

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2016
(Judgment Reserved on 28.11.2016)

CORAM: THE HONOURABLE Mr. JUSTICE N.SESHASAYEE

C.M.A.No.2625