



C.M.A(MD)No.1314 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 07.03.2024

CORAM:

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

C.M.A(MD)No.1314 of 2014

and

M.P(MD)No.1 of 2014

1.Gopal

2.Kolanji

3.Subramanian

... Appellants/Respondents/
Defendants

Vs.

Ramalingam

... Respondent/appellant/
Plaintiff

Prayer : This Civil Miscellaneous Appeal filed under Order 43, Rule 1 of the C.P.C, to set aside the judgment and decree, dated 23.07.2014 made in A.S.No.8 of 2014 on the file of the Additional Subordinate Judge's Court, Kumbakonam remanding the suit by judgment and decree, dated 08.10.2013 made in O.S.No.35 of 2009 on the file of the District Munsif cum Judicial Magistrate, Papanasam.



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For Appellants : Mr.S.Siva Thilakar

For Respondent : Mr.V.Chandrasekar

JUDGMENT

This Civil Miscellaneous Appeal has been preferred as against the judgment and decree passed in A.S.No.8 of 2014 on the file of the Additional Subordinate Judge, Kumbakonam, dated 23.07.2014. In fact the respondent herein has filed a suit in O.S.No.35 of 2009 on the file of the District Munsif cum Judicial Magistrate Court, Papanasam for the relief of recovery of possession and for permanent injunction and for cost. The said suit was dismissed. As against the decree and judgment, the plaintiff has preferred the first appeal in A.S.No.8 of 2014 on the file of the Additional Subordinate Judge, Kumbakonam and the First Appellate Court allowed the appeal by setting aside the judgment and decree and remanded the case to Trial Court for fresh disposal. Aggrieved by the said order, the present Civil Miscellaneous Appeal has been filed by the appellants / respondents / defendants.



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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 facts of the case are as follows:

The plaintiff is the absolute owner of the property comprised in S.Nos.116 and 116/7 measuring an extent of 0.15 cents and 0.18 cents respectively. Originally the properties were allotted to the plaintiff through partition deed, dated 07.12.1971. The properties are coconut grove and punja lands. Though the properties are bearing two survey numbers, it has been enjoyed only as a single strip of land and there is no boundary line to demarcate the two survey numbers. The defendants have no semblance of right over the properties and they are only the encroachers of the adjacent land bearing S.F.No.109/3 which is Kalam Poromboke. The defendants are doing illegal activities like damaging the coconut trees and the saplings by trespassing into the properties. They are also attempted to put up small huts in the suit property. When the same was questioned by the plaintiff, they threatened with dire consequences. Hence, the plaintiff filed a suit for recovery of possession. The plaintiff also filed a rough sketch along with this plaint. The area encroached by the defendants have been marked as



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'ABCD' and 'EFGH' in the rough sketch. The remaining portion of the grove is in possession and enjoyment of the plaintiff herein. Therefore filed the suit.

4. The brief averments of the written statement filed by the defendants are as follows:

The suit is not maintainable either in law or on facts and the same is liable to be dismissed *in limine*. The suit property is under the possession and enjoyment of the defendant for more than 50 years and now filed the suit in order to get the property illegally. The rough sketch annexed with the plaintiffs not correct. The entire suit property was under the enjoyment of the defendant. This defendant obtained the property through lease and paid Rs.50/- per month. The defendants are residing in the said property for more than 50 years. The trees situated in the property are planted by these defendants. There is no cause of action for the suit and there was no any new huts put up as alleged in the plaint. The plaintiff never enjoyed the property and thereby, he is not entitled to relief of permanent injunction. The plaintiff has not approached the Courts with clean hands. The plaintiff is not entitled to the relief of recovery of possession. Hence,



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the suit is liable to be dismissed.

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

"1. தாவாவுடன் வரைபடத்தில் குறிப்பிட்டுள்ள ஏபிசிடி மற்றும் ஈஎப் ஜிஹெச் கூரை பகுதிகளை அப்புறப்படுத்தி மேற்படி சொத்தின் சுவாதீனம் வாதிக்கு கொடுக்க வேண்டுமென்று வாதி கேட்டுள்ள பரிகாரம் அவருக்கு கிடைக்கக்கூடியதா?

2. வாதி தாவாவில் கேட்டுள்ள நிரந்தர உறுத்துக்கட்டளை பரிகாரம் அவருக்கு கிடைக்கக்கூடியதா?

