



C.M.A(MD)No.473 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated: 23.01.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

C.M.A(MD)No.473 of 2014

and

M.P(MD)No.1 of 2014

Paraloga Meriammal

... Appellant/Respondent/
Plaintiff

Vs.

Innasimuthu

... Respondent/Appellant/
Defendant

Prayer : This Civil Miscellaneous Appeal filed under Order 43, Rule 1(4) of CPC, to set aside the judgment and decree, dated 12.11.2013 in A.S.No. 10 of 2011 on the file of the Subordinate Judge, Virudhunagar in reversing the judgment and decree, dated 09.07.2010 made in O.S.No.266 of 2006 on the file of the District Munsif Court, Virudhunagar.

For Appellant : Mr.P.Athimoolapandian

For Respondent : Mr.N.Subramanian



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JUDGMENT

This Civil Miscellaneous Appeal has been preferred as against the judgment passed in A.S.No.10 of 2011 on the file of the Subordinate Judge, Virudhunagar, wherein the respondent herein has preferred appeal as against the judgment and decree passed in O.S.No.266 of 2006 on the file of the District Munsif Court, Virudhunagar and the suit was decreed. The First Appellate Court has set aside the order passed by the Trial Court and allowed the appeal by remanding back the matter for fresh disposal. As against the decree and judgment passed by the First Appellate Court, the present Civil Miscellaneous Appeal has been preferred.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

3. The brief case of the plaintiff are as follows:

The suit property was originally belonged to one Somasundara Nadar and the plaintiff purchased the property from the Somasundara Nadar through sale deed, dated 12.03.1979 and thereby, he became the



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owner of the suit property. The defendant is stranger to the suit property and he attempted to encroach the property of 7 cents on the northern side of the property by digging the land for foundation. Thereafter, due to objection, he stopped the same. Again the defendant completed the construction with his men and thereby, the plaintiff issued notice to the defendant. The defendant after issuance of notice did not give reply. Therefore, he filed the suit for declaration of property, recovery of possession and mandatory injunction to remove the encroachment made in the plaint 'B' Schedule property. The entire schedule property was mentioned as 'A' Schedule property. The encroached portion was shown as 'B' Schedule property.

4. The case of the defendant is as follows:

The suit properties are not described properly. The plaint schedule property is not in possession and enjoyment of the plaintiff. In the suit property, there are six terraced houses and one thatched house are available. Out of six terraced houses, one thatched house was constructed even in the year 1990 and assessment was also made in the name of the defendant. The averment that the suit property was purchased by the



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plaintiff through sale deed, dated 12.03.1979 is false. The defendant is enjoying the house by paying house tax and also got electricity connection. Therefore, the suit is liable to be dismissed.

5. Based on the above said pleadings, the Trial Court has framed the following issues:

- 1) பி அட்டவணைச் சொத்து வாதிக்கு பாத்தியப்பட்டதா?
- 2) வாதி கோரும் விளம்புகை மற்றும் சுவாதீன பரிகாரம் கிடைக்கத்தக்கதா?
- 3) வாதி கோரும் செயலுறுத்துக்கட்டளை பரிகாரம் கிடைக்கத்தக்கதா?
- 4) வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரம் யாரு?

6. Before the Trial Court, on the side of the plaintiff, she has examined P.W.1 and P.W.2 and marked Exhibits A.1 to A.7 and on the side of the defendant, D.W.1 and D.W.2 were examined and marked Exhibits B.1 to B.5. Apart from that, Exhibits X.1 to X.5 and Exhibits C.1 to C.3 also were marked.



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7. After completion of Trial, upon hearing both the sides and perusing the records, the Trial Court has decreed the suit in favour of the plaintiff. As against the decree and judgment, the defendant had preferred the appeal in A.S.No.10 of 2011 on the file of the Subordinate Judge, Virudhunagar.

8. The First Appellate Court after analyzing all the evidences, set aside the decree and judgment of the Trial Court and remanded the case back for fresh disposal on the ground that the properties are not identified. As against the decree and judgment, the present Civil Miscellaneous Appeal has been preferred by the appellant / plaintiff on the following grounds:

1) The order of the First Appellate Court remanding the matter to Trial Court is against law.

2) The learned First Appellate Court ought not to have remanded the matter since admittedly there is no dispute as regards the identity of the suit property.

3) The learned First Appellate Court ought not to have attached the Commissioner plan with the decree, if it entertains any documents as



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regard the identity of the suit property.

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4) The learned First Appellate Court ought not to have reversed the well considered judgment and decree of the Trial Court on technical ground.

5) The learned First Appellate Court ought to have seen that the plaintiff's ownership over the disputed property has been proved by Exhibit A.1 and the defendant is not having any document of title in respect of suit property.

6) The learned First Appellate Court ought to have held that when there is no dispute regarding the identity of the suit property in view of the commissioner's plan absence of the measurement and non mentioning of door number are not fatal maintainability of the suit.

