

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.08.2015

C O R A M

THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

C.M.A.No.1280 of 2010
and M.P.No.1 of 2010

1. Krishnappa
2. Jayalakshmi
3. Jeevajothi
4. Nethradevi
5. Veda
6. Nithiyananda Moorthy, minor
rep. by R2.Appellants/Defendants

Vs.

Aswathappa Respondent/Plaintiff

PRAYER : This Civil Miscellaneous Appeal is filed against the order of remand, passed by the Sub Court, Hosur, in A.S.No.23 of 2007, vide judgment and decree, dated 12.02.2010, whereby, the judgment and decree dated 20.10.2006, passed by the District Munsif Cum Judicial Magistrate, Denkanikottai, in O.S.No.105 of 2003, was reversed.

For Appellants : Mr.V.Raghavachari

For Respondent : Mr.R.Jayaprakash

JUDGEMENT

The defendants are the appellants herein.

2. The suit is filed by the respondent herein/plaintiff for redemption of the mortgage, stating that the sale of the suit property vide sale deed, dated 25.03.1985, in favour of the first defendant is conditional sale deed, and in pursuance of the same, possession of the suit property along with Tamarind Trees erected on the suit property was handed over to the first defendant, and during the year, 1998, the plaintiff and his mother approached the first defendant for re-transfer of the suit property by receiving the mortgage due and the same was, on some pretext or other, postponed even beyond the period specified in the agreement. Thereafter, the first defendant sold the property to the second defendant, and the second defendant, knowing fully well that the mortgage entered into between the plaintiff and first defendant is for re-transfer, purchased the property, which per se shows that the sale transaction is only to defraud and to defeat the rights of the plaintiff.

3. The Suit was contested by both the defendants 1 and 2 by filing written statement.

4. The Trial Court, on the basis of the pleadings raised by parties, framed the following Issues for determination of the relief sought for in the suit:-

i) Whether the plaintiff has right to redeem the mortgaged property by paying the balance sale consideration of Rs.6,200/- to the first defendant?

ii) Whether the plaintiff is entitled to the relief that the first defendant has to hand over the first mortgage document by way of giving appropriate written document to that effect?

iii) Whether the plaintiff is entitled to the relief sought for in the suit that possession of the suit property has to be handed over to him?
And

iv) To what relief, the plaintiff is entitled to?
Additional Issue:-

Whether the document, dated 25.03.1985, is conditional sale deed or mortgage by conditional sale deed?

5. The plaintiff and the defendants, with regard to their respective pleadings, adduced both, oral and documentary evidence.

6. The trial Court after detailed discussion on the issues framed as mentioned supra, in the light of the oral and documentary evidence arrived at the conclusion that Ex.A1 (Ex.B6) dated 25.03.1985 is only a sale with right to repurchase the property and the suit filed beyond six years is hence, barred by limitation.

7. Aggrieved by the judgment and decree of the Trial Court, the plaintiff preferred Appeal Suit, A.S.No.23 of 2007, before the Lower Appellate Court.

8. During the pendency of the First Appeal, the plaintiff/appellant filed an Interlocutory Application No.108 of 2009, under Order XXXXI, Rule 23 of the Code of Civil Procedure for receiving petition mentioned documents, numbering 8, as additional documents to be marked on his side and also to permit him to examine additional witnesses. The said application was seriously resisted by the defendants.

9. The Lower Appellate Court heard the main Appeal along with I.A.No.108 of 2009, and after advertng to the arguments raised on both sides for and against the correctness of the findings rendered by the Trial Court, and after pointing out the omission on the part of the trial Court to frame any issues on the limitation aspect as well as regarding possession of the plaintiff and after referring to the documents sought to be marked as additional evidence though I.A.No.108 of 2009, held that, had the documents been marked before the Trial Court, the Trial Court would have obviously, rendered findings on the issue of possession in the light of the documents sought to be marked, and the failure of the Trial Court to frame two issues and the omission on the part of the plaintiff to file documents before the Trial Court, warranted the matter to be remanded to the Trial Court for fresh disposal. The Lower Appellate Court, by holding so, ordered I.A.No.108 of 2009, in favour of the plaintiff, and set aside the judgment and decree of the Trial Court and remanded the matter for fresh disposal.

10. Aggrieved against the aforesaid order of remand, the present Appeal is before this Court by the defendants.

11. This Appeal is admitted on the following Substantial Question of Law:-

"Whether the Lower Appellate Court is justified in remanding the case to the Trial Court, which is contrary to the provisions of Order XXXI, Rule 23 C.P.C.?"

