



C.M.A(MD)No.1275 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 07.09.2023

PRONOUNCED ON:24.11.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.1275 of 2011

and

M.P.(MD)No.1 of 2011

Alagappan

: Appellant/Respondent/Defendant

Vs.

Alagappa University,
through its Registrar,
Alagappapuram,
Karaikudi Town,
Sivagangai District.

: Respondent /Appellant/Plaintiff

PRAYER:- Civil Miscellaneous Appeal filed under Order 43 Rule 1, clause (u) of the Code of Civil Procedure, 1908, against the order of remand dated 07.02.2011 in A.S.No.12 of 2011, on the file of the Subordinate Court, Devakkottai, remanding the suit in an appeal against the decree and judgment in O.S.No.91 of 1998, dated 30.07.2004, on the file of the Additional District Munsif Court, Karaikudi.



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For Appellant : Mr.R.Sundar Srinivasan

For Respondent :Mr.T.Cibi Chakraborty

JUDGMENT

This Civil Miscellaneous Appeal is directed against the judgment and decree passed in A.S.No.12 of 2011, dated 07.02.2011, on the file of the Subordinate Court, Devakottai, setting aside the judgment and decree passed in O.S.No.91 of 1998, dated 30.07.2004, by the Additional District Munsif, Karaikudi and remanding the suit back to the trial Court for trial.

2. The plaintiff University, by alleging that Alagappa Chettiyar Educational Trust has settled the suit property in favour of the Tamil Nadu Government, vide settlement deed dated 29.09.1984, that the Tamil Nadu Government has handed over the suit property to the plaintiff University through the Government Order in G.O.Ms.No.761 (Educational Department), dated 03.06.1986, that the defendant has trespassed into the suit property and constructed a terraced house in the year 1996 and that the defendant has been attempting to extend his



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constructions from 25.07.1997, the plaintiff has filed the above suit for mandatory injunction directing the defendant to remove the illegal constructions made by him in the suit property and for permanent injunction restraining the defendant and their men from in any manner trespassing into the suit property.

3. The defence of the defendant is that his wife has purchased the suit property from its previous owner Parvathy in the year 1985, that the defendant's wife has been in possession and enjoyment of the suit property from 1985, that the defendant's wife by peaceful, continuous, exclusive and uninterrupted possession of the suit property for over the statutory period, has perfected her title by adverse possession, that since the plaintiff had acquiesced the construction, they are estopped from claiming any right over the suit property and from seeking recovery of possession and that therefore, the suit is liable to be dismissed.

4. The trial Judge has framed the following issues:

- (1) Whether the suit property is correctly described?
- (2) Whether the suit property is correctly valued?
- (3) Whether the suit property is in possession of the defendant?



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(4) Whether the plaintiff is entitled to get the relief of permanent injunction?

(5) Whether the plaintiff is entitled to get the relief of mandatory injunction?

(6) To what other relief, the plaintiff is entitled?

5. During trial, the plaintiff has examined its official Thiru.Seetharam Ragupathy as P.W.1 and exhibited the copy of the master plan of the plaintiff's University as Ex.A.1. The defendant has examined himself as D.W.1 and adduced no documentary evidence. The Advocate Commissioner's report, plan and surveyor's plan were exhibited as Exs.C.1 to C.3 respectively. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the judgment and decree dated 30.07.2004, by holding that the plaintiff has not proved their title or right over the suit property and that since the plaintiff have themselves admitted that the defendant is in possession and enjoyment of the suit property, they are not entitled to get permanent injunction and mandatory injunction, dismissed the suit.



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6. Aggrieved by the dismissal of the suit, the plaintiff has preferred an appeal in A.S.No.12 of 2011, on the file of the Subordinate Court, Devakottai. The learned Appellate Judge, upon considering the evidence available on record and on hearing the arguments of both sides, has passed the impugned judgment and decree dated 07.02.2011, setting aside the judgment and decree passed by the trial Court and remanded the case back to the trial Court for the purpose of claiming proper reliefs and for paying proper Court fees and for production of additional documents to the plaintiff and for giving opportunity to both parties to adduce additional evidence and then to decide the suit.