7) The learned First Appellate Court ought to have seen that the defendant is not having any trace of defence and therefore their no needs to remand the matter.

8) The learned First Appellate Court having accepted the entire evidence both oral and documentary on the side of the present appellant should have dismissed the first appeal straight away.

9) All other reasons assigned by the learned First Appellate Court in



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remanding the matter are any legally un-sustainable are factually incorrect.

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9. The learned Counsel for the appellant / respondent / plaintiff would contend that the appellant / respondent / plaintiff has filed the suit for declaration, recovery of possession and mandatory injunction. The Trial Court has decreed the suit. The appellant / respondent / plaintiff has examined P.W.1 and P.W.2 and marked Exhibits A.1 to A.7, on the side of the respondent / appellant / defendant, they have examined D.W.1 and D.W.2 and marked Exhibits B.1 to B.5, third party documents Exhibits X.1 to X.5 were marked and Court documents Exhibits C.1 to C.3 were also marked. The plaintiff has established the case by identifying the property and the Commissioner also visited the property and filed reports and based on the documents, the Trial Court has categorically held that the plaintiff is the owner of the property and the defendant encroached the property and thereby decreed the suit in favour of the plaintiff. But the First Appellate Court without considering the evidences in the proper perspective, erroneously set aside the judgment and decree passed by the District Munsif Court, Virudhunagar and remanded back for identification of the property. Already the Commissioner has filed a report and plan and



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as per the Commissioner's Report and Plan, the properties were clearly identified. But the Trial Court has failed to consider the same and thereby, the present Civil Miscellaneous Appeal is filed and the judgment passed by the First Appellate Court is liable to be set aside by allow this appeal. There are sufficient materials available to pronounce complete and effective judgment and thereby, the remand order passed by the First Appellate Court is liable to be set aside.

10. To support the contention of the appellant / respondent / plaintiff, he relied upon the following judgments:

(i) Sirajudheen Vs. Zeenath and Others reported in 2023 (2) MLJ 264 (SC),

(ii) V.Munusamy (deceased) and Others Vs. M.Suguna reported in 2005 (1) CTC 107 and

(iii) Karuppaiyan Vs. Pannaiya Nadar and Others reported in 2021 (4) CTC 435.

11. The learned Counsel appearing for the respondent / appellant / defendant would contend that the plaintiff has not properly described the



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property and identification of the property is not sufficient to grant the reliefs by the Court. The Trial Court erroneously granted decree without considering the evidences of the parties and according to the description of property mentioned in the plaint, the second schedule 'B' schedule property was mentioned as vacant site. But for the vacant site, the Trial Court has granted mandatory injunction. For the vacant site, the mandatory injunction cannot be granted. Without mentioning the measurements, the Trial Court has erroneously granted decree for mandatory injunction and without considering the evidence of defendant's side that he constructed the house in the year 1990 and has been continuously paying the house tax to the property. But without considering the same, the Trial Court has erroneously granted decree as prayed for by the plaintiff. Therefore, the defendant has preferred an appeal in the First Appellate Court, after considering the entire evidences fairly came to a conclusion that the property is not identifiable and the description of property is not correct and in order to grant reliefs, the suit property has to be correctly identified and even if relief of recovery of possession and mandatory injunction is granted, it would not be possible to execute the decree. Therefore, the Trial Court has correctly remanded back the case to



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the Trial Court. Therefore, the order passed by the First Appellate Court is in accordance with law and the present appeal is liable to be dismissed.

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12. This Court after hearing both sides and upon perusing the documents including the order of the Tribunal, the points for determination in this appeal are:

i) Whether the properties are correctly described in the plaint to identify the properties?

ii) Whether the order of the First Appellate Court by setting aside the judgment and decree of the Trial Court and remand back to the Trial Court is sustainable in law and facts?

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

iv) To what relief the parties are entitled to?

13. Point No.1:

In this case, the suit has been filed for the relief of declaration, recovery of possession and mandatory injunction. The Trial Court has decreed the suit. According to the plaintiff, the properties belongs to him and he is in possession and enjoyment of the suit property and he



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constructed six houses. In 'A' Schedule property, six houses are available, in the 'B' Schedule property, the defendant has encroached the property. Thereby, he filed the suit. According to the defendant, the plaintiff has not purchased the property as alleged by him. The defendant has constructed the property in the 'B' Schedule property in the year 1990 and thereafter, he has been in possession and enjoyment of the suit property. He is also paying house tax to the property and the plaint schedule property has not been properly described and the identification of property is vague and the plaintiff has not identified the property.

14. On the side of the plaintiff, they have examined P.W.1 and P.W.2 and marked Exhibits A.1 to A.7 and on the side of the defendant, they have examined D.W.1 and D.W.2 and marked Exhibits B.1 to B.5. The Trial Court after considering the above said submissions made by both the Counsels and based on the records, the Trial Court has decreed the suit as prayed for in the plaint.

