



C.M.A.(MD)No.1309 of 2011

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Dated: **12.03.2024**

CORAM:

THE HON'BLE MR.JUSTICE P. DHANABAL

C.M.A.(MD)No.1309 of 2011

and

M.P(MD)No.1 of 2011

1.M.Rakku

2.M.Muthukumar (died)

3.M.Saravanamurugan

4.Sumithra

5.Minor Padmapriya

6.Minor Hariprasath

.. Appellants/Plaintiffs

Vs.

K.Allimuthu

.. Respondent/Defendant

[Appellants 4 to 6 are brought on record as LR's of the deceased 2nd appellant vide Court order dated 29.08.2023 made in CMP(MD)Nos.8626 and 8627 of 2023 in CMA(MD)No.1309 of 2011 by KMSJ]

[Minor Appellants 5 & 6 are represented by their mother and natural guardian 4th appellant]



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Prayer : This Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of the Civil Procedure Code against the judgment and decree dated 05.08.2011 in A.S.No.95 of 2010 on the file of the Sub Court, Sivagangai, reversing the judgment and decree in O.S.No.59 of 2006 dated 20.10.2009 on the file of the learned Additional District Munsif cum Judicial Magistrate, Manamadurai.

For Appellants : Mr.S.Venkatesh

For Respondent : Mr.S.Ramesh

JUDGMENT

This Civil Miscellaneous Appeal has been preferred by the appellants as against the reversing order passed by the learned Sub Judge, Sivagangai, in A.S.No.95 of 2010, dated 05.08.2011, wherein the appellants herein have filed a suit in O.S.No.59 of 2006 as against the respondent/defendant for the relief of declaration, recovery of possession and consequential relief of permanent injunction before the trial Court. The trial Court decreed the suit on 20.10.2009. For setting aside the decree and judgment passed by the trial Court, the defendant preferred an appeal before the first appellate Court in A.S.No.95 of 2010. The first appellate



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Court set aside the decree and judgment passed by the trial Court and remanded the matter back to the trial Court for fresh disposal. Being aggrieved by the order of the first appellate Court, the present appeal is preferred by the appellants/plaintiffs.

2. The brief facts of the case of the plaintiffs before the trial Court are as follows:

The suit properties are ancestral properties of the plaintiffs. Originally the suit properties belong to one Mottaiyan and he was in possession and enjoyment of the suit properties. Mottaiyan had three sons namely, Mayandi, Velu and Kalimuthu and after the demise of Mottaiyan, his three sons were enjoying the suit properties jointly. Two sons of Mottaiyan, ie., Velu and Kalimuthu were died as bachelors. Hence, the father of the plaintiffs, Mayandi alone is entitled for suit property. After the death of Mayandi, the plaintiffs and their family are enjoying the suit property. The defendant is no way related to the suit property and considering the absence of the plaintiffs, he encroached the first item of the property by constructing a house. Already the plaintiffs sent notice dated 20.10.2006 to the defendant and he replied to the said notice stating



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that he had already got construction in the first item of the suit property.

According to the plaintiffs, the defendant has no right to construct the same in the first item of the property, which belongs to the plaintiffs. Hence, the plaintiffs filed the suit for declaration, recovery of possession and permanent injunction against the construction made by the defendant in the first item of the suit property.

3. The brief averments made in the written statement filed by the defendant is as follows:

All the averments made in the plaint are false and the plaintiffs have not at all enjoying the property as alleged by them. In fact, the suit property belonged to one Kalathi and Mottaiyan. The defendant has not encroached any portion of the suit property, but he constructed a house only within his property situated in S.No.101/9. He had not encroached any portion of the property for his construction in S.No.101/5A which belongs to the plaintiffs. Hence, the suit is liable to be dismissed.



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4. Based on the said pleadings and hearing both sides, the trial Court has framed the following issues and additional issues:

1. Whether the plaintiffs are entitled for the relief sought for in the plaint?

2. What are the other reliefs the plaintiffs are entitled for?

Additional Issues:

1. Whether the plaintiffs are entitled for declaration of the first item of the suit property?

2. Whether the plaintiffs are entitled for recovery of possession by demolishing the house constructed by the defendant in the first item of the suit property?

3. Whether the plaintiffs are entitled for mandatory injunction for removing the construction of the house in the first item of the property?

4. Whether the plaintiffs are entitled for declaration of second item of the suit property and permanent injunction for restraining the defendant from disturbing the plaintiffs' peaceful possession and enjoyment in the suit property?



