



C.M.A(MD)No.1077 of 2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.04.2023

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1077 of 2016

and

C.M.P(MD)No.9710 of 2016

Sarathamanidevi

... Appellant/1st Respondent/
1st Defendant

Vs.

1.Panchavarnam

... 1st Respondent/Appellant/
Plaintiff

2.Ramaish

... 2nd Respondent/2nd Respondent/
2nd Defendant

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1(u) of Code of Civil Procedure, to set aside the remand back order in judgment and decree passed in A.S.No.22 of 2014, dated 30.03.2016 on the file of the learned District Judge, Sivagangai setting aside the judgment and decree passed in O.S.No.79 of 2011 on the file of the learned Subordinate Judge, Devakottai.

For Appellant : Mr.K.Chokalingam

For R1 : Mr.M.Shakul Hameed



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JUDGEMENT

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The present appeal has been filed by the 1st defendant in a suit for permanent injunction.

2. The 1st respondent in the appeal as plaintiff has filed O.S.No.79 of 2011 on the file of Sub-Court, Devakottai for the relief of permanent injunction. According to the plaintiff, the suit property was originally purchased by the 2nd defendant Ramaiah in the name of his 1st wife, who is the 1st defendant Sarathamanidevi. After customary divorce, the said 2nd defendant has executed two registered settlement deeds, dated 26.03.2003 and 12.05.2008 in favour of the plaintiff. From the said date onwards, the plaintiff is the absolute owner and she is in possession of the property. The 1st defendant started disturbing her possession on the ground that the title deed stand in her name. Hence, the present suit.

3. Pending suit, the 1st defendant through her power agent had filed I.A.No.325 of 2012 in order to reject the plaint on the ground that the plea of benami is prohibited under law and the plaint has to be rejected. The plaintiff has not filed his counter to the said application and I.A.No. 325 of 2012 was allowed on 04.10.2013 on the ground that the plaintiff had remained ex parte. Consequentially, the suit was also dismissed on 04.10.2013.



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4. Aggrieved over the rejection of the plaint, the plaintiff had filed A.S.No.22 of 2014 before Principal District Court, Sivagangai. The learned District Judge after hearing both the parties, arrived at a conclusion that just because counter was not filed, Order 7 Rule 11 application cannot be allowed. The said application has not been decided after considering the averments in the affidavit. He further found that since various factual disputes are involved, the same cannot be decided in an application under Order 7 Rule 11. After arriving at such a finding, the first appellate Court dismissed I.A.No.325 of 2012 and directed the trial Court to decide the suit on merits. This order of remand is under challenge in the present appeal.

5. According to the learned counsel appearing for the appellant, when the first appellate Court had arrived at a finding that I.A.No.325 of 2012 has not been decided on merits, thereafter should not have ventured into the merits of Order 7 Rule 11 application and dismissed the application. He further contended that once the first appellate Court arrives at a finding that an opportunity should have been given to the plaintiff to project his case, thereafter, the said application cannot be dismissed on merits by the first appellate Court.



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6. The learned counsel appearing for the appellant had further contended that the order passed in I.A.No.325 of 2012 is admittedly not on merits, but on the ground that the plaintiff had remained ex parte in the said application. Therefore, when no orders have been passed by the trial Court on merits and an ex parte order has been passed, the only option open to the first appellate Court is to remit the Interlocutory Application back to the trial Court and the appellate Court cannot dismiss the said application.

7. The learned counsel appearing for the appellant had further contended that the entire grounds of appeal is only challenging the passing of the ex parte order in the interlocutory application and therefore, the first appellate Court ought not to have decided I.A on merits. The only issue that was before the first appellate Court is whether the ex parte order of rejection of plaint was right or not without affording an opportunity to the plaintiff. Therefore, he prayed that the first appellate Court ought to have dismissed the appeal and confirmed the order of rejection.

8. Per contra, the learned counsel appearing for the respondent had contended that the issue raised by the 1st defendant in the Order 7 Rule



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11 application does not satisfy any one of the ingredients under the said provision of law. Due to some miscommunication, the learned counsel for the plaintiff could not file their counter in time. Once a suit is numbered, thereafter, if the trial Court would like to reject the plaint, it can be done only after affording due opportunity to the plaintiff. In the present case, after perusing the averments in the plaint, the suit has been numbered. Thereafter, on the plea of benami raised in the affidavit, the Order 7 Rule 11 application has been filed.

