



C.M.A(MD)No.236 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.06.2023

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.236 of 2018

Ramasamy

... Appellant/Respondent/
Plaintiff

Vs.

A.Gurusamy(Died)

... Respondent/Appellant/
Defendant

2.Raamuthai

3.Muthukrishnan

4.Alagarsamy

5.Subramanian

6.Venkatesan

7.Selva Kumar

... Proposed Respondents

(R2-R7 are brought on record as legal heirs of the deceased sole respondent vide court order, dated 02.03.2023 in C.M.P(MD)No.2689 & 2690 of 2023)

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1(u) of Code of Civil Procedure, to set aside the judgment and decree passed by the Sub Court, Virudhunagar in A.S.No.21 of 2016, dated 01.09.2017.



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For Appellant : Mr.Lakshmi Gopinathan

For R2,R3,R5&R7 : Mr.T.S.Mohammed Mohideen

For R4&R6 : No Appearance

JUDGMENT

The present appeal has been filed by the plaintiff in a suit for declaration, recovery of possession and mandatory injunction challenging the order of remand passed by the first appellate Court.

2. The appellant herein as plaintiff had filed O.S.No.146 of 2010 on the file of District Munsif Court, Virudhunagar for the relief of declaration of title, recovery of possession, mandatory injunction and for other reliefs. According to the plaintiff, he is the owner of the portion marked as ABCD in the rough sketch filed along with the plaint.

3. The defendant had filed a written statement disputing the title and the right of the defendant to seek recovery of possession. The defendant has also disputed the right of the plaintiff to seek the decree for a mandatory injunction. The defendant has also contended that the schedule of property does not contain the boundaries so as to identify the property to declare the title or seek recovery of possession. A



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Commissioner was appointed by the trial Court in I.A.No.420 of 2013 and based upon the said report, the trial Court proceeded to hold that the plaintiff has established his title over the ABCD portion and has also granted a decree for recovery of possession and mandatory injunction.

4. This decree was challenged by the defendant by filing A.S.No. 21 of 2016 before Sub Court, Virudhunagar. The learned Subordinate Judge had arrived at a finding that the plaintiff has not incorporated the boundaries in the schedule of property so as to identify the property and grant a decree for declaration of title and recovery of possession. The first appellate Court further found that the trial Court has not framed any specific issue with regard to the prayer for recovery of possession. On these two grounds, the first appellate Court has set aside the judgment and decree of the trial Court and it has remitted the matter back to the trial Court. The first appellate Court has also made observations to the effect that the plaintiff after remand, would be entitled to amend the schedule of property and consequently, the defendant would be entitled to file an additional written statement. The trial Court was directed to frame an additional issue relating to recovery of possession. Challenging the said order of remand, the present appeal has been filed by the plaintiff.



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5. According to the learned counsel appearing for the appellant, the plaintiff wants to succeed in his suit without making any amendment in the schedule of property. He would like to stick on to the existing pleadings and the schedule of property. Further, the parties have understood the dispute and they have let in evidence with regard to the right of the plaintiff to seek recovery of possession. Therefore, non framing of a specific issue with regard to recovery of possession would not be in fatal and for the said purpose, an order of remand should not have been passed.

6. Per contra, the learned counsel for the respondents had contended that the first appellate Court has recorded various findings in favour of the defendant. Despite those favourable findings, the first appellate Court has not chosen to dismiss the first appeal, but has rather remanded the matter back to the trial Court. The first appellate Court ought to have allowed the first appeal and dismissed the suit. Instead, it has chosen to grant a second chance to the plaintiff to prove his case. If the plaintiff has not chosen to let in any oral or documentary evidence to establish his title or his right to seek recovery of possession before the trial Court, he cannot be granted a second chance.



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7. I have carefully considered the submissions made on either side and perused the judgment of the first appellate Court directing an order of remand.

8. It could be seen from the judgment of the first appellate Court that it has arrived at a finding that non-inclusion of the boundary recitals in the schedule of property is fatal and therefore, in order to afford an opportunity to the plaintiff, it has passed an order of remand. However, the learned counsel appearing for the appellant/plaintiff submits that there is no dispute whatsoever with regard to the identity of the property and the plaintiff does not like to carry out any amendment in the body of the plaint or in the schedule of property. It is settled position of law that mere non framing of an issue on a particular aspect would not be fatal when both the parties have understood the issues and they have let in evidence. In the present case, the parties have let in oral and documentary evidence with regard to the right of the plaintiff to seek for recovery of possession. Therefore, the first appellate court was not right in remitting the matter for the purpose of framing a specific issue with regard to recovery of possession.

9. 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



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remitted back to the file of the first appellate Court to decide the appeal on merits and in accordance with law on the basis of the oral and documentary evidence which are already on record. The appeal shall be disposed of on or before 31.12.2023.

10. With the above said observations, this Civil Miscellaneous Appeal stands allowed. No costs.

30.06.2023

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

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To

- 1.The Sub Court,
Virudhunagar.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Judgment made in
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