



C.M.A(MD).No.991

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 25.07.2024

DELIVERED ON: 30.07.2024

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

**C.M.A.(MD).No.991 of 2017
and CMP(MD).No.10296 of 2017**

Mary Suseela

...Appellant/Respondent
Plaintiff

Vs

Michael (died)

1.Anasthasi

2.Mariaselvi

3.Little Flower

4.Mary Santhakumari

5.Maria Lisa

6.Marianesam

7.Albert

8.Margret Pushpalatha

9.Joshep Benedicts

1/14



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10. Josephin Edward

(1st Respondent/Appellant died. LR's are additional appellants impleaded as per order in I.A.No.245 of 2009 dated 23.12.2009)

11. Silvestor

12. Nimal Star

.... Respondents/Appellants
/Defendants

PRAYER: The Civil Miscellaneous Appeal is filed under Order 43 Rule 1(U) of CPC to set aside the judgment and decree dated 21.04.2017 passed in A.S.No.69 of 2006 on the file of the Camp Court Judge at Kuzhithurai (II Additional Subordinate Judge, Nagercoil), Kanyakumari District so far as setting aside the judgment and decree dated 30.11.2005 passed in O.S.No.31 of 1997 on the file of the Principal District Munsif, Kuzhithurai, Kanyakumari District and remanding the case to the trial Court.

For Appellant : Mr.K.N.Thampi

For Respondents : Mr.C.K.M.Appaji

For R1, R3 to R5, 7, 8, 10 & 11

: No appearance for R9 & R12

: R2 & R6 died

J U D G E M E N T

The plaintiff in O.S.No.31 of 1997 on the file of the Principal District Munsif Court, Kuzhithurai has filed the present appeal challenging



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the order of remand passed in A.S.No.69 of 2006 on the file of the Camp Court, Kuzhithurai (II Additional Subordinate Judge, Nagercoil).

(A)Factual Matrix:

2.The appellant herein as plaintiff had filed the above said suit for the relief of declaration of title and recovery of possession.

4.The defendants in their written statement have disputed the identity and location of the suit schedule property.

5.An Advocate Commissioner was appointed by the trial Court and he has filed his report as Exhibit C1 and plan as Exhibit C2. The Advocate Commissioner was examined as CW1. The plaintiff had examined herself as PW1 and marked Exhibits A1 to A8. The first defendant's son has been examined as DW1 and Exhibits B1 to B13 documents have been marked.

6.The trial Court after considering the oral, documentary evidence, commissioner's report and plan had proceeded to decree the suit as prayed for.

7.Challenging the said judgment and decree, the defendants have filed A.S.No.69 of 2006 on the file of the II Additional Subordinate Court, Nagercoil. Pending appeal, the defendants have filed I.A.No.157 of 2010



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and 150 of 2013 for reception of certain documents as additional documents. Those applications have been allowed by the First Appellate Court and the orders have not been put to challenge by the plaintiff.

8.The defendants/appellants had filed I.A.No.75 of 2015 to set aside the Commissioner's report and plan filed before the trial Court. The appellants had filed I.A.No.83 of 2013 to receive objections to the Commissioner's report that was filed during the appellate stage. I.A.No.1 of 2017 was filed to examine the Advocate Commissioner. The defendants had filed I.A.No.2 of 2017 to receive the sale deed dated 01.12.1977 as additional evidence. I.A.No.76 of 2008 was filed seeking amendment of the written statement.

9.The First Appellate Court had allowed all the interlocutory applications except I.A.No.76 of 2008. The First Appellate Court had proceeded to frame two additional issues. The First Appellate Court had remitted the matter back to the trial Court with a direction to reissue the Commissioner's warrant to identify the suit schedule of property with certain observations. The trial Court was further directed to answer the additional issues framed by the Court. In the judgment, the First Appellate Court has also made an observations that the report filed by the Advocate



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Commissioner before the First Appellate Court is not sufficient to identify the location of the suit schedule property. Based upon the above said observations, an order of remand has been passed by the First Appellate Court. Challenging the same, the present appeal has been filed by the plaintiff.

(B)Submissions of the counsels appearing on either side:

10. According to the learned counsel appearing for the appellant plaintiff, the First Appellate Court itself ought to have considered the Commissioner's report. He had further contended that the Commissioner's report filed before the trial Court cannot be set aside because it is forming part of the Court records. The Advocate Commissioner has already been examined before the trial Court and therefore, reexamination of the Commissioner would not arise. The additional evidence which is sought to be marked is a sale deed of the year 1977 which is 20 years prior to the filing of the suit. No proper explanation has been offered by the defendants to mark the said document during the appellate stage. Hence, he prayed for allowing the appeal and to direct the First Appellate Court to dispose of the appeal on merits.



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11.The learned counsel for the appellant had relied upon two judgments of our High Court reported in **2017 (1) CTC 307 (Elumalai Vs. Kanthamani Ammal)** and **2017 (4) CTC 243 (Rajammal (Deceased) and another Vs. Chinnathayee (died) and another)** to contend that when the description or identity of the suit schedule property is not disputed, the appointment of the Advocate Commissioner is not necessary. He had further contended that the order of remand should be invoked sparingly and as a last alternative. The order of remand cannot be passed for the purpose of granting a second opportunity to a party to fill up the lacuna when the suit was pending before the trial Court. Hence, he prayed for allowing the appeal.

