

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

C.M.A.No.445 of 2015
and
M.P.No.1 of 2015

1.Mohammed Yusuf
2.Shakila Banu

... Appellants

.Vs.

1.S.Manoharan
2.Devaraj
3.Sampathu
4.Sundar

... Respondents

This Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of the code of Civil Procedure praying to set aside the Judgment and Decree dated 12.11.2014 and made in A.S.No.5/2013 on the file of the Principal Sub Court, Villupuram, remanding and without setting aside the Judgment and Decree dated 29.11.2011 and made in O.S.No.11 of 2010 on the file of Principal District Munsif Court, Villupuram.

For Appellants : M/s.N.Suresh

For R1 : Mr.V.Janarthanan

सत्यमेव जयते
O R D E R

Challenging the order of remand dated 12.11.2014 and made in A.S.No.5 of 2013 on the file of the Principal Sub Court, Villupuram, present Civil Miscellaneous Appeal is filed under Order 43 Rule 1 (u) of Civil Procedure Code.

2. The appellants herein are defendants 1 and 2, the first respondent herein is the plaintiff and the respondents 2 to 4 are defendants 3 to 5 in O.S.No.11 of 2013 on the file of the Principal District Munsif Court, Villupuram.

3. As it is manifested from the records, the first respondent/plaintiff has filed the above suit as against the

appellants/defendants 1 and 2 as well as against the remaining respondents seeking the relief of declaration to declare his right in the suit property and also seeking a direction to the appellants/defendants 1 and 2 to deliver the possession of the suit property to the plaintiff free from obstruction and further seeking a direction to the defendants to remove the compound wall raised by the defendants 1 and 2 in the suit property within a time frame which may be fixed by this Court.

4. This suit was originally contested by appellants 1 and 2 by filing their written statement. It is to be noted that the respondents 2 to 4 herein/defendants 3 to 5 have not contested the suit and remained *exparte*. Banking heavily on the evidences placed before the Trial Court both oral and documentary, the learned Trial Judge had proceeded to dismiss the suit on the ground that the first respondent/plaintiff had not properly identified the suit property and further the learned Trial Judge had found that the properties purchased by the appellants 1 and 2 compromised in S.No.299/9A2 were found to be in their possession.

5. Having been aggrieved by the dismissal of the suit in O.S.No.11 of 2010, the first respondent/plaintiff had preferred an appeal in A.S.No.5 of 2013 on the file of learned Principal Subordinate Judge, Villupuram.

6. After hearing both sides, the learned Principal Subordinate Judge, Villupuram, being the First Appellate Court, had remitted back the suit to the file of Trial Court, with a direction to the Trial Judge to instruct the first respondent/plaintiff to file an application to appoint an Advocate Commissioner to measure the property with a help of Taluk Surveyor with the Assistance of Revenue records and dispose the suit in accordance with law, after giving due opportunity to the parties to the suit.

7. Mr.N.Suresh, learned counsel appearing for the appellants has indicated that the Appellate Court has not stated anything as to whether the appeal preferred by the first respondent/plaintiff was dismissed or allowed. Secondly, the Judgment and Decree passed by the Trial Court have not been set aside. However, the learned First Appellate Judge had proceeded to remand the suit back to the Trial Court, with a direction to the Trial Judge to give instruction to the first respondent/plaintiff to file an application to appoint an Advocate Commissioner to measure the property with the Assistance of Taluk Surveyor so as to enable the first respondent/plaintiff to identify his property.

8. From the submission made by Mr.N.Suresh, learned counsel for the appellants, this court finds that the first respondent/plaintiff had never spoken to before the First Appellate Court to appoint an Advocate Commissioner. It is also to be highlighted that the first respondent/plaintiff had never evinced any interest in taking steps to amend the plaint for the purpose of identifying the property in respect of which, he has sought the relief for declaration.

9. Mr.N.Suresh, learned counsel has further submitted that the Appellate Court, while remanding the suit to the Trial Court, had given instruction to the plaintiff to file an application to appoint an Advocate Commissioner. The Appellate Court itself could have taken steps or instructed the first respondent/plaintiff to file an application to appoint an Advocate Commissioner instead of remanding the matter of the trial court. It may also be relevant to note here that while remanding the suit back to the Trial court, the first appellate Court had neither allowed the appeal nor dismissed the same.

10. Order XLI Rule 23 deals with remand of case by the Appellate Court.

It is extracted as under:

Rule 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 things fit, by order remand the case, and may further direct what issue or issues 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.

11. In respect of Rule 23 of Order 41, the following amendments has been made by Madras High Court.

a) After the words "the decree is reversed in appeal" insert the words "or where the appellate Court, in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case" has been inserted

b) after the words "the appellate court made the words if it things fit "have been deleted

Order XLI Rule 23(A) of C.P.C. provides remand in other cases. It is extracted as under:

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 the same powers as it has under Rule 23.

From the provisions of Rule 23 it is explicit that the following conditions are necessarily to be complied with.

i) the suit must be disposed of by the Trial court on a preliminary point;

ii) the decree of the Trial court must be reversed in appeal or where the Appellate court in reversing the order or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case.

12. Insofar as this case is concerned, the Appellate Court has never stated that the Trial Court had disposed the suit on a preliminary point. The First Appellate court has neither reversed nor setting aside the decree of the Trial court which is under appeal and the First Appellate Court has also not given a finding saying that it is considered to be necessary in the interest of justice to remand the case. But without satisfying the above statutory requirements, the First Appellate Court has merely remanded the suit on the sole intention of helping the first respondent/plaintiff to identify the property by appointing an Advocate Commissioner along with Taluk Surveyor. The order of remand passed by the Tribunal is absolutely erroneous and in total negation of the provisions of Rule 23 of Order 41.

13. The order of remand by the First Appellate Court, with a direction to the Trial Court to instruct the first respondent/plaintiff to file an application is not sustainable. The First Appellate court itself is having the power under Rule 33 of Order 41 to give such an instruction to the first respondent/plaintiff to make an application to appoint an Advocate Commissioner for the purpose of identification of property, if it is considered as fit and proper. It is well

settled principle that the appeal is a continuation of the original proceedings. Under such circumstances, the First Appellate Court ought to have allowed the first respondent/plaintiff to file an application for appointment of an Advocate Commissioner, instead of remanding the matter back to the file on Trial Court. Secondly, the decree which is appealed from, has not been either reversed or set aside. Virtually the first appellate Court has not given any reasoning for non setting aside or non reversal of the decree.

14. Under such circumstances, the impugned order of remand itself is not sustainable and liable to be set aside and accordingly, the Civil Miscellaneous Appeal is allowed and the impugned order of remand in O.S.No.11 of 2010 on the file of Principal District Munsif Court, Villupuram, is hereby set aside and the grounds of appeal is remanded back to the first appellate Court with a direction to dispose of the appeal in A.S.No.5 of 2013 on merits and in accordance with procedure known to law, within a time frame of three months from the date of receipt of a copy of this order. There shall be no order as to costs.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

kkd

To

1.The Principal Sub Court,
Villupuram.

2.The Principal District Munsif Court,
Villupuram.

Copy To

The Section Officer,
V.R.Section,
High Court, Madras 104.

+1cc to Mr.N.Suresh, Advocate, S.R.No.44994

C.M.A.No.445 of 2015
and M.P.No.1 of 2015

SV(CO)
CA(02/09/2016)