12. The learned counsel appearing for the appellants/defendants would seriously argue before this Court that the order of the Lower Appellate Court in ordering I.A. for receiving additional evidence, without duly considering the circumstances under which additional documents were sought to be produced, and without considering the objection raised on the side of the defendants, and without considering the nature of documents sought to be produced as additional evidence, and without deciding the relevancy of the same for deciding the issues on hand, and the order of remand by the Lower Appellate Court, without even making any attempt to decide the correctness of the findings rendered by the Trial Court on the basis of the pleadings already raised, and on the basis of the evidence already adduced by the parties, is totally erroneous.

13. It is contended before this Court that the Lower Appellate Court being a fact Finding Authority, ought to have first decided the correctness of the findings rendered by the Trial Court on merits in the light of the available evidence, and only after having found that the evidence available are not sufficient enough to sustain the findings, and after rendering findings that the additional documents are necessary to effectively deal with the issues on hand, allowed I.A.No.108 of 2009, and set aside the judgment and decree of the Trial Court on merits, and remanded the matter for fresh disposal.

14. It is further contended before this Court that, having regard to the specific averments raised in the plaint that the suit property having been already handed over to the first defendant on the date of execution of the sale deed, dated 25.03.1985, the question of framing issues for going into the theory of the plaintiff's possession over the suit property does not arise.

15. It is furthermore contended that the issue of limitation, being a question of law, the Lower Appellate Court, by itself, ought to have decided the same.

16. The learned counsel appearing for the appellants have also cited the following judgments in support of their contention that order of remand should not be passed as a matter of routine and the Lower Appellate Court, has power to analyse the factual position, and also to decide the issues or additional issue, and the Lower Appellate Court, being a Fact Finding Authority by itself, can receive the additional evidence by marking documents by examining and cross-examining the witnesses, without resorting to the order of remand, which is likely to procrastinate the proceedings between the parties :-

i) (2008) 12 S.C.C. 372 in (Bachahan Devi and another Vs. Nagar Nigam, Gorakhpur and another).

ii) (2011) 15 S.C.C. 300 (Rajinder Sharma Vs. Arpana Sharma).

iii) (2009) 3 C.T.C. 241 (Ramasamy Vs. Ramachandran).

iv) (2010) 3 C.T.C. 512 in (Thangavelu Vs. Sampooram and others) and

v) (2010) 6 C.T.C. 65 (M.Kuppusamy Vs. K.L.Jani and others).

17. In short, it is contended that the order of remand of the Lower Appellate Court, in the manner as stated above, is contrary to the procedure laid down under Order XXXI, Rule 23 C.P.C.

18. Per contra, the learned counsel appearing for the respondents/plaintiff would make a serious endeavor to defend the correctness of the order of remand passed by the lower appellate court.

19. Heard the rival submissions made on both sides and perused the records.

20. The scope for passing an order of remand under Amended Order 41 Rules 23 and 23-A is dealt with by the Supreme Court in the judgment reported in 2002 (2) SCC 686 - P.Purusottam Reddy and another V. Pratap Steels Ltd., referred to in para 10 of the judgment reported in 2010 (6) CTC 65 - M.Kuppusamy V. K.L.Jain and others the Supreme Court has held "after the amendment all the cases of whole sale remand are covered by Rules 23 and 23A. It is only in exceptional cases where the Court may not exercise the power of remand dehors Rules 23 and 23A. To wit the superior Court, if it finds that the judgment under Appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3, or Order 41, Rule 31 CPC and hence it is no judgment, in the eye of the law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25, CPC. An unwarranted order or remand gives the litigation an undeserved lease of life and, therefore, must be avoided".

21. Another judgment of the Supreme Court referred to in paragraph 11 of the same judgment is Ashwinkumar K.Patel V. Upendra J.Patel and others - 1999 (1) CTC 710 : 1999 (3) SCC 161 wherein it has been held that High Court should not ordinarily remand a case merely because it considers the reasoning of the lower Court to be wrong as remand of a case causes delay and prejudice to involved parties. Thus, when material is available before it, High Court should exercise its own discretion and decide the Appeal.

22. The Apex Court in the judgment reported in (2008) 12 SCC 372 - Bachahan Devi and another V. Nagar Nigam, Gorakhpur and another it is held :

"The order of remand should not be passed as a matter of routine. The first appellate court which has the power to analyse the factual position can decide the issue and the additional issues. In order to bring in application of Order 41 Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate court to do so. This is clear from the use of the expression "may".

23. The Hon'ble Supreme Court while dealing with the powers of the appellate court in remanding the matter in (2011) 15 SCC 300 - Rajinder Sharma v. Arpana Sharma found fault with the High Court in remitting the matter to the trial Court and directed the trial Court to allow the application of the respondent for adducing additional evidence by giving corresponding right to the appellant to rebut that evidence and also directed the trial Court to decide the matter afresh. The Hon'ble Supreme

Court having observed the documents which are sought to be adduced by way of adducing evidence are on record is pleased to hold that the High Court being the first appellate court, is a court of both fact and law and the High Court in the interest of justice ought to have decided the controversy in accordance with law and the order to remit the matter to the trial court is unwarranted and it will merely prolong the proceedings between the parties.

