

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.08.2015

CORAM :

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. No. 3257 of 2006
and CMP No. 10321 of 2006

1. Nirmala Vijayaraghavan
2. Chitra Radhakrishnan ... Appellants/Appellants/Defendants

vs.

Sankaran ... Respondent/Respondent/Plaintiff

PRAYER : Civil Miscellaneous Appeal is filed under Order XLIII Rule 1(u) read with Section 104 of the Civil Procedure Code, against the Judgment and decree dated 23.11.2005 passed in A.S. No.4 of 2005 on the file of the District Judge of Nilgiris at Uthagamandalam, remanding and setting aside the judgment and decree dated 18.10.2004 passed in O.S. No.33 of 1995 on the file of the learned Subordinate Judge of Nilgiris at Uthagamandalam.

For appellants : Mr. S.K. Rakhunathan
For respondent : Mr. S. V. Jayaraman,
Sr. Counsel for Mr. P. Sivakumar

JUDGMENT

The defendants in O.S. No 67 of 1990, renumbered as O.S. No. 33 of 1995 on the file of the Sub Court, Nilgiris at Uthagamandalam, are the appellants herein.

2. The present Civil Miscellaneous Appeal is filed against the judgment and decree made in AS.No.4 of 2005 dated 23.11.2005, in and by which the lower Appellate Court set aside the decree of the trial court made in O.S.No.33 of 1995 and remanded the matter to the trial court with a direction to appoint an Advocate Commissioner for the purpose mentioned in the remand order.

3. The substantial questions of law that arise for consideration herein are as follows:

- (i) Whether the impugned order of remand passed by the lower appellate court is in accordance with the procedure laid down under Order 41 Rule 23 CPC?

(ii) Whether the lower appellate court erred in not following the procedure laid down under Order 41 Rules 24 and 25 CPC?

4. Before going into the correctness of the order of remand, few facts, which are relevant for consideration herein, are as follows :-

The respondent herein as the plaintiff filed the suit for specific performance of suit agreement dated 6.2.1987 in respect of 68 cents out of 1.63 acres in R.S.No.207/1B, Gudalur Village, Nilgiris District more fully described in the suit schedule. As per the terms of Ex.A1 sale agreement, the defendants 1 and 2 are the owners of the suit property and the plaintiff agreed to purchase entire extent of 1.51 acres under two sale deeds one in respect of 66 cents for sale consideration of Rs.10,000/- per cent and another in respect of 68 cents for free consideration. However, the suit came to be filed only for execution of sale agreement in respect of 68 cents, after receiving the balance sale consideration of Rs.20,000/-.

5.The suit is seriously resisted by the defendants on the ground that Ex.A1 suit sale agreement was in respect of entire 1.34 acres and the sale price agreed was about to Rs.4,900/- per cent and Rs.6,60,000/- for entire extent of 1.34 acres and the time was the essence of the contract and the plaintiff failed to fulfill his part of obligation under the agreement by offering to pay the entire sale consideration agreed, before the time fixed in the agreement i.e. 31.12.1987 and the agreement stood terminated.

6.Based on their respective pleadings, the trial court framed the following issues for its determination:

1. Whether the sale agreement is enforceable ?
2. Whether the defendants agreed to sell 66 cents of land for Rs.6,60,000/- or agreed to sell 1.34 acres of land for Rs.6,60,000/- ?
3. Whether the plaintiff was ready and willing to perform his part of contract, if not, whether the plaintiff is entitled to the relief as prayed for ?
4. Whether the court fee paid is correct ?
5. To what relief ?

7.With the above pleadings, the parties entered into trial and the plaintiff examined himself as PW1 and produced Exs.A1 to A23 documents and the first defendant examined herself as DW1, but no document was produced on the defendants' side. Ex.C1 Commissioner's report, Ex.C2 Commissioner's plan and Exs.C3 to C20 photos and Ex.C21 negatives were received through the Advocate Commissioner appointed by the trial court. The trial court from para 5 onwards, discussed all the issues separately, in the light of the oral and documentary evidence made available before the same and first answered Issue No.4

as unwarranted and infructuous. The trial court from para 8 onwards, discussed the issues 1 to 3 and 5 on merits and answered the same in paras 14, 15, 23 and 24 respectively. On the basis of the findings rendered in the paragraphs above stated, the trial court decreed the suit in the terms contained in para 25 of its judgment. The operative portion of the trial court judgment reads as follows :

"25. In the result, if the plaintiff sells 32 cents of land in the present market value and pays the amount at once as and when the sale deeds executed by the defendants in favour of 3rd parties as procured by the plaintiff within a period of 6 months from the date of judgment, the defendants shall execute the sale deed in respect of the remaining 68cents of land as a brokerage as agreed upon under Ex.A1 in favour of the plaintiff without consideration. The suit is decreed in the above terms without costs."