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5. Before the trial Court, the second plaintiff was examined himself as PW1 and marked Ex.A1 to Ex.A6. On the side of the defendant, he did not examine any witness and not filed any document. Ex.C1 and Ex.C2 were marked through Advocate Commissioner.

6. After evaluating the oral and documentary evidences adduced on either side, the trial Court decreed the suit in favour of the plaintiffs. Aggrieved by the said decree and judgment, the defendant has preferred an appeal before the Sub Judge, Sivagangai. The first appellate Court, after perusing the records and evidence, set aside the decree and judgment passed by the trial Court and remanded the case to the trial Court for fresh disposal after identification of the suit schedule properties. As against the said judgment and decree passed by the first appellate Court, the present appeal has been preferred by the plaintiffs.

7. The learned counsel for the appellants would contend that the appellants have filed a suit in O.S.No.59 of 2006 before the trial Court for the relief of declaration, recovery of possession, mandatory injunction and permanent injunction. The trial Court decreed the suit in favour of the



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plaintiffs. Aggrieved over the same, the defendant preferred an appeal before the first appellate Court. The first appellate Court set aside the decree and judgment passed by the trial Court and remanded the matter back for fresh consideration to identify the properties. There is no dispute in respect of the identification of the properties. It is the specific case of the plaintiffs that the defendant encroached the property in the first item of the suit schedule property and therefore, they sought for declaration, recovery of possession and mandatory injunction. The defendant has also admitted that he never encroached any property in the first item of the suit property and he constructed a house within his property in S.No.101/9 and he never encroached the property in S.No.101/5A belongs to the plaintiffs. Therefore, there is not dispute in respect of the identification of the property. Further, before the trial Court, an Advocate Commissioner was also appointed and he inspected the properties and filed a report. In the said Commissioner's report, the encroachment has been clearly mentioned and there is no dispute in respect of the identification of the property. But the first appellate Court, without considering the same, simply set aside the judgment and decree passed by the trial Court and remanded back the matter without even taking into consideration of the measurement made



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by the Advocate Commissioner. Therefore, the decree and judgment passed by the first appellate Court is liable to be set aside.

8. The learned counsel for the respondent would contend that the property mentioned as suit schedule properties, there is no whisper about the portion of encroachment and the plaintiffs failed to give the measurement of the encroached property. In fact, the defendant constructed a house in S.No.101/9 which belongs to the plaintiffs and there is no construction in S.No.101/5A. The second plaintiff also in his evidence stated that there is no encroachment in the first item of the schedule property and only in the second item of the property, the encroachment was made by the defendant. Therefore the first appellate Court has set aside the judgment and decree passed by the trial Court and remanded the matter back to the trial Court to establish the plaintiffs' title over the suit property and to give measurement to the encroachment made by the defendant in the first item of the property. The trial Court, without considering the defendant's case and only considering the evidences of the plaintiff side, erroneously decreed the suit as against the general principles of burden of proof, which is the plaintiffs' initial duty and the



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same has to be proved by them. Therefore, the defendant filed the appeal before the first appellate Court and the first appellate Court, after considering the evidences adduced on either side held that there is no encroachment made in S.No.101/5A and the defendant had only constructed a house in his property, ie., S.No.101/9. The trial Court only considered the Advocate Commissioner's report and granted the relief of declaration and recovery of possession and mandatory injunction. Even according to the Advocate Commissioner's report, there is no measurement in respect of the A-schedule property and the Commissioner has only identified the measurement in respect of the house and there is no evidence to show that the entire property was measured and the defendant constructed the house in the plaintiffs' property. The second plaintiff himself admitted that the defendant constructed the house in the second schedule of the property. But, the trial Court has granted the decree in respect of the first schedule of the property. Therefore, the first appellate Court, after taking into consideration all those evidence, remanded back the case after setting aside the judgment and decree of the trial Court. Therefore, the order passed by the first appellate Court is in order and present appeal is liable to be dismissed.



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9. This Court has considered the submission made by either side counsel and perused the materials available on record.

10. This Court after hearing both sides and upon perusing the documents, frames the following point for determination in this appeal:

(i) Whether the properties listed in the plaint are correct and the properties are identified properly?

(ii) Whether the order passed by the first appellate Court remanding back the case before the trial Court is sustainable in law and on facts?

(iii) Whether the appeal has to be allowed or not?