3. தாவாச் சொத்தும் 50 வருடங்களுக்கு மேலாக பிரதிவாதிகளின் அனுபவத்திலும், சுவாதீனத்திலும் இருந்து வருவதாக கூறுவது சரியா?

4. சொத்து விபரம் தவறுதலாக குறிப்பிடப்பட்டுள்ளதாக கூறுவது சரியா?

5. வரைபடத்தில் குறிப்பிடப்பட்டுள்ளதுபோல் பூஸ்திதியில் அமைப்பு இல்லை என்று கூறுவது சரியா?

6. வழக்கிற்கு வழக்குமூலம் இல்லை என்று கூறுவது சரியா?

7. வாதிக்கு கிடைக்கக்கூடிய ஏற்புடைய பரிகாரங்கள் என்ன?"

6. Before the Trial Court, on the side of the plaintiff, he examined



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P.W.1 and marked Exhibit A.1. On the side of the defendants, D.W.1 and D.W.2 were examined and marked Exhibits B.1 to B.3. Thereafter, the Trial Court after hearing both sides, dismissed the suit. As against the decree and judgment passed by the Trial Court, the plaintiff therein has filed an appeal in A.S.No.8 of 2014 on the file of the Additional Subordinate Judge, Kumbakonam. The First Appellate Court set aside the decree and judgment and remanded the case back to Trial Court for fresh disposal.

7. As against the judgment and decree, the present Civil Miscellaneous Appeal has been filed by the defendants in the suit and the respondents in the first appeal on the following grounds:

1. The judgment and decree of the lower appellate Court remanding the suit to the trial Court without considering the facts and circumstances of the case is legally un-sustainable and the learned Judge has failed to understand the scope of remand as contemplated under Order 41, Rule 23 of CPC and hence the same is liable to be set aside.

2. The lower appellate Court ought to have seen that the respondent / plaintiff having filed the suit based on Exhibit A.1 partition



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deed is unable to identify the property as per the said partition deed and in such circumstances the suit is liable to be dismissed as held by the Trial Court.

3. The lower appellate Court erred in law holding that the appellants have not filed any documents to prove possession and it is not a ground for setting aside the well considered judgment and decree of the Trial Court especially when the respondent / plaintiff has to specifically plead correct extent and prove the same by reliable documents and in the absence of the same the suit ought to have been dismissed.

4. The lower appellate Court has failed to follow the established procedure of law before remanding suit to the trial Court for fresh disposal especially when the respondent / plaintiff is not sure about his title and the property available on earth and hence the reliefs sought for cannot be granted after remand.

5. The lower appellate Court ought to have confirmed the judgment and decree of the trial Court especially when the respondent / plaintiff himself has categorically admitted that the appellants in possession and enjoyment of the entire suit properties and when the respondent is unable to prove his title based on valid documents of title, the suit as framed is



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not maintainable.

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6. The lower appellate Court has failed to see that there is no triable issue or issues to be tried by way of remand and for proving the identity of property remand is not necessary and that exercise can be done by the lower appellate Court.

7. The lower appellate Court ought to have seen that it should be circumspect in ordering the remand when the case is not covered either by Rule 23 of Order 41 of CPC or any other relevant provision and in the absence of the same the remand should not have been ordered.

8. In any view of the matter, the judgment and decree of the lower appellate Court is liable to set aside.

8. The learned Counsel appearing for the appellants / respondents / defendants would contend that the plaintiff has filed suit for relief of recovery of possession and permanent injunction and the Trial Court dismissed the suit on the ground that the plaintiff failed to prove that the thatched house mentioned in the rough sketch are put up recently either through Commissioner or through other evidence and dismissed. The plaintiff has filed appeal and the First Appellate Court without considering



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the evidences simply remanded back the case by holding that the defendants have not filed any documents to show that the coconut grove is belongs to them and there is no proper identification about the encroached portion of the properties and thereby, if the decree is granted, it is difficult to execute the decree for recovery of possession, since no measurements have been given in the rough sketch. There is no dispute in respect of the identification of the properties. Therefore, the order passed by the First Appellate Court by remanding the case for identification of the property is not in accordance with the provisions of Order 41, Rule 23 of CPC. Therefore, the order passed by the First Appellate Court is liable to be set aside.

