



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:**30.07.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)NO.1068 OF 2008

and

M.P(MD)Nos.1 of 2008 and 1 of 2009

Mariappan

:Appellant/Appellant/Plaintiff

.VS.

1.Subbammal

2.Anusuya

3.Jayaram @ Ibrahim

:Respondents/Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.36 of 2003, dated 18.2.2008, on the file of Sub-Court,Sivakasi confirming the judgment and decree made in O.S.No.113 of 1998, dated 7.8.2003, on the file of District Munsif Court, Sivakasi.

For Appellant

:Mr.T.R.Rajagopalan
Senior Counsel
for Mr.A.Sivaji

For Respondents
1 to 3

:Mr.M.Arjun Varman

**JUDGMENT**

WEB COPY

The Second Appeal is directed against the judgment and decree made in A.S.No.36 of 2003, dated 18.2.2008, on the file of Sub-Court, Sivakasi confirming the judgment and decree made in O.S.No.113 of 1998, dated 7.8.2003, on the file of District Munsif Court, Sivakasi.

2.The plaintiff in the suit is the appellant. The suit is for injunction. The suit was dismissed by the trial Court, Aggrieved by the same, the Plaintiff preferred an appeal in A.S.No.,36 of 2003, on the file of Sub-Court, Sivakasi.The First Appellate Court by its order, dated 7.8.2003, remanded the matter back to the file of trial Court with liberty to the plaintiff to amend the prayer in the suit to incorporate the prayer for declaration and possession. Aggrieved by the order of remand, the defendants have preferred an appeal in C.M.A(MD)No.3 of 2005 before this Court. The said C.M.A was allowed by this Court by setting aside the order of remand and the matter was sent back to the First Appellate Court to decide the First Appeal afresh.The First Appellate Court dismissed the appeal on merits. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.



3. According to the appellant/Plaintiff, the suit properties belong to one Gurusamy, husband of the first defendant and father of the second defendant. According to the appellant/plaintiff, the suit properties were purchased by Gurusamy and his brother Sankaralingam from one Subbiah. Later on, there was an oral partition among brothers and the suit properties were allotted to the share of Gurusamy. Thus Gurusamy was in possession and enjoyment of the suit properties. The plaintiff purchased the suit properties under sale deed 28.05.1992 and has been in possession and enjoyment of the same by mutation of revenue records. The defendants, who are none other than the wife, daughter and son in law of the said Gurusamy, attempted to interfere with the plaintiff's possession and enjoyment and hence, the plaintiff was constrained to file the suit for injunction.

4. The defendants in their written statement disputed the claim made by the plaintiff that the suit properties belong to Gurusamy. It was claimed by the defendants that a portion of the second schedule property belong to the first defendant. The allegation in the plaint as if the suit properties were purchased by Gurusamy and his brother Sankaralingam from one Subbiah were denied in the written statement. It was also claimed that some of the suit properties were purchased by Gurusamy and his brother



and the said properties were partitioned by way of registered partition in the year 1984. Under the said partition, some of the suit properties were allotted to the share of Gurusamy. The allegation in the plaint with regard to enjoyment and possession of the suit properties by Gurusamy was denied. The defendants also raised the plea regarding creation of charge over the portion of the suit properties in favour of first defendant in a decree passed in O.S.No.239 of 1992. The sale deeds relied on by the plaintiff to claim right over suit properties under Gurudamy were denied as invalid transactions. Thus the defendants, who disputed the plaintiffs's title as well as possession over the suit properties, sought for dismissal of the suit.

5.As mentioned earlier, the suit was dismissed by the trial Court and on appeal filed by the plainiff, the same was remanded back to the file of the trial Court, with a direction to amend the plaint.The remand order was set aside.The remand order passed by the First Appellate Court was set aside by this Court in C.M.A.No.3 of 2005. After the order passed by this Court in C.M.A.No.3 of 2005, as per the order of remand, the matter has been taken up for fresh hearing by the First Appellate Court and the First Appellate Court had dismissed the First Appeal confirming the judgment and decree passed by the trial Court.



Aggrieved by the concurrent findings, the plaintiff is before this Court by way of this Second Appeal.

6.Mr.T.R.Rajagopalan, learned Senior Counsel appearing for the appellant/plaintiff submitted that the First Appellate Court while confirming the judgment and decree passed by the trial Court, observed that in pursuance of the liberty granted by the First Appellate Court, plaintiff filed an amendment application for amendment of the plaint seeking declaration and possession and therefore, she was not entitled to claim possession over the suit properties and the said observation is against the judgment and decree passed by this Court in C.M.A(MD)No.3 of 2005.The learned Senior Counsel further submitted that once the order of remand passed by the First Appellate Court was set aside by this Court in C.M.A(MD)No.3 of 2005, any amendment made to the plaint in pursuance of the order of remand will automatically go and the First Appellate Court ought not have taken into consideration the amendment made by the plaintiff.

7.Based on the submission made by the learned Senior Counsel for the appellant, the following substantial questions of law are taken up for consideration:



1.Is the learned Subordinate Judge right in not deciding the issue for permanent injunction as originally calimed after the decree and judgment, dated 20.8.2004 made in A.S.No.36 of 2003 were set aside by the Honourable High Court inC.M.A.No.3 of 2005?

