



CMA(MD).No.1169 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.04.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1169 of 2017

and

C.M.P(MD) No.11673 of 2017

PerumalAppellant/ Respondent/Defendant

Vs.

Rengasamy Konar (died)

1. Thangaraj

2. Arayee

3. Karuppiah

... Respondents/Appellants/Plaintiffs

PRAYER:- Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of C.P.C., against the judgment and decree of Additional District cum Sessions Judge, Pudukottai, dated 20.01.2017 in A.S.No.9 of 2016 reversing the judgment and decree of District Munsif cum Magisterate, Keeranoor, dated 05.02.2007 in O.S.No. 199 of 2000.

For Appellant : Mr.N.Balakrishnan

For Respondents : Mr.R.Paranjothi
for R1 to R3



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J U D G M E N T

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The present Civil Miscellaneous Appeal has been filed by the defendant challenging the order of remand passed by the first appellate Court.

2. The respondents/plaintiffs have filed O.S.No.199 of 2000, on the file of Sub Court, Pudukottai, for the relief of declaration of title, recovery of possession and mandatory injunction. Before the trial Court, five documents were marked on the side of the plaintiffs, seven documents were marked on the side of the defendant. Two Commissioners have been appointed in the trial Court who have filed their Reports under Ex.C1 to C.4. On the side of the plaintiffs P.W.1 to P.W.3 were examined and on the side of the defendant D.W.1 to D.W.3 were examined.

3. After considering the oral and documentary evidence, the trial Court, had arrived at a finding that the plaintiffs have not established the title and their right to recover the possession of the property and ultimately, dismissed the suit.



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4. Challenging the same, the plaintiffs have filed A.S.No.9 of 2016, on the file of the Additional District and Sessions Court, Pudukottai. The learned appellate Judge, after hearing both the parties have arrived at a finding that the Court is not in a position to identify the suit schedule property with regard to the old/new survey numbers extent, and the four boundaries. The first appellate Court further found that the plaintiffs have not properly conducted the suit and therefore, the suit has to be dismissed by the trial Court. The first appellate Court further found that even though two Advocate Commissioners were appointed before the trial Court, the report and the sketch filed by the respective Commissioners are not enough to decide with regard to the identity or physical features of the suit schedule property. The first appellate Court further found that the existing the oral and documentary evidence is not enough to decide the suit on merits. Based upon the said findings, the first appellate Court had remitted the matter back to the trial Court. This order is under challenge in the present appeal.



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5. According to the learned counsel appearing for the appellant, when the first appellate Court arrived at a finding that the plaintiffs have not established their title or their right to recover the possession of the property, the first appellate Court ought to have dismissed the appeal and confirmed the judgment of the trial Court. It should not have granted a second opportunity to the plaintiffs to prove their case. Even assuming that the Commissioners report is not helpful the Court, the first appellate Court itself could have appointed an Advocate Commissioner and received the report. Therefore, for the purpose of identifying the old and new survey numbers and to find out the extent of the property, the order of remand is not legally sustainable. The learned counsel for the appellant had further relied upon the judgment of our High Court reported in **2021 (4) CTC 435 (Karuppaiyan Vs. Pannaiya Nadar and others)** to contend that the first appellate Court itself has ample powers to frame additional issues and the plaintiff cannot be allowed to fill up the lacunae by remitting the matter back to the trial Court. Hence, he prayed for allowing the appeal.



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6. Per contra, the learned counsel appearing for the respondents/plaintiffs had contended that the first appellate Court has arrived at categorical finding that the oral and documentary evidence before the said Court is not sufficient enough to arrive at any conclusion. The first appellate Court after setting aside all the findings of the trial Court is not in a position to arrive at an independent finding based upon the existing oral and documentary evidence. Therefore, the order of remand is legally sustainable. Unless the oral and documentary evidence is sufficient that was let in both the parties before remand, the suit cannot be decided on merits. Hence he prayed for dismissal of the appeal.

7. I have carefully considered the submissions made by the learned counsel on either side and also the judgment cited by both the parties.

8. The plaintiffs had filed a suit for declaration of title, recovery of possession and mandatory injunction. As far as the prayer for declaration of title is concerned, the entire burden is upon the plaintiffs to establish the title by way of letting in oral and documentary evidence. The



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defendant has not only disputed the title of the plaintiffs, but also have contended that they have acquired title by way of adverse possession.

9. Considering the fact that the suit is for recovery of possession and mandatory injunction and the contention of the defendant that they have acquired title by way of adverse possession, it is clear that the defendant is in possession of the suit schedule property. Therefore, the only issue that has to be decided by the first appellate Court is that whether the plaintiffs have proved their title by letting in oral and documentary evidence and whether the defendant had acquired title by way of adverse possession or not. Therefore, in such circumstances, the question of remitting the matter back to the trial Court would not arise. In the written statement, the defendant has not specifically disputed about the extent, of property or the breadth and width of the suit schedule property or the old and new survey numbers. Therefore, for resolving the said issues, the order of remand passed by the first appellate Court is not legally sustainable.



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10. In view of the above said deliberations, the order of remand passed by the first appellate Court is hereby set aside. The first appellate Court is directed to decide the appeal on merits and in accordance with law after giving due opportunity to both the parties and based upon the oral and documentary evidence which are already on record.

11. Accordingly, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

11.04.2023

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

1.The Additional District cum Sessions Judge,
Pudukottai.

2.The District Munsif cum Magistrate,
Keeranoor,

3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

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R.VIJAYAKUMAR,J.

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Judgement made in
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