7. At the outset, it is pertinent to note that the appellate Court while setting aside the judgment and decree of the trial Court and remanding the matter to the trial Court, ought to have allowed the appeal, but instead, dismissed the appeal and it can only be considered as a mistake committed by the appellate Court by over sight and that cannot be taken advantage of, by any of the parties.

8. The learned Counsel for the appellant would submit that the judgment remanding the suit is not in conformity and consonance with



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the provisions of Order 41 Rule 23 C.P.C., that the learned Subordinate Judge has remanded the matter for amending the plaint and for payment of additional Court fees and for production of additional documents, without considering the fact that the objection has been specifically raised in the written statement and even before the trial Court, no steps were taken by the respondent/plaintiff and if that be the case, the appellate Court is not justified in passing the impugned order and that too without any formal application, that the trial Court has failed to consider the settled legal position that the remand cannot be ordered as a matter of course and only if there was any decision upon a preliminary point or on sufficient cause, the remand can be ordered, that the learned appellate Judge has also failed to take note of the position that the post trial amendment cannot be permitted in the absence of any explanation regarding want of due diligence and there were no steps for amendment even during trial and during the pendency of the appeal and that therefore, the order of remand to enable the plaintiff to amend the plaint is erroneous and against the provisions of Order 6 Rule 17 C.P.C.

9. The learned Counsel for the respondent would submit that the appellate Court has come to a definite conclusion that the evidence and



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the documents already adduced are not sufficient enough to enable the Court to come to a definite decision on the issue, that the appellate Court has absolute power under Order 41 Rule 23 and Order 41 Rule 23(A) C.P.C., for reversing the judgment of the trial Court and retain it consider necessary, that the appellate Court has independently appraised the evidence of the parties and considered the relevant points and come to a conclusion that the appellate Court was unable to come to the conclusion over the Commissioner's report, that it was clear from the Commissioner's report filed in Exs.C.1 and C.2 that the suit property belongs to the appellant and the defendant had committed trespass, that the appellate Court has decided to invoke Order 6 Rule 17 C.P.C., in the interest of justice for the purpose of determining the controversy between the parties and that since the appellate Court has given an opportunity for both parties to produce additional evidence with documents, the remand order cannot be found fault with and as such, the Civil Miscellaneous Appeal has to be dismissed.

10. The points that arise for consideration are:

(1) Whether the appellate Court erred in remanding the matter back to the trial Court for the purpose of amending the plaint and for the



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payment of proper Court fee and for production of additional documents to the plaintiff and for both parties to adduce additional evidence, in the absence of any application filed by the appellant/plaintiff seeking the above reliefs and that the same is not in conformity with the provisions of Rule 23 or Rule 23(A) of Order 41 C.P.C.?

(2) Whether the order remanding the suit back to the trial Court is liable to be set aside?

(3) What other relief, the parties are entitled to?

Points 1 to 3:

11. As rightly contended by the learned Counsel for the appellant, the appellate Court has discussed about the finding given by the trial Court with regard to the first issue as to whether the suit property is correctly described and that since the plaintiff has been claiming that the suit property is situated in S.No.25/1B and whereas the defendant has been alleging that the suit property is situated in S.No.25/1-A part, the appellate Judge, taking note of the plaint pleadings and the evidence of P.W.1, has come to a decision that the property is situated in S.No.25/1B. Thereafter, the appellate Court has proceeded to observe as follows:



