



C.M.A(MD)No.930 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **26.06.2024**

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THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.930 of 2019
and
C.M.P(MD)No.12527 of 2019

Ramar ... Appellant/3rd Respondent/
3rd Defendant

Vs.

1.Kalyani ... Respondent/Appellant/
Plaintiff

2.Tirunelveli Corporation,
Represented through its Commissioner,
Opposite to Bharatha Bank, Tirunelveli Junction,
Tirunelveli Taluk, Tirunelveli District.

3.Kalaiselvai ... Respondents/Respondents 1&2/
Defendants 1 & 2

Prayer: Civil Miscellaneous Appeal is filed under Order 43 Rule 1(u) of Code of Civil Procedure, to set aside the judgment and decree of the lower appellate Court, dated 25.10.2019 made in A.S.No.57 of 2018 on the file of the IV Additional District Court, Tirunelveli remanding the suit in O.S.No.41 of 2009 to the file of the Principal Sub Court, Tirunelveli.



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For Appellant : Mr.D.Srinivasa Raghavan
for S.P.Maharajan

For R1 : Mr.H.Arumugam

For R2 : Mr.Ayiram K.Selvakumar

For R3 : Mr.T.Selvan

JUDGMENT

The present appeal has been filed by the 3rd respondent in A.S.No. 57 of 2018 on the file of IV Additional District Court, Tirunelveli challenging the order of remand.

2. The 1st respondent herein as plaintiff has filed O.S.No.41 of 2009 for the relief of recovery of possession of 2nd schedule property from the 3rd defendant. The plaintiff has further prayed that the construction made by the 3rd defendant in plot no.49 is in violation of Municipal Building Rules and therefore, he has prayed for mandatory injunction to remove the said construction.

3. Pending suit, an Advocate Commissioner was appointed to note down the physical features of the suit schedule property and also to find out the extent of alleged encroachment along with a surveyor. The



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Commissioner has submitted a report on 15.09.2015. The trial Court relying upon the Commissioner's report, arrived at a finding that the plaintiff has not established his plea of encroachment and has proceeded to dismiss the suit by way of a judgment and decree, dated 22.09.2017.

4. Challenging the same, the plaintiff had filed A.S.No.57 of 2018 before IV Additional District Court, Tirunelveli. At the time of hearing the appeal, the first appellate Court has arrived at a finding that the Commissioner's report is insufficient to arrive at a finding whether there is any encroachment or not. The first appellate Court has further held that the trial Court has erroneously relied upon the insufficient Commissioner's report and thereafter, has remitted the matter back to the trial Court for appointment of an Advocate Commissioner and thereafter proceed with the trial. Challenging the order of remand, the present appeal has been filed.

5. According to the learned counsel appearing for the appellant, there was no request from the plaintiff / appellant seeking for an appointment of an Advocate Commissioner. In such circumstances, the first appellate Court was not right in setting aside the judgment and



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decree of the trial Court remitting the matter back to the trial Court for the purpose of appointing an Advocate Commissioner.

6. Per contra, the learned counsel appearing for the respondent herein / plaintiff contended that when the first appellate Court found that the Commissioner's report is insufficient to decide the suit, it has rightly remitted the matter back to the trial Court and prayed for sustaining the order of remand.

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

8. A perusal of the typed set of papers indicate that the Advocate Commissioner has filed two reports on 15.09.2015 and 09.11.2016. However, the plaintiff has not chosen to file his objection to both the reports. The plaintiff has also not filed any application before the first appellate Court seeking appointment of an Advocate Commissioner. Even assuming that the Advocate Commissioner's report is insufficient, the first appellate Court itself could have appointed an Advocate Commissioner to find out the extent of alleged encroachment in the suit



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schedule properties. For the purpose of appointment of Advocate Commissioner, it is not necessary to set aside the judgment and decree of the trial Court and to remit the matter back to the trial Court. In such circumstances, this Court is of the considered opinion that the order of remand is not sustainable in the eye of law.

9. The order of remand, dated 25.10.2019 passed in A.S.No.57 of 2018 on the file of IV Additional District Court, Tirunelveli is hereby set aside and the matter is remitted back to the file of the first appellate Court. In case if the appellant in the appeal files any application for appointment of an Advocate Commissioner, the same may be decided on merits and in accordance with law.

10. With the above said observations, this Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

26.06.2024

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

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To

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- 1.The IV Additional District Court,
Tirunelveli.
- 2.The Principal Sub Court,
Tirunelveli.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Order made in
C.M.A(MD)No.930 of 2019

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