9. To support the contention of the learned Counsel appearing for the appellant, he relied upon the following judgments:

- i) Ashwin Kumar K.Patel Vs. Upendra J. Patel and Others reported in AIR 1999 SC 1125 and*
- ii) P.V.Chinnaraj Vs. V.Nagaraj reported in 2013 (1) L.W 353.*

10. The learned Counsel appearing for the respondent / appellant /



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plaintiff would contend that the respondent / appellant / plaintiff herein has filed a suit for the relief of recovery of possession and permanent injunction and he examined himself as witness P.W.1 and marked Exhibits A.1. In fact entire property belongs to the respondent / plaintiff and the Trial Court has without considering the evidences erroneously dismissed the suit. In fact the appellants / respondents / defendants have attempted to encroach the property and they recently put up thatched house and thereby, those thatched houses have to be removed and the defendants are liable to hand over the possession of the property. But the Trial Court failed to consider the same and dismissed the suit erroneously. Thereafter, the respondent herein filed appeal before the First Appellate Court and the First Appellate Court remanded the case by setting aside the decree and judgment by holding that there is no measurements in the alleged encroached portion and there is no proper identification of property, even if the decree is granted, it is difficult to execute the decree and thereby, remanded back the case for fresh disposal. Therefore, the order passed by the First Appellate Court is in order and the present Civil Miscellaneous Appeal is liable to be dismissed.



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11. This Court had heard both sides and perused the records and upon perusing the records, the points for determination in this appeal are:

i) Whether the order of remand passed by the First Appellate Court is sustainable in law and on facts?

ii) Whether this appeal has to be allowed or not?

Point No.1:

12. In this case, the respondent herein has filed a suit before the Trial Court for the relief of recovery of possession and permanent injunction and the Trial Court has dismissed the suit by holding that there is no evidence that the alleged thatched huts were put up recently either through oral evidence or by way of appointment of Commission. As against the said judgment and decree, the plaintiff has filed the First Appeal before the Subordinate Judge, Kumbakonam and the Subordinate Judge, Kumbakonam has allowed the appeal by setting aside the judgment and decree and remanded the case back to the Trial Court for fresh consideration by holding that the measurement of the encroached properties were not given and there is no proper identification of the property, even if the decree is granted, it is difficult to execute the decree.



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Therefore, remanded back the case for fresh disposal. This Court has carefully perused the entire case records. On careful perusal of records, it is observed that the plaintiff has filed a plan along with plaint and in that plan, he categorically mentioned the portions alleged to have been encroached (i.e.,) 'ABCD' and 'EFGH'. Therefore, there is no any difficulty in identification of the property. The Trial Court has dismissed the suit on the ground that the plaintiff has failed to prove the alleged encroached property and the huts were put up recently. The First Appellate Court in the order observed that the measurements of the property have not been given and even if the decree is passed, possession cannot be given without any measurements. In this case, there is no dispute in respect of the identification of the property because the alleged encroached portions are within the larger extent of the property and the plaintiff has clearly mentioned the portions, which alleged to have been encroached by marking those portions. The measurements are immaterial and if the Court comes to conclusion that there are some encroachments then what are all the encroachments available in the suit property, all the encroachments have to be removed. For example, if the encroachment is 20 X 10 feet on the date of filing of the suit and the measurements are given as 10 X 20, if



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any further encroachments were made in addition to the previous measurements, for example, 20 X 20 feet, can the Court decline to grant decree? Obviously no. Therefore, the measurements to identify the property are immaterial and the plaintiff has earmarked some portions ABCD and EFGH as alleged to have been encroached and the same is sufficient.

13. In this case, the available materials are sufficient to decide the case and with the available records, the First Appellate Court itself can pass judgment, even if the First Appellate Court is in difficulty to find out the identification of the property, the First Appellate Court itself can appoint a Commissioner to identify and measure the property and the First Appellate Court itself can dispose the appeal instead remanding the case to Trial Court.

14. Therefore, if the Court come to conclusion that there is some encroachment, then all the encroached portions have to be removed and the possession has to be given to the concerned parties. Therefore, there is no dispute in respect of the identification of the property. Therefore, the



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order passed by the Trial Court by remanding the case for identification of property is not sustainable and the same is liable to be set aside.