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“நேநிலையில் வா.சா.1 சாட்சியத்தினை ஁நாக்கும்பாது தாவாச்சுுத்து சம்மந்தமான கூடுதல் அசல் ஆவணங்கள் ஁வறு வழக்கிற்காக வெ஁வறு நீதிமன்றங்களில் நுப்பதாக சாட்சியம் அளித்துள்ளது அறிய முடிகின்றது. நீத ஁மல்முறையீட்டுக்கான காரணங்களில் அவ்வாறு ஁ரிய நீதிமன்ற கட்டணம் செலுத்துவதற்கு 145 சி.பி.சி.ன் படி ஁ரிய கால அவகாசம் வழக்காமல் தாவா வழக்கில் எழுவினா 2க்கு எதிராக தீர்வு காணப்பட்டுள்ளது என்றும் சொல்லப்பட்டுள்ளது. ஁மலும் நீதிமன்ற ஆணையர் அறிக்கை நீ.ம.சா.ஆ.1 மற்றும் வரைபடம் நீ.ம.சா.ஆ.2 மற்றும் குருவட்ட அளவையர் வரைபடத்தின்படி ஆக்கிரமிக்கப்பட்ட பகுதி ஁தா கலரில் காணப்பட்டு஁ பரிதிவாதி பெயரில் தார்கவீடு கிணறு ஁ள்ளது காணப்பட்டுள்ளதும்஁ அது பற்றி நீ.ம.சா.ஆ.1 அறிக்கையின் விரிவாக துவக்கப்பட்டுள்ளதும் தெரிய வருகின்றது. ஆனால் வா.சா.ஆ.1 மா!டர் பிளானின் தாவாச்சுுத்து குறித்து எந்தவிதமான குறிப்புகளும் துலக்கப்படவில்லை. ஁மலும் பரிதிவாதிதர்பில் பரிதிவாதியின் மனைவியால் தாவாச்சுுத்தைப் பொறுத்து 20.9.86ம் ஁த்தியன்று பார்வதி என்பவரிடமிருந்து கிரையம் பெற்றிருந்ததாக சொல்லப்பட்டிருந்தாலும் ஁ற்படி கிரையப்பத்திரமும் பரிதிவாதிதர்பில் தாக்கல் செய்யப்படவில்லை. ஆனால் நீ.ம.சா.ஆ.1ன் படி தற்பாது பரிதிவாதி தாவாச்சுுத்தில் கட்டிடம் கட்டி அனுபவத்தில் ஁ள்ளவை ஆக்கிரமிப்பு பகுதி என்று துலக்கப்பட்டுள்ளது. ஆகவ வேழக்கில் தீர்வு முடிவுக்கு வருவதற்கு



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யேலாத நிலையில் நேரப்பதால்இ வாத் உரிய நீதிமன்ற கட்டணம்
சேலுத்தி உரிய பரிகாரம் ுகாரவும்தி வாத் தரப்பில் ஏற்கனவு ுவறு
நீதிமன்றகளிலுள்ள ஆவண்களைத் தாக்கல் செய்ய அவகாசம்
அளிப்பதும் மிகவும் பொருத்ததாகவும் நியாயமாகவும் நேக்கும் என்று
நேநீதிமன்றம் தீர்மானிக்கிறது. ஏனவு நேத நிலையில் வாத்ரு ஒரு
சந்தர்ப்பம் அளிக்கும் விதமாக வேவழக்கு உரிய நீதிமன்ற கட்டணம்
சேலுத்தி உரிய பரிகாரம் ுகாருவதற்காகவும்தி ுமலும் வாத் தரப்பு
கூடுதல் ஆவண்கள் ுவறு நீதிமன்றகளில் உள்ளதை வாத்
தரப்பில் தாக்கல் செய்து அது சம்மந்தமாக சாட்சியம் அளித்து வாத்
தரப்பில் கூடுதல் ஆவண சாட்சியம் அளிப்பதற்காகவும் மற்றும் நே
தரப்பினருக்கும் கூடுதல் ஆவண சாட்சியம் அளிக்க ுபாதிய
அவகாசம் கொடுத்து வழக்கை திரும்ப விசாரணை செய்து
தீர்வு காணுவண்டுமென்ற அடிப்படையில் வேவழக்கு கீழமை
நீதிமன்றத்திற்கு மீட்டனுப்புகை செய்வத நீதிக்கு உகந்ததாகும்
என்று முடிவு காணப்படுகிறது.”