24. The observation of the Hon'ble Supreme Court in the judgment above cited would clearly go to show that the order of remand cannot be passed as a matter of routine and only in exceptional cases and the High Court can by itself take additional evidence and to decide the matter in controversy on merits. The same view is reiterated by the learned single judges of this court in the remaining three judgments above cited.

25. This Court is of the view that, this is a fit case, wherein, the principles laid down by the Hon'ble Supreme Court in the authorities cited on the side of the appellants and the observation of the learned brother Judge of this Court in the citations, above cited are squarely applicable to the facts of the present case and the order of the remand impugned herein is contrary to law and legally un-sustainable, and is, hence, liable to be set aside, with direction issued to the Lower Appellate Court to decide the matter afresh by framing additional issue, if necessary and decide the main controversy in issue in the light of the additional documents received by it. Consequently, the Substantial Question of Law is answered in favour of the appellants/defendants.

26. In the result, the civil miscellaneous appeal stands allowed, and the order of the remand of lower appellate Court is set aside and the appeal is remitted back to the lower appellate Court to be considered afresh on merits by framing additional issues, if any and by deciding the controversies in issue in the light of the evidence already available and also in the light of the additional documents received on the plaintiff's side and by giving the parties opportunity to adduce additional oral and documentary evidence, if any. The lower appellate Court is also directed to dispose of the appeal within a period of four months from the date of receipt of copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.
tsh/sd

Sd/-
Assistant Registrar (IV)

/True Copy/

Sub-Assistant Registrar

To

1. The Sub Court,
Hosur.
2. The District Munsif Cum Judicial Magistrate,
Denkanikottai,

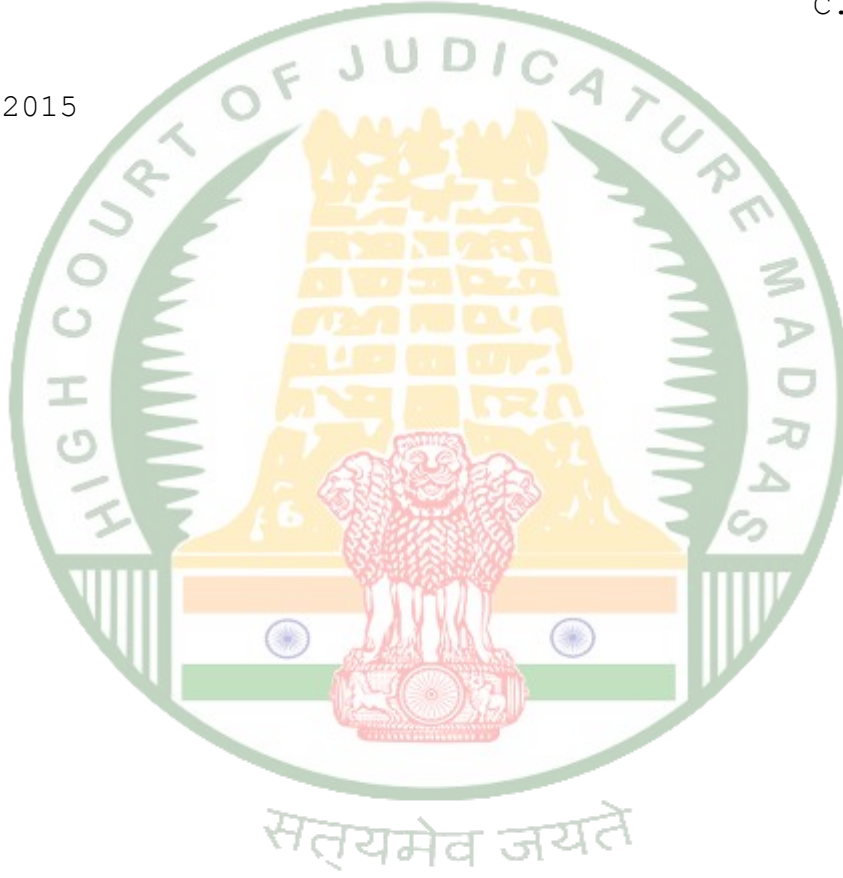
+1 C.C. To MR.R.Jayaprakash, Advocate in SR.NO.42261

+1 C.C. To MR.V.Raghavachari, Advocate in SR.NO.42283

C.M.A.No.1280 of 201

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sd : 03/11/2015



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