



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.04.2015

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

CMA. (MD) No.30 of 2013

and

M.P (MD) No.1 of 2013

WEB COPY

Janaki Ammal (died)

- 1.Murugan
- 2.Kottai Ammal
- 3.Vijayakumar
- 4.Jeevanantham
- 5.Poongothai
- 6.Kalyanakumar
- 7.Meenal
- 8.Tamilselvi

: Appellants/Respondents/
Defendants

Vs.

Palaniappan

: Respondent /Appellant/
Plaintiff

Appeal filed under Section 43 Rule 1 (11) of CPC against the Judgment and Decree dated 01.10.2012 passed in A.S.No.17 of 2012 on the file of Sub Court, Devakottai remanding the suit in O.S.No.141 of 2007 on the file of the Additional District Munsif Court, Karaikudi, and set aside the same.

For Appellants : Mr.I.Robert Chandrakumar
For Respondent : Mr.D.Rajkumar

JUDGMENT

Challenging the judgment and decree dated 01.10.2012, made in A.S.No.17 of 2012, on the file of the file of the Sub Court, Devakottai, remanding the suit in O.S.No.141 of 2007, on the file of the Additional District Munsif Court, Karaikudi, the appellants have filed the Civil Miscellaneous Appeal.

2.The defendants in O.S.No.141 of 2007 and respondents in A.S.No.17 of 2012 are the appellants herein. The respondent filed the suit in O.S.141 of 2007 before the Additional District Munsif, Karaikudi, to direct the appellants to deliver possession of suit property. The appellants resisted the same. The learned Additional District Munsif, Karaikudi, dismissed the suit, by the Judgement and decree, dated 13.07.2011. Against the said Judgement and Decree, the respondent filed A.S.No.17 of 2012 before the Sub Court, Devakottai. The learned Sub Judge, Devakottai, set aside the judgment and decree of trial Court and remanded the suit to the trial Court, for fresh trial. The lower appellate Court also permitted the respondent to amend the plaint and to appoint an Advocate Commissioner to inspect



the suit property along with a Surveyor in the presence of the counsels for the parties and file a report.

3. The lower appellate Court has given an opportunity to the respondent, to send for patta and Tax receipts filed in O.S.No.2 of 1999 filed by respondent. Against the said Judgment and Decree, dated 1.10.2012, the present appeal has been filed.

4. The learned counsel for the appellants contended that:-

I) the lower appellate court erred in law in remanding the case to the trial Court for re-trial. The reasons assigned by the lower appellate Court do not warrant for re-trial of the case;

ii) the lower appellate court failed to note that the respondent did not come forward to produce the documents even in the appellate Court;

iii) the lower appellate Court failed to see that the respondent did not deny the patta, dated 11.10.1984, issued to the appellants;

iv) the lower appellate Court on assumption, has given liberty to the respondent to send for the alleged patta issued in the years 2011 and 1984; and

v) the order of remand allowing the respondent to amend the prayer as well as the description of property, is contrary to law.

5. The learned counsel for the appellants relied on the following judgments;

(i) 2003(4) L.W. 873 (Subbiah Konar & 3 others v. State of Tamil Nadu, etc., and another), wherein in paragraph 17 it has been held as hereunder:-

"17. It may not be necessary to refer to any other pronouncement excepting the earlier pronouncement of this Court in *Srinivasagam Vs. Kuttiah* reported in AIR 1989 Madras 18=1988-1 L.W. 1000, where in the consistent view of this Court has been reiterated holding that remand cannot be made just to fill up a lacuna by allowing the party to adduce evidence, but remand is possible only if the court feels that further evidence is necessary for arrival at the just decision. This is not the case here. Having held that the plaintiffs have miserably failed to prove their case of title and possession and having set aside the judgment of the trial court as casting onus wrongly and the erroneous view taken in this respect, it is not open to the first appellate Court to remand the matter to fill up the lacuna or just to enable the plaintiffs to seek for appointment of commissioner.

