and possession of the plaintiff.

3. The trial Court, after considering the oral and documentary evidence let in on either side, had dismissed the said suit on the ground that the plaintiff has not properly described the suit schedule property and he has also not identified the suit schedule property. Challenging the same, the plaintiff had filed A.S.No.34 of 2012 before the Additional Subordinate Court, Kumbakonam. The first appellate Court, after considering the submissions made on either side felt that the plaintiff may be permitted to amend the plaint schedule property to incorporate the four boundaries and he may also be permitted to seek appointment of an Advocate Commissioner with Surveyor to note down the physical features. This order of remand is under challenge in the present appeal.



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4. According to the learned counsel appearing for the appellant, the plaintiff cannot be given a second chance by remitting the matter back to the trial Court and the first appellate Court has to decide the issue on merits and in accordance with law, on the basis of the records which are already available. He further contended that an application for appointment of an Advocate Commissioner was filed in the Trial Court and the same was dismissed and therefore, such an indulgence cannot be granted to the plaintiff for the second time.

5. Per contra, the learned counsel appearing for the respondent/plaintiff had contended that the order of rejecting an application for appointment of an Advocate Commissioner does not operate as *res judicata* and if the first appellate Court feels that such an appointment is necessary, the same can be allowed by the first appellate Court. He further contended that due to inadvertent mistake, the four boundaries have not been incorporated in the disputed property in the plaint schedule and amendment of the plaint, would not cause prejudice to the defendant. Hence, he prayed for sustaining the order of remand passed by the first appellate Court.



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

7. A perusal of the judgment and decree of the first appellate Court indicates that the first appellate Court has arrived at a finding that the defendant out of 27 Kuzhis, had sold 3 Kuzhis to the plaintiff for the construction of a colony house and therefore, it is all the more necessary that the four boundaries should be identified to the suit schedule property. First of all, the four boundaries have to be incorporated in the schedule of property and thereafter, an Advocate Commissioner has to be appointed. Therefore, this Court does not find any reason to set aside the finding of the first appellate Court with regard to amendment application or appointment of an Advocate Commissioner. However, both these aspects can be done before the first appellate Court itself without remitting the matter back to the trial Court.

8. In view of the above said deliberations, 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 plaintiff, if he is so advised, can file an application for amendment of plaint to incorporate the four boundaries. In



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case, if such an amendment is allowed, he can seek for appointment of an Advocate Commissioner to identify the suit schedule properties. Based upon the report of the Advocate Commissioner, the first appellate Court shall decide the matter on merits and in accordance with law. The first appellate Court shall permit the defendant to file an additional written statement, in case, amendment application stands allowed.

9. With the above said observation, this Civil Miscellaneous Appeal stands allowed. There shall be no order as to costs.

21.06.2023

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

1. The Additional Subordinate Judge,
Kumbakonam.
2. The I Additional District Munsif,
Kumbakonam.
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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