Point No.1:

11. In this case, the plaintiffs have filed a suit for declaration, recovery or possession, mandatory injunction in respect of the first item of the schedule property and permanent injunction in respect of the second item of the schedule property. Before the trial Court, the second plaintiff examined himself as PW1 and marked Ex.A1 to Ex.A6. On the side of the defendant, no witness was examined and no documents were filed.



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Advocate Commissioner's report and plan were marked as Ex.C1 and Ex.C2. After evaluating the oral and documentary evidences adduced on either side, the trial Court decreed the suit in favour of the plaintiffs. Aggrieved by the said decree and judgment, the defendant has preferred an appeal before the first appellate Court. After perusing the records and evidence, the first appellate Court set aside the decree and judgment passed by the trial Court and remanded the case to the trial Court for fresh disposal by holding that the second plaintiff himself admitted that the defendant has constructed the house in the second item of the schedule property whereas the trial granted relief in respect of the first item of the schedule property for declaration, recovery of possession and mandatory injunction. Further the measurement and encroached portion of the property are not even mentioned in the plaint. Therefore, the first appellate Court remanded back the case for fresh disposal.

12. In such circumstances, the specific case of the plaintiff is that the defendant encroached the property in first item of the schedule property, but has not given any measurement in the schedule of property or in the averments of the plaint. But at the same time, the Advocate



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Commissioner was appointed before the trial Court and the Commissioner had filed a report. In the Advocate Commissioner report, there is no whisper about the measurement of the entire suit schedule properties and only the Commissioner measured the building situated in the first item of the property. As per the Commissioner's report, the house was constructed East-West 42 feet and North-South 26 feet. He also mentioned that 39 feet of the house was situated in S.No.101/5A and 3 feet situated in S.No. 101/9. Though the Commissioner had filed report and plan, there is no whisper about the measurement in respect of either the first item of the schedule property or the defendant's property, ie., S.No.101/9. When the defendant specifically denied the encroachment, it is the duty of the plaintiffs to establish the alleged encroachment, but the plaintiffs have not stated about the specific portion of the encroachment. The Advocate Commissioner's report also does not reveal measurement of the entire properties and it only mentioned the measurement about the building. The surveyor also accompanied with the Advocate Commissioner. However, the surveyor has also not filed the plan. In order to identify the encroached portion, the exact measurement of the property had not been in this case. Without measuring the property of first item, it is not appropriate to fix the



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encroached portion of the property. Therefore, it is appropriate to appoint an Advocate Commissioner once again to inspect the property and along with a qualified surveyor to identify the physical features as well as taking measurement of the entire property. Thus, the first point is answered.

Point Nos.2 &3:

13. The first appellate Court also after elaborate discussion, stated that in order to identify the property, it is appropriate to remand back the case for identification of the entire property and to give a measurement to the encroached portion. At this stage, the learned counsel for the appellants submitted that the first appellate Court itself can appoint a Commissioner and he has also fairly submitted that the appellants shall bear the cost for appointment of Advocate Commissioner before the first appellate Court and he will file appropriate petition to that effect.

14. The learned counsel for the respondent opposed for the appointment of Advocate Commissioner before the first appellate Court. If any Commissioner is appointed, the same can be exercised by the trial Court and thereby both parties can adduce evidence before the trial Court



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to establish their case in accordance with law.

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15. Considering the submissions made by both side counsels and considering the pendency of the case from the year 2006 and also considering the nature of the case, since there is a dispute in respect of the identification of A and B schedule properties and the dispute is the identification of the encroached portion, this Court feels that it is appropriate to direct the first appellate Court to appoint an Advocate Commissioner and to dispose the case in accordance with law after giving opportunities to both parties.

16. Since the first appellate Court itself having power to decide the case, the first appellate Court itself can dispose of the case without remanding the same to the trial Court. Therefore, the order passed by the first appellate Court in A.S.No.95 of 2010 dated 05.08.2011 is liable to be set aside and accordingly set aside. The first appellate Court/Sub Court, Sivagangai, is directed to hear the appeal in A.S.No.95 of 2010, afresh and appoint Advocate Commissioner to measure the property with qualified Surveyor and dispose the appeal within a period of three months from the



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date of receipt of a copy of this order and the first appellate Court can permit the parties to adduce the evidence in respect of identification of properties alone. Thus, the points 2 & 3 are answered.

17. With the above direction, this Civil Miscellaneous Appeal is allowed. No Costs. Consequently, connected miscellaneous petition is closed.

12.03.2024

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

To

1. The Sub Judge, Sivagangai.
2. The Additional District Munsif cum Judicial Magistrate,
Manamadurai.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL,J.

PJL

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