9. The learned counsel for the respondent had further contended that even when there is no counter on the side of the plaintiff, the trial Court ought to have considered the application on merits and passed an order. Rejection of plaint has got serious civil consequences and the same cannot be easily resorted to by the trial Court just because counter has not been filed by the respondent in the said application. He further contended that the first appellate Court had rightly arrived at a finding that the application under Order 7 Rule 11 is not maintainable on the facts of the case and therefore, the said application was dismissed by the first appellate Court. Hence, he prayed for sustaining the order of remand passed by the first appellate Court.



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10. I have carefully considered the submissions made on either side and perused the records.

11. The appeal against the order of remand was originally listed before other learned Judge and he has arrived at a prima facie finding that the suit is frivolous in nature. He has also recorded that the learned counsel for the respondent / plaintiff had agreed to withdraw the suit. This recording has been done on 01.10.2020. Thereafter, the learned counsel for the respondent had filed C.M.P(MD)No.6935 of 2020 seeking to recall the said order. The learned Judge has rejected the said application on the ground that such a recall application is not maintainable. However, liberty was granted to the respondent / plaintiff to file a review application, if they are so advised. According to the learned counsel appearing for the respondent, they have filed a review application and the same is pending in the unnumbered stage.

12. The learned counsel appearing for either parties agreed to argue the appeal on merits and therefore, this Court proceeds to pass orders on merits in the appeal.

13. A perusal of the plaint indicates that the suit has been filed for permanent injunction based upon 2 title deeds and few revenue records.



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The 1st defendant has chosen to file I.A.No.325 of 2012 under Order 7 Rule 11 to reject the plaint on the ground that the entire title and possession of the plaintiff is based upon the fact that the 2nd defendant had purchased the property in the name of the 1st defendant and after customary divorce of the 1st defendant, the 2nd defendant has executed 2 settlement deeds in favour of the plaintiff. Therefore, it is the case of the 1st defendant that the plea of Benami being prohibited under the Benami Prohibition Act 1998, the suit is not maintainable and he had sought for rejection of the plaint. Unfortunately, in the said application, the plaintiffs have not chosen to file a counter for the reasons best known to them. No attempt was also made to file an application to set aside the ex parte order. Therefore, the plaint was rejected by an ex parte order.

14. The plaintiff had filed A.S.No.22 of 2014 challenging the order of rejection of plaint. A perusal of the grounds of first appeal clearly indicate that they have challenged the ex parte order of rejection of plaint only on the ground that sufficient opportunity was not afforded to them. The first appellate Court has also arrived at a finding that just because a counter was not filed by the plaintiff, the plaint cannot be rejected at the instance of the defendants. However, the first appellate Court has further proceeded to hold that the ingredients of Order 7 Rule 11 are not



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satisfied on the facts of this case and proceeded to dismiss I.A.No.325 of 2012. Thereafter, the first appellate Court has directed the trial Court to proceed with the trial and decide the suit on merits.

15. The above said findings of the first appellate Court will clearly indicate that the first appellate Court had exceeded the grounds of appeal and has proceeded to dismiss I.A.No.325 of 2012 on merits. The first appellate Court ought to have remitted I.A.No.325 of 2012 to be considered on merits by the trial Court. The trial Court had committed a mistake by allowing Order 7 Rule 11 application ex parte and the same mistake has been committed by the first appellate Court by deciding I.A.No.325 of 2012 on merits when there is no counter from the plaintiff side. Therefore, this Court is of the view that the order of the first appellate Court in dismissing I.A.No.325 of 2012 has to be set aside. The plaintiff should be given an opportunity to file her counter before the trial Court in the said application.

16. In view of the above said facts, this Court passes the following order:

(i) The order of the first appellate Court dismissing

I.A.No.325 of 2012 is hereby set aside and the appeal



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stands allowed.

(ii) I.A.No.325 of 2012 is remitted back to Sub Court, Devakottai for fresh disposal on merits and in accordance with law after giving due opportunity to both the parties.

(iii) The plaintiff shall file her counter to I.A.No.325 of 2012 on or before 30.06.2023.

(iv) The trial Court is directed to dispose of I.A.No. 325 of 2012 on or before 31.08.2023.

(v) Any other application filed by either parties shall be considered after disposal of I.A.No.325 of 2012 depending upon the result of the said application.

17. In view of the above said observations, this Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

26.04.2023

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



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To

- 1.The District Judge,
Sivagangai.
- 2.The Subordinate Judge,
Devakottai.
- 3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR ,J.

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Order made in
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