12. Considering the above, the learned appellate Judge has specifically observed that since he is unable to decide the case, decided to remand the matter back to the trial Court. But the fact remains that the learned trial Judge, upon considering the evidence available on record, has given his findings specifically to all the issues framed by him.



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13. Before entering into further discussion, it is necessary to refer Order 41 Rule 23 and 23(A) C.P.C.:

“23. Remand of case by Appellate Court

Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issue shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases

Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have



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the same powers as it has under rule 23.”

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14. The learned Counsel for the appellant has relied on the judgment of the Hon'ble Supreme Court in ***Sirajudheen Vs. Zeenath and Others*** reported in **2023 LiveLaw (SC) 145** and the relevant passages are extracted hereunder:

“11. One of the striking features of the impugned judgment dated 28.06.2019 is that even while dealing with a regular first appeal against the judgment and decree of the Trial Court, the High Court has not even adverted to the findings of the Trial Court pertaining to the present case and has not specified as to how the findings recorded by the Trial Court were unsustainable or unjustified. As noticed, in the impugned judgment, the High Court has narrated a few circumstances leaning in favour of the plaintiff (in paragraph 21) and then a few other circumstances which favour the genuineness of the sale in question (in paragraph 22) and thereafter, has observed that the evidence necessary for a proper determination of the suit had not been brought on record; and that the evidence on record was insufficient to arrive at a proper finding in favour or against the sale deed in question. The High Court would further observe that material witnesses have not been examined and no evidence has been brought in with regard to passing of consideration.



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11.1. With respect, what turns on the observations in the impugned judgment is that the High Court was unable to arrive at a conclusion on the basis of the material on record. However, fact of the matter remains that on the basis of the same material on record, the Trial Court had indeed arrived at a definite conclusion that the plaintiff had failed to establish her case and hence, the suit was liable to be dismissed. As indicated hereinabove, the High Court has not at all referred to the findings of the Trial Court and it is difficult to find from the judgment impugned as to why at all those findings of the Trial Court were not to be sustained or the decree was required to be reversed.”

15. In the case on hand also, the trial Court, on the basis of the evidence available on record has come to a definite conclusion that the plaintiff had failed to establish their case and hence, their suit was liable to be dismissed. But the learned appellate Judge, without considering or appreciating the evidence available on record, has arrived at a finding that the appellate Court was unable to arrive at a conclusion. It is pertinent to note that the appellate Court has not at all referred the findings of the trial Court nor shown as to how those findings were not sustainable.



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16. Admittedly, the plaintiff either before the trial Court or before the appellate Court has filed any application under Order 6 Rule 17 C.P.C., seeking permission to amend the plaint. It is also not known as to whether the plaintiff's side Counsel has made any submission with regard to the amendment of the plaint. As rightly pointed out by the learned Counsel for the appellant, the appellate Court, without any discussion, while observing that the plaintiff should be given an opportunity to pay the property Court fee, has added that he should also be permitted to claim proper relief. Absolutely there is no basis for making such a direction while remanding the suit. Moreover, as per the amended Rule 17 of Order 6 C.P.C., after commencement of trial, amendment cannot be permitted, in the absence of satisfactory explanation regarding want of due diligence.

17. As rightly contended by the learned Counsel for the appellant, the trial Court, after considering the submissions made on either side, has specifically given a finding that the plaintiff has failed to produce any document to prove the market value of the property, that the plaintiff has not valued the property properly and consequently, the Court fee was not



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paid correctly and decided the issue against the plaintiff. The appellate Court has not proceeded to consider the correctness of the said finding, but on the other hand, without any prayer for amendment of the plaint with regard to the valuation of the suit and payment of Court fee, the appellate Court has mechanically permitted the plaintiff to amend the plaint to seek proper prayer and for payment of Court fees.