Aggrieved against the same, the defendants preferred A.S. No. 4 of 2005.

8.The main contention raised before the lower Appellate Court against the correctness of the findings rendered by the trial court is against the operative portion of the trial Court judgment, which is according to the defendants, un-executable and un-workable. The Lower Appellate Court, after due contest, set aside the judgment and decree of the trial court and remanded the case for fresh trial solely on the ground that the judgment of the trial Court and decree based on such judgment is not in clear terms, hence is un-enforceable and is likely to lead to multiplicity of proceedings. The lower Appellate Court while setting aside the decree of the trial court, further issued direction to the trial court to appoint an Advocate Commissioner for the purpose mentioned in the same. The relevant portion of the lower appellate Court judgment in paras 9 to 12 are as follows :

"9.No doubt, the trial Court while pronouncing the judgment should keep it in mind, the result portion has to be clear for executing the decree based on the judgment, perhaps, it is stated that the market value has to be assessed if the plaintiff sells the 32cents of land in pursuance of Ex.A1, but it is open to asses the market value and there is no guidelines how to workout the present market value as directed in the result portion of the lower court's judgment. The judgment with the above result portion would not be enforceable resulting in miscarriage of justice, thereby justice will not meet its end. But, only leads to multiply the proceedings.

10.Therefore, the option open to the trial court is to appoint an advocate commissioner to assess the present

market value with reference to the sale deeds and guideline values in and around the area of the suit property with the assistance of a qualified surveyor and fix the market value and pronounce the judgment with specific direction, so as to execute the decree in accordance with the terms in the result portion.

11. Therefore, the judgment and decree of the trial Court is hereby set aside and the trial Court is directed to appoint a Commissioner with a direction to incur the expenditure by the plaintiff, the trial Court is also directed to give reasonable opportunities to both sides, if necessary, to adduce any fresh evidence. The issue is answered accordingly.

12. In the result, the appeal is allowed in part and the judgment and decree passed by the trial court is hereby set aside and the matter is remanded back to the trial Court with a direction to appoint an advocate commissioner to assess the present market value with reference to the sale deeds and guideline values in and around the area of the suit property with the assistance of a qualified surveyor and fix the present market value and then pronounce the judgment with specific direction, so as to execute the decree in accordance with the terms in the result portion. The trial Court is also directed to give reasonable opportunities to both sides, if necessary, to adduce any fresh evidence. In view of the facts and circumstances of the case, each parties to bear their own costs."

9. It is seriously argued by the learned counsel for the appellants/ defendants that the course adopted by the lower appellate court for setting aside the judgment and decree of the trial court and for remanding the matter, with further direction, without deciding the correctness of the finding rendered by the trial court on facts, is contrary to the procedure laid down under law and is legally un-sustainable. It is also seriously contended before this Court that the lower Appellate Court being final fact finding authority, ought to have gone into the trial court findings on merits and ought to have arrived at a clear finding either agreeing or disagreeing with such findings and ought to have accordingly decided the issues on merits and the failure to do so has resulted in totally erroneous order of remand. This Court finds legal force in the argument so advanced on the side of the appellants.

10. This Court, considering the manner in which the appeal was disposed of as extracted above, is inclined to interfere with the order of the lower Appellate Court, with a direction issued to the Lower Appellate Court to dispose of the appeal, on merits.

11. In the result, the Civil Miscellaneous Appeal is allowed by setting aside the judgment and decree of the lower Appellate Court and remanding the appeal to the lower Appellate Court, for disposing the appeal on merits, after giving due opportunity to both the parties, as per law. The Lower Appellate Court is further directed to dispose of the appeal, as expeditiously as possible, by not later than three months from the date of receipt of a copy of this judgment, along with the lower court records. The office is directed to send back the lower court records, along with this judgment, without delay. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

Avr/rk

To

1. The District Judge of Nilgiris
Uthagamandalam.
2. The Subordinate Judge of Nilgiris
Uthagamandalam
3. The Section Officer,
VR Section, High Court, Madras.

+1 cc to Mr.P.Sivakumar, Advocate, sr.42285

+1 cc to Mr.S.K.Rakhunathan, Advocate, sr.42385

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