15. In this context, the learned Counsel appearing for the appellants also relied judgments in *Ashwin Kumar K.Patel Vs. Upendra J. Patel and Others reported in AIR 1999 SC 1125* and *P.V.Chinnaraj Vs. V.Nagaraj reported in 2013 (1) L.W 353*.

16. The Hon'ble Supreme Court in a judgment reported in *AIR 1999 SC 1125 [Ashwin Kumar K.Patel Vs. Upendra J. Patel and Others]*, wherein, paragraph No.7 has held as follows:

"7. In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court



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ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary."

17. This Court in a judgment reported in **2013 (1) L.W 353 [P.V.Chinnaraj Vs. V.Nagaraj]**, wherein, paragraph No.6 has held as follows:

*"6. We are unable to sustain the order under challenge. Remand is not a procedure easily to be resorted to. In decision of Apex Court in **Municipal Corporation, Hyderabad Vs. Sunder Singh, (2008) 8 SCC 485** it was held that an order of remand should not be passed by the First Appellate Court as a matter of course. In fact, the Court should be slow in exercising the discretionary powers conferred under Order 4, Rule 23. Further, before passing an order of remand, the first Appellate Court has to record reasons that re-trial was necessary and also give a*



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finding that the decree and judgment passed by the trial Court is liable to be reversed and only then, an order of remand should be passed. It would be useful to extract para Nos.17, 18, 32, 33 and 34 of such judgment:-

"17. Order 41, Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate Court must disagree with the findings of the trial Court on the said issue. Only when a decree is to be reversed in appeal, the appellate Court considers it necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the appellate Court.

18. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the Court should loathe to exercise its power in terms of Order 41, Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate Court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial Court, it has to come with a proper finding of its own. The appellate Court cannot shirk its duties.

32. A distinction must be borne in mind between diverse powers of the appellate Court to pass an order of remand. The scope of remand in terms of



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Order 41, Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41, Rule 23 was therefore, not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41, Rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41, Rule 23 of the Code.

*34. An order of remand cannot be passed on ipse dixit of the Court. The provisions of Order 2, Rule 2 of the Code of Civil Procedure as also Section 11 thereof could be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in **Dadu Dayalu Mahasabha, Jaipur (Trust) Vs. Mahant Ram Niwas.**"*

On perusal of the records, we find that ample opportunity stands afforded by trial Court to the defendant to examine further witnesses after his examination stood completed. The defendant has failed to avail such opportunity. Even otherwise



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remand is not an procedure easily to be resorted to as cited supra. All that appellate Court has felt necessary was to obtain.

(1) the opinion of the expert by comparison of signatures of P.W.3 with that of the attesting witness in the document Exhibit P.1 and

(2) the evidence of the said Unniappan. In the circumstances of the case, it safely can be stated that Order 41, Rule 27 (b) stands attracted."

18. On careful perusal of the above said judgments, it is clear that the order of remand should not be passed by the First Appellate Court as a matter of course. In fact, the Court should be slow in exercising the discretionary powers conferred under Order 41, Rule 23 and further, if materials available are sufficient, the First Appellate Court itself can decide the case on merits. In the case on hand also, there is no dispute in respect of the identification of the property. Therefore, the above said case laws, are squarely applicable to the present facts of the case. In view of the above said discussions and the above said judgments, the remand order passed by the First Appellate Court is not sustainable and the same is liable to be set aside. Thus the point is answered.



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Point No.2:

19. In the previous point, this Court has decided that the order passed by the First Appellate Court is not sustainable and thereby, the present appeal is liable to be allowed by setting aside the order passed by the First Appellate Court in A.S.No.8 of 2014, dated 23.07.2014.

20. In the result, this Civil Miscellaneous Appeal stands allowed and the order passed by the First Appellate Court in A.S.No.8 of 2014 on the file of the Additional Subordinate Court, Kumbakonam, dated 23.07.2014 is set aside and the First Appellate Court is directed to dispose the case with available records, in case if the First Appellate Court is of the opinion that the available records are not sufficient to identify the property, then the First Appellate Court itself can appoint Commissioner and decide the case in accordance with law, after affording chances to the parties to adduce evidences, if necessary and to dispose the case in accordance with law within six months from the date of receipt of copy of this judgment. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.



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Index : Yes / No
Internet : Yes
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To

- 1.The Additional Subordinate Judge's Court,
Kumbakonam.
- 2.The District Munsif cum Judicial Magistrate,
Papanasam.
- 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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