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CMA.(MD)No.964 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserved	30/07/2024
Date of Pronounced	09/09/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

CMA (MD) No. 964 of 2021

and

CMP (MD) No. 9119 of 2021

Syed Mohammed Maheen : Appellant/Respondent/
Plaintiff

Vs.

P.F.Sumaiya Banu : Respondent/Appellant/
Defendant

PRAYER:-Civil Miscellaneous Appeal is filed under Order 43 Rule 1(u) of the Civil Procedure Code, to set aside the judgment and decree passed in AS No.25 of 2020 on the file of the Sub Court, Padmanabhapuram, dated 17/09/2021 remanding the judgment and decree in OS No.139 of 2016 on the file of the Principal District Munsif, Padmanabhapuram, dated 11/11/2020.

For Appellant : Mr.S.Meenakshisundaram
Senior Counsel
for Mr.Sengu Vijay

For Respondent : Mr.V.Meenakshi Sundaram



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JUDGMENT

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This Civil Miscellaneous Appeal is filed against the judgment and decree passed in AS No.25 of 2020 by the Sub Court, Padmanabhapuram, dated 17/09/2021 remanding the judgment and decree passed in OS No.139 of 2016 by the Principal District Munsif, Padmanabapuram, dated 11/11/2020.

2.The plaint averments in brief:-

The plaintiff purchased the property measuring about 47.750 cents comprised in R.S No.146/12 situated at Ponmanai Village, Padmanabapuram, on 04/01/2007. After purchase, he constructed a building within 5 cents. From the date of purchase, the plaintiff was in possession and enjoyment by paying kists, tax, etc. The defendant is the wife of the plaintiff and she is mentally ill person. She was taken by the plaintiff to Psychiatrist Doctor at Nagercoil for treatment. The Doctor advised the plaintiff to take care of the defendant, since there is possibility of running away after taking the medicine. After taking tablets, the defendant had a sleep. But gave a false complaint before the Kulasekharam Police Station stating that she was detained in a room and the plaintiff locked it and never allowed her children to speak. On the basis of the false complaint, a case in Crime No.375 of 2013



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was registered for the offences under sections 342, 294(b), 324 and 506(ii) IPC and Section 4 of the Tamil Nadu Women Harassment Act, 2002. The plaintiff was released on anticipatory bail by the District Court, Nagercoil. To save the life, he shifted to Nagercoil. Due to enmity, the defendant disturbing the peaceful possession and enjoyment of the property of the plaintiff. The plaintiff is not bound to maintain the defendant. So, the plaintiff filed OS No.296 of 2013 for permanent injunction. But the defendant broke open the lock and trespassed into the house on 15/12/2013 and committed theft of valuable ornaments and goods. Now the defendant is in illegal possession of the property. She filed a suit in OS No.141 of 2014 against the plaintiff before the Principal District Munsif Court, Padmanabapuram, for restitution. That was dismissed on 24/08/2015. So, the suit is laid for recovery of possession and for payment of mesne profit at the rate of Rs.66,000/- for the use and occupation and for granting mense profit till the date of delivery.

3.Written statement was filed by the defendant stating that she is not the mental ill patient. She was treated cruelly by the plaintiff. Even though the property was purchased in the name of the plaintiff, but



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the sale price was made out of the funds created by the defendant by selling the jewels which belongs to her. The defendant was locked inside the room and was given tablets. Only on that basis, the complaint was registered against the plaintiff. But the plaintiff was living with another lady. Through her, he begotten two childrens and she is reserving the property and enjoying the same. The divorce, dated 14/09/2016 is denied as false. It is also denied that the defendant trespassed into the property by breaking open the lock on 15/12/2013. The property measuring about 7.5 cents given by her at the time of marriage as sridhana was sold out of the compulsion of the plaintiff on 03/01/2023 for Rs.23,00,000/-. Out of the sale price, Rs.10,00,000/- was utilized for construction of the plaintiff's house.

4.On the basis of the pleadings on both sides, the following issues were framed by the trial court:-

(1)Whether the plaintiff is entitled for recovery of possession of plaint schedule property as prayed for?

(2)Whether the plaintiff is entitled for mesne profit as prayed for?



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(3) To what relief, the plaintiff is entitled for?

5. Before the trial court, on the side of the plaintiff, one witness was examined and 10 documents were marked. On the side of the defendant, no oral and documentary evidence was adduced.

6. In conclusion, the suit was decreed as prayed with costs for recovery of possession and in respect of other reliefs, it was dismissed.

7. Against which, appeal was preferred by the defendant in AS No.25 of 2020 on the file of the Sub Court, Padmanabhapuram. Along with the Appeal Memorandum, IA No.1 of 2020 was filed by the appellant under Order XLI Rule 27 and section 151 of CPC to examine the witness on their side. But the appellate court after considering the same, dismissed that application and directly pronounced judgment without affording opportunity to the appellant to lead evidence on their side.



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8.The appellate court took up the appeal along with IA. After hearing both sides, by setting aside the decree and judgment of the trial court, the suit was remitted back to the trial court for fresh consideration permitting both sides to lead both oral and documentary evidence.