12.Per contra, the learned counsel appearing for the respondents had contended that the First Appellate Court had arrived at a specific finding that the Commissioner's report filed before the trial Court as well as before the Appellate Court are not sufficient enough to identify the suit schedule property. In fact, the defendants have taken a specific stand in the written statement disputing the lie and location the suit schedule property. When a second Commissioner had already been appointed naturally, the first Commissioner's report and plan have to be set aside.



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13.Since the Commissioner was appointed by the Appellate Court and the time had expired for reception of objection, an application was filed to receive the objection. The same Commissioner who was appointed by the trial Court has been appointed by the First Appellate Court and he has filed a fresh report and therefore, re-examination of the Commissioner has become essential.

14.The learned counsel had further contended that the sale deed of the year 1977 which is sought to be marked as an additional evidence is very much essential to prove that the plaintiff's claim is not legally sustainable. He had further contended that when the additional evidence application has been allowed, a direction has been issued for appointment of a fresh Commissioner and additional issues are framed, it is necessary to remand the matter back to the trial Court. Hence, he prayed for sustaining the order of remand passed by the First Appellate Court.

15.I have considered the submissions made on either side and perused the material records.



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(C)Discussion:

16.The plaintiff had filed the suit for declaration of title and recovery of possession. A perusal of the written statement indicates that the defendants have specifically disputed the lie and location of the property. The Appellate Court has arrived at a specific finding that the Commissioner's report submitted before the trial Court as well as the First Appellate Court are insufficient to arrive at a conclusion with relation to lie and location of the property. However, for the purposes of appointment of an Advocate Commissioner, an order of remand cannot be passed. In case, if the First Appellate Court feels that the warrant has to be reissued to the same Advocate Commissioner with certain directions, the same can be done by the First Appellate Court itself.

17.The Advocate Commissioner has filed a report before the trial Court and there is no allegation of bias as against him. In fact the same Commissioner has been appointed for the second time by the First Appellate Court. Once a Commissioner's report is filed, it becomes part of the Court records and it cannot be set aside unless a party establishes that the report is biased. Therefore, the trial Court was not right in allowing I.A.No.75 of 2015.



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18.The Advocate Commissioner appointed before the First Appellate Court has filed his report and therefore, the First Appellate Court was right in allowing I.A.No.83 of 2013 to receive objections from the defendant in the said report. The Commissioner had already been examined before the trial Court as CW1. Therefore, the reexamination of the Commissioner before the First Appellate Court would not arise. The order passed by the First Appellate Court in I.A.No.1 of 2017 is hereby set aside. However, if fresh warrant is issued to the Advocate Commissioner with certain direction by the First Appellate Court, thereafter if the parties feel that the examination of the Commissioner is essential, they are at liberty to approach the First Appellate Court again.

19. I.A.No.2 of 2017 had been filed for reception of additional evidence. A perusal of the affidavit reveals that the defendants have prayed for reception of the sale deed of the year 1977 as additional evidence. As rightly pointed out by learned counsel appearing for the plaintiff, the said document is 20 years prior to the filing of the suit. The defendants have not properly explained the reason for not filing the said document before the trial Court. Therefore, the First Appellate Court was not right in allowing I.A.No.2 of 2017.



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20.The First Appellate Court has framed two additional issues and has cited the framing of the said additional issue as one of the grounds for remitting the matter back to the trial Court. A perusal of the judgment of the trial Court indicate that originally three issues were framed and thereafter, an additional issue was framed. The trial Court has recasted the issues and answered the same in favour of the plaintiff and decreed the suit.

21.A perusal of the additional issues framed by the First Appellate Court reveals that these issues are already in-built in the recasted issues framed by the trial Court. Therefore, on the ground of framing of additional issues, the First Appellate Court ought not to have remitted the matter back to the trial Court.

22.The First Appellate Court has the same power as that of the trial Court to appoint a fresh Advocate Commissioner or to reissue the warrant to the same Advocate Commissioner to identify the suit schedule property. The First Appellate Court can also issue instruction/direction to the same Advocate Commissioner to the manner in which the



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identification of the property has to be conducted. Therefore, the said ground cannot be a reason for remitting the matter back to the trial Court.

(D) Conclusion

23.In view of the above said deliberations, this Court is inclined to pass the following order;

(i)The order of remand passed by the II Additional Subordinate Court, Nagercoil in A.S.No.69 of 2006 dated 21.04.2017 is hereby set aside and the matter is remitted back to the First Appellate Court to consider the appeal on merits and in accordance with law after giving due opportunity to the parties concerned.

(ii)The order passed by the First Appellate Court in I.A.No.75 of 2015, I.A.No.1 of 2017 and I.A.No.2 of 2017 are hereby set aside and those applications stand dismissed.

(iii)The order of the First Appellate Court in I.A.No. 83 of 2013 and I.A.No.76 of 2008 stand confirmed.

(iv)The parties to the appeal are at liberty to file appropriate application for appointment of an Advocate Commissioner before the First Appellate Court and directions



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may be issued for appointment of Advocate Commissioner based upon the observations made by the First Appellate Court in Direction No.1.

(v)The parties are directed to appear before the First Appellate Court on 02.12.2024.

24.With the above said directions, this Civil Miscellaneous Appeal stands allowed to the extent as stated above. No costs. Consequently, connected miscellaneous petition is closed.

30.07.2024

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The Camp Court Judge at Kuzhithurai
(II Additional Subordinate Judge, Nagercoil), Kanyakumari District
2. The Principal District Munsif,
Kuzhithurai, Kanyakumari District
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR, J

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Pre-delivery judgement made in
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