15. The First Appellate Court set aside the order of the Trial Court and remanded back the case for proper identification of the properties.



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This Court has perused the entire records and the plaintiff has filed the suit for declaration, recovery of possession and mandatory injunction described the properties in the schedule as 'A' Schedule and 'B' Schedule property. The 'B' Schedule property is the disputed property and in that property only, the defendant alleged to have encroached. But the plaintiff has not mentioned the measurements of alleged encroached property. Once the plaintiff filed the suit for recovery of possession and mandatory injunction, it is his duty to describe in the plaint as to what extent of property was encroached by the defendant. But in this case, there is no measurements and extent of property described. Moreover, in the plaint, the second Schedule mentioned as vacant site. While so, how the plaintiff can get decree for mandatory injunction for the vacant site. Therefore, the First Appellate Court after taking into consideration of all these aspects, has correctly come to a conclusion that even if the decree is passed, it cannot be executed because of the schedule properties are not properly described. Therefore, this Court is fully agree with the view of the First Appellate Court that the properties have not been described properly. Though the Commissioner has inspected the property and identified the encroachment, without properly described the properties decree cannot be



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granted. Therefore, the plaintiff has failed to describe the property in a proper manner and failed to identify the property.

16. Point No.2:

In the previous point, this Court came to a conclusion that the properties of the plaintiff have not been properly described and thereby, it is not appropriate to grant decree for recovery of possession and mandatory injunction, without describing of property about which extent it was encroached and constructed by the defendant. Therefore, the Trial Court after taking into consideration of all these aspects, correctly set aside the order passed by the Trial Court and remanded back to the Trial Court for identifying the property for proper identification. This appeal has been preferred as against the remand order passed by the First Appellate Court and this Court in the previous point decided that the plaintiff failed to describe the property properly and thereby, the First Appellate Court after analyzing all the evidences, correctly set aside the order passed by the Trial Court and remanded back to the First Appellate Court for proper identification and to describe the properties properly. The learned Counsel appearing for the appellant /respondent / plaintiff had relied upon the



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following judgments:

- (i) *Sirajudheen Vs. Zeenath and Others reported in 2023 (2) MLJ 264 (SC),***
- (ii) *V.Munusamy (deceased) and Others Vs. M.Suguna reported in 2005 (1) CTC 107 and***
- (iii) *Karuppaiyan Vs. Pannaiya Nadar and Others reported in 2021 (4) CTC 435.***

17. On careful perusal of the judgments, it is clear that if the Appellate Court without recording any finding and without explaining as to on what ground the decree was being reversed, the Appellate Court cannot remand the case and also it is clear that under Order 41, Rule 23 and 27, the Appellate Court itself can take evidence and decide the case after framing appropriate issues, if necessary and dispose the case in accordance with law. But in the case on hand, the plaintiff has not taken any steps to describe the properties in a proper manner and even in the Appeal stage. Therefore, in order to give opportunity to the plaintiff and even if the decree is granted, the decree cannot be executed. On that ground only the First Appellate Court has remanded back to the case.



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Therefore, the said judgments will not be applicable to the present facts of the case and no way helpful to decide the case in favour of the appellant.

18. Per contra, the learned Counsel for the respondent / appellant / defendant has relied judgment in *A/M Kothandaramasamy Koil Thirupuvanam Vs. Vairam and Others reported in 2012 (1) T.N.C.J 649 (Mad) (MB)*. On careful perusal of the above said judgment, it is clear that if the property is not described properly instead of dismissing the suit, an opportunity can be given to the plaintiff so as to set right the plaint for the purpose of suiting the nature of relief sought for therein and as per Order 7, Rule 3 of CPC, if a suit has been instituted in respect of an immovable property, the plaint should contain necessary description so as to identify the same and as per Section 39 of the Specific Relief Act, 1963, a decree of mandatory injunction should be granted only when the same is capable of being executed and if no proper description has been given it is not been consonance with Order 7, Rule 3 of CPC. In the case on hand also, the plaint schedule property (i.e.,) 'B' Schedule property has not been properly described and the measurements also not given and thereby, the First Appellate Court has rightly held that in order to given opportunity to



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the plaintiff remand back the case for fresh disposal.

19. In view of the above said discussions, the order passed by the First Appellate Court is in order and is perfectly correct and warrants no interference. The order passed by the First Appellate Court in A.S.No.10 of 2011 on the file of the Subordinate Judge, Virudhunagar is confirmed. Therefore, the present Civil Miscellaneous Appeal has no merits and deserves to be dismissed. Accordingly, this Civil Miscellaneous Appeal stands dismissed.

20. In the result, this Civil Miscellaneous Appeal stands dismissed.

There shall be no order as to costs.

23.01.2024

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

To

1.The Subordinate Judge,
Virudhunagar.



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2.The District Munsif Court,
Virudhunagar.

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



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P. DHANABAL, J.

BTR

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