



C.M.A.(MD).No.357 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.06.2023

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.(MD).No.357 of 2023

and

C.M.P.(MD).No.4458 of 2023

K.Subbu

... Appellant

Vs.

Subbaiah

... Respondent

PRAYER: Civil Miscellaneous Appeal has been filed under Order 43 Rule 1(u) of C.P.C., against the decree and judgment passed in A.S.No.57 of 2008, dated 10.01.2009 on the file of the Sub Court, Ramanathapuram reversing the judgment and decree passed in O.S.No.39 of 2006, dated 25.07.2008 on the file of the District Munsif cum Judicial Magistrate, Thiruvadanai.

For Appellant : Mr.J.M.Hassanul Bazari

For Respondent : Mr.S.Ramesh

J U D G M E N T

This appeal has been filed challenging the order of remand passed by the first appellate Court in A.S.No.57 of 2008, dated 10.01.2009.



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2. The suit in O.S.No.39 of 2006 has been filed by the plaintiff for declaration and recovery of possession. It is the case of the plaintiff that originally the suit property was assigned to one Muthumanickam on 02.12.1982. The said Muthumanickam sold the property in favour of the plaintiff on 16.09.1993 and all the mutations also taken place. Hence, the suit has been filed for declaration and recovery of possession.

3. The defence of the defendant that the said Muthumanickam, the original assignee has agreed to sell the property for a total sale consideration of Rs.2,000/- and received a sum of Rs.500/- as advance and possession also handed over to the defendant as part performance of the contract. Hence, according to him, he is in possession of the property, on the basis of the agreement. The trial Court has framed as many as four issues.

4. Before the trial Court, on the side of the plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A8 were marked and on the side of the defendant, D.Ws.1 to 3 were examined and Exs.D1 to D7 were marked.



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5. Based on the evidence, the trial Court has decreed the suit. Challenging the same, an appeal has been filed before the first appellate Court. During the appellate stage, a contention was raised that the assignment itself is not valid. While assailing the said contention, the first appellate Court has set aside the entire decree and judgment of the trial Court mainly on the ground that the parties have to prove the assignment.

6. Heard the learned counsel for the appellant and the learned counsel for the respondent and perused the materials available on record.

7. In the light of the above submissions, now the point for consideration in this appeal is, whether the first appellate Court is right in setting aside the entire decree and judgment of the trial Court while remanding the matter, particularly when the issues are not with regard to the assignment?

8. It is relevant to note that the suit has been laid on the basis of the sale deed executed in favour of the plaintiff by the original assignee one Muthumanickam, whereas it is the specific case of the defendant that after assignment, he has entered into an agreement in the year 1982 for sale of the



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suit property for a total sale consideration of Rs.2,000/- and received a sum of Rs.500/- as advance. According to him, he is in possession of the property based on the agreement, otherwise, it is the case that in furtherance of the part performance, he is in possession of the property.

9. In such a view of the matter, this Court is of the view that the parties themselves have not disputed the assignment and the defendant has pleaded his possession on the basis of the agreement said to have been executed by the original assignee. It is also brought to the notice of this Court that he has already filed a suit in O.S.No.200 of 1995 before the District Munsif Court, Thiruvadanai for confirming the so called contract. The said suit has been dismissed on 09.10.2001.

10. Such being the position, when the title of the parties has been clearly admitted by the defendant, the question of proving the assignment does not arise at all. The first appellate Court gone beyond the scope of the suit and shirked from its responsibility to decide the appeal, set aside the well considered judgment of the trial Court. The remand of the matter is possible only on the circumstances under Order 41 Rules 23 to 25 of C.P.C., and except the circumstances narrated, remand is not an automatic.



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11. Such being the position, I do not find any merit in the judgment of the first appellate Court. Accordingly, the same is set aside. The first appellate Court is directed to dispose of the appeal, on its own merits strictly following the pleadings and evidence of the parties, within a period of three months from the date of receipt of a copy of this order.

12. In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

19.06.2023

akv

To

1. The Sub Court,
Ramanathapuram.
2. The District Munsif cum Judicial Magistrate,
Thiruvadanai.



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