2.The learned Subordinate Judge, having held that the amendment order passed in I.A.No.924 of 2004 is invalid in view of the order passed in C.M.A.No.3 of 2005, was right in proceeding to decide the appeal on the basis of the amended plaint which is held to be invalid?

3.Whether the learned Subordinate Judge right in not considering I.A.No.27 of 2004 filed under Order 41 Rule 27 of Civil Procedure Code, ignoring the direction in C.M.A.No.3 of 2005?

8.The learned counsel for the respondents is heard on the questions of law taken up for consideration.

9.The learned counsel for the respondents submitted that after the order of remand by the First Appellate Court, the appellant herein accepted the same and filed an amendment application seeking declaration of title and possession. Therefore, he clearly admitted that he was out of possession of the suit properties and therefore, he is not entitled to argue the First Appeal as if he had been in possession of the suit properties on the date of presentation of the plaint. The learned counsel further



submitted that the First Appellate Court by taking into consideration the conduct of the plaintiff, in filing the amendment application, without challenging the findings rendered against him with regard to possession, rightly held that he was not entitled to decree for injunction.

10.It is seen from the typed-set of papers and also the submission of the learned counsel appearing on either side, after remand order passed by the First Appellate Court, the plaintiff filed an application for amendment of the plaint seeking declaration of title as well as possession. In the meantime, the order of remand passed by the First Appellate Court was challenged by the defendants by way of an appeal before this Court in C.M.A(MD)No. 3 of 2005 and the order of remand passed by the First Appellate Court was set aside with a direction to the First Appellate Court to dispose of the First Appeal as well as I.A.No.27 of 2004 filed to raise additional evidence, on merits after affording an opportunity to both the parties concerned.

11.The First Appellate Court without considering the appeal on merits, as directed by this Court in the order passed in C.M.A(MD)No.3 of 2005, non-suited the plaintiff mainly on the ground that the plaintiff has failed to challenge the findings



rendered by the First Appellate Court earlier at the time of remanding the matter back to the trial Court. The First Appellate Court came to the conclusion that having failed to challenge the adverse finding against him in the order of remand, he also filed an amendment application to amend the prayer for declaration and possession and hence, the plaintiff is not entitled to argue the first appeal on merits, as if he was in possession of the suit properties on the date of filing of the plaint. The said conclusion reached by the First Appellate Court is erroneous in the light of the order passed by this Court while setting aside the order of remand. The relevant portion of the order made in C.M.A(MD)No.3 of 2005 reads as follows:

“8.The decree and judgment of the learned Subordinate Judge, Sivakasi, dated 20.08.2004 made in A.S.No.36 of 2003, are set aside. A.S.No.36 of 2003 is remanded back to the file of the Lower Appellate Court who shall dispose of the appeal and I.A.No.27 of 2004, on merits after affording sufficient opportunity to both the parties concerned.”

12. Therefore, it is clear that the findings rendered by the First Appellate Court with regard to the possession of the plaintiff in the earlier remand order passed by the First Appellate Court was set aside by this Court and the matter was sent back to the file of the First Appellate Court to dispose of the first appeal on merits



along with I.A.No.27 of 2004 filed to raise additional evidence.

When the order of remand is set aside by this Court in C.M.A(MD)No.3 of 2005, absolutely there is no necessity for the plaintiff to challenge the same by way of separate appeal. Once the order of remand passed by the First Appellate Court is set aside by this Court, any proceedings taken before the trial Court including the amendment of the plaint sought for by the plaintiff would automatically get obliterated and the rights of the parties have to be decided by the First Appellate Court based on the original unamended plaint. In fact, while disposing the First Appeal, the First Appellate Court also observed that in view of the order passed by the High Court, it could not decide the question of title and question of title can be gone into only incidentally as in the case of bare injunction suit. Therefore, the conclusion reached by the First Appellate Court as if the original prayer in the suit for bare injunction became infructuous due to the subsequent amendment sought for by the plaintiff, is not sustainable in the light of the order passed by this Court in C.M.A(MD)No.3 of 2005. The questions of law taken up for consideration are answered accordingly in favour of the appellant/Plaintiff and against the respondents.

13.In view of the above, the Second Appeal is allowed by



setting aside the judgment and decree passed by the First Appellate Court and the matter is remanded back to the file of the First Appellate Court with a direction to dispose of the First Appeal on merits along with I.A.No.27 of 2004 filed to raise additional evidence in the light of the direction issued by this Court in C.M.A(MD)No.3 of 2005. No costs. Consequently, connected Miscellaneous Petitions are closed.

30.07.2024

Index:Yes/No

Internet:Yes/No

NCC:Yes/No

vsn

To

- 1.The Sub-Judge,
Sivakasi.
- 2.The District Munsif,
Sivakasi..
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



11

S.SOUNTHAR, J.

vsn

JUDGMENT MADE IN
S.A(MD)NO.1068 OF 2008
and
M.P(MD)Nos.1 of 2008
and 1 of 2009

30.07.2024