18. Admittedly, the plaintiff has not filed any application under Order 41 Rule 27 C.P.C., for reception of additional evidence before the appellate Court. It is also not the case of the plaintiff that they have produced the documents before the trial Court, but the same were not received by the trial Court. Moreover, the appellate Court has observed that P.W.1 in his evidence has stated that the documents relating to the suit property produced in other cases were available in different Courts. In the absence of any application and in the absence of any particulars about the documents, the appellate Court has given a blanket permission to the plaintiff for production of additional documents.

19. As rightly pointed out by the learned Counsel for the appellant,



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the trial Court has specifically observed that the plaintiff has not produced any documents to prove their case and that, in the only document exhibited under Ex.A.1 – master plan, there was no reference to the suit property.

20. The Hon'ble Supreme Court in ***Sirajudheen's case***, above referred has specifically observed that merely because a particular evidence had not been produced, the appellate Court cannot adopt the soft course of remanding the matter and the relevant passage is extracted hereunder:

“14. In regard to the want of any particular evidence, we may observe in the passing that if the Court finds any particular evidence directly within the control and possession of a party having not been produced, the necessary consequences like those specified in illustration (g) to Section 114 of the Evidence Act may follow but, merely because a particular evidence which ought to have been adduced but had not been adduced, the Appellate Court cannot adopt the soft course of remanding the matter. We would hasten to observe that we are not commenting on the merits of the case either way. The observations herein are only to indicate that the remand of the suit for trial de novo cannot be considered justified in the present case from any standpoint.”



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21. It is settled law that the scope of remand in terms of Rule 23 of Order 41 C.P.C., is very limited and that the necessary requirement for invoking Rule 23(A) of Order 41 C.P.c., is that the decree is reversed in appeal and a re-trial is considered necessary. It is necessary to refer the following passage in ***Sirajudheen's case*** above referred:

11.2. After having taken note of the salient features of the impugned judgment as also the significant omissions therein, if we refer to the provisions empowering the Appellate Court to make an order of remand, it is difficult to find any justification for remand by the High Court in the present case. As noticed, the scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary requirements are that “the decree is reversed in appeal and a re-trial is considered necessary”. As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the



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Trial Court remains a sine qua non. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC. 11.2. After having taken note of the salient features of the impugned judgment as also the significant omissions therein, if we refer to the provisions empowering the Appellate Court to make an order of remand, it is difficult to find any justification for remand by the High Court in the present case. As noticed, the scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary requirements are that “the decree is reversed in appeal and a re-trial is considered necessary”. As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the Trial Court remains a sine qua non. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC. “

22. Considering the above and taking note of the legal position



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above referred, this Court has no hesitation to hold that the impugned order, remanding the case for the purpose of amending the plaint and for production of additional evidence, in the absence of any application or prayer of the plaintiff and without complying the mandatory requirements contemplated under Order 6 Rule 17, Order 41 Rule 23, 23(A) and 27 C.P.C., is not in accordance with law and the same is liable to be set aside and the above points are answered accordingly.

23. In the result, the Civil Miscellaneous Appeal is allowed and the impugned judgment and decree passed in A.S.No.12 of 2011, dated 07.02.2011, on the file of the Subordinate Court, Devakottai, is set aside and the appellate Court is directed to restore the appeal and to hear the same and dispose of the same in accordance with law within a period of two months from the date of receipt of a copy of this judgment. Consequently, the connected Miscellaneous Petition is closed. Considering the other facts and circumstances of the case, there shall be no order as to costs.



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NCC : Yes : No

Index : Yes : No

Internet : Yes : No

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- 1.The Subordinate Court, Devakottai,
- 2.The Additional District Munsif Court, Karaikudi.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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