(ii) 2010(5) LW 378 (D.Arulraj v. D.Vijayalakshmi & another), wherein in paragraph 13, it has been held as hereunder:-

"13. In (*Kannathal and four others vs. Arulmighu Kanniammal Karuppasamy Thirukoil, Pothanur Chettipalayam, Coimbatore, rep. By its Executive Officer and another*) 2007 (2) CTC 49, a learned single Judge of this Honourable

<https://hcservices.courts.gov.in/hcservices> para No.15 and 17 as follows:-

15. It is also settled law that if the issues arising in the suit could be decided on the evidence available on



record, the lower Appellate Court itself should decide the case on merits without unnecessarily ordering remand. A perusal of the pleadings in the case shows that all the necessary pleadings in the case shows that all the necessary pleadings are available on record. Even if the Lower Appellate Court was of the opinion that it was necessary to give an opportunity to the plaintiff to amend the pleadings, that opportunity could have been given in the First Appellate Court itself and for that purpose, the remand is not needed.

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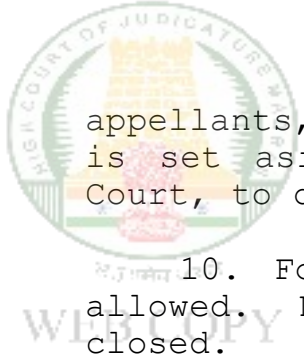
17. In the light of the law laid down by the Apex Court in the decisions reported in *Ishwardas vs. State of Madhya Pradesh and others*, AIR 1979 SC 55 and *p. Purusottam Reddy and another vs. Pratap Steels Limited*, 2002(2) CTC 686, this Court is of the considered view that the Lower Appellate Court has committed an error of law in remanding the matter only for the purpose of affording an opportunity to the plaintiff to amend the pleadings and to adduce additional evidence. As laid down by the Apex Court it is not proper for the Appellate Court to remand the case to enable the parties to make good their lapse. "

6. Per contra, learned counsel for the respondent contended that the order of the lower appellate court is as per law as contemplated by provisions of Civil Procedure Code and there is no circumstance warranting interference to set aside the order of remand.

7. I have perused all the materials on record and the judgments relied on by the counsel for the appellants and rival contentions of parties.

8. The lower appellate court has power to remand the matter as per Section 107 (b) of C.P.C. The order of remand cannot be made as a matter of course. The order should not enable the parties to fill up lacuna or give a fresh opportunity to prove their case. The appellate court has to consider the pleadings, evidence and decide the issue. As per Order 41 Rule 24 CPC, when the evidence on record is sufficient, the lower appellate Court has to pronounce the Judgment, if necessary, after re setting the issues.

9. In the present case, the suit was decided on merits therefore, if the lower appellate Court forms an opinion that some of the necessary issues were not framed by the trial Court, then it can frame, such necessary issues and remand the matter to trial Court only to decide those issues and if necessary, by permitting the parties to let in evidence. This power can be exercised by the lower appellate Court as per Order 41 Rule 23(A). In the present case, the Court has not given any reason as contemplated by Order 41 Rule 23(A) or Order 41 Rule 24 CPC. The lower appellate Court has not held that evidence on record is not sufficient to decide the issue as pleaded by the parties. Therefore, applying the principles laid down in the judgment relied on by the learned counsel for the



appellants, the judgement and decree of the lower appellate Court, is set aside and the matter is remanded to the lower appellate Court, to decide all the issues on merits.

10. For the above reason, the Civil Miscellaneous Appeal is allowed. No Costs. Consequently, connected M.P.(MD)No.1 of 2013 is closed.

Sd/-
Assistant Registrar(AE)

/True Copy/

Sub-Assistant Registrar

To

- 1.The Subordinate Judge, Devakottai
- 2.The Additional District Munsif ,
Karaikudi

+One cc to M/s.T.Antony Arul Raj, Advocate, SR.No.21043
+one cc to Mr.G.Prabhu Rajadurai, Advocate, SR.No.20876

am
RL/5 c- 1/7/2015

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