9.Against which, this Civil Miscellaneous Appeal is preferred by the appellant.

10.Heard both sides.

11.The learned Senior counsel appearing for the appellant would submit that the grounds of remand are not satisfying the requirement of law. He is referring to para 18 of the order of the appellate court. He extracted the 'B' diary of the trial court and also the written statement stating that sufficient opportunity was given to the respondent herein not only for cross examining the plaintiff, but also for leading the defence side evidence. In spite of the sufficient opportunity given, the respondent chose to drag on the matter. Only because of dragging on the conduct on the part of the respondent herein, further evidence was closed. After hearing the arguments, judgment was pronounced.



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12.Further he would submit that amendment petition was filed for amending the court fee particulars. So, there is no necessity for filing the additional written statement for them. No further pleadings is also required on that issue. As per section 12(1) of the Tamil Nadu Court Fees and Suits Valuation Act, payment of court fee cannot be taken as preliminary issue after the evidence was recorded. The order passed in IA No.1 of 2020 was not properly appreciated by the appellate court. The respondent cannot be permitted to fill up the lacuna in the evidence. Even in the petition filed under Order 41 Rule 27 CPC, no document proposed to be produced is mentioned.

13.Per contra, the learned counsel appearing for the respondent would submit that no oral evidence on the side of the defendant was permitted. Only on that account, the appellate court remanded the matter. Since the appellate court has exercised the discretion in a particular manner, no interference is called for.

14.As mentioned in the preamble portion and as per the submission made by the appellant, the dates and events before the trial court requires repetition.



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15.The suit was filed in the year 2016. Originally the defendant remained ex-parte. Later statement was filed. Ex-parte decree was set aside and posted for the cross examination of PW1. Again, the defendant defaulted. The case was posted to 26/04/2018 for defendant side evidence. That was not properly utilized by the defendant. He dragged on for several hearings. Later only, he filed an application to recall PW1. That was allowed, cross examination was made and later again, posted for defendant side witness from 12/02/2019 to 27/04/2019. Thereafter, another application was filed to receive the additional written statement in IA No.1 of 2020. That was dismissed and posted for defendant side evidence. Since the defendant did not come forward to adduce evidence, it was closed on 29/11/2019 *suo muto*.

16.By pointing out this dates and events, the learned Senior counsel appearing for the appellant would submit that it is not the fittest case for the appellate court to exercise the discretionary power in remanding the matter back to the trial court. Even if remanded to the trial court, there is no guarantee that the respondent will complete the trial. Apart from that, it is seen that belated attempt was made by the defendant to challenge the payment of court fee. But as per section



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12(C) of the Tamil Nadu Court Fees and Suits Valuation Act, after the trial commenced, no such plea can be raised. On that account, the learned Senior counsel appearing for the appellant would submit that no further evidence is required and remanding the matter back is absolutely nothing, but an attempt on the part of the appellate court to give approval of the respondent conduct.

17. So the learned counsel appearing for the respondent would draw the attention of this court to the judgment of the Hon'ble Supreme Court in **Jaganathan Vs. Raju Sihamani [(2012) 5 SCC 540]** and submit that CMA is equivalent to second appeal under section 100 of the Civil Procedure Code. Unless the substantial question of law is involved, CMA will not lie. According to the respondent, no substantial question of law is involved in this matter. So, CMA will not lie. He would also contend that the appellant court has exercised the discretion in a particular manner, unless that discretionary power found to be exercised without following the fundamental principle of law, CMA will not lie. If the additional evidence is recorded by the appellate court, opportunity must be given to the parties to let in evidence, which is settled proposition of law and procedure reiterated by



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the Hon'ble Supreme Court in the judgment reported in

Akhilesh Singh @ Akhileshwar Singh Vs. Lal Babu Singh and

others (2018-3-L.W.97). So, no doubt that if additional evidence is permitted by the appellate court, as mentioned above by the respondent, two courses are available to the appellate court, either take up the additional evidence or it can remand the matter back to the trial court.

18. Here, as mentioned above, discretion has been exercised by the appellate court in a particular manner. More so, when the respondent has not let in any oral evidence or documentary evidence, remanding the matter is the only course available to the appellate court. No doubt that there were lapses and laches on the part of the respondent herein to utilize the opportunity. The appellate court thought it otherwise to give opportunity to the respondent to lead evidence. But unless that power is established by the appellant that it was exercised in an improper or illegal manner, no interference is called for. Except the delay on the part of the respondent and belated attempt to raise the issue of payment of court fee, no other substantial ground was made out by the appellant herein to interfere the order passed by the appellate court.



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19.I find absolutely no merit in the appeal and accordingly, it is **dismissed** of course there shall be a direction to the trial court to see that the suit is disposed of as expeditiously as possible considering the oldness of the matter as directed by the appellate court. Consequently, connected Miscellaneous Petition is closed. No costs.

Index:Yes/No
Internet:Yes/No
er

09/09/2024

To,

- 1.The Sub Judge,
Padmanabhapuram.
- 2.The Principal District Munsif,
Padmanabhapuram.
- 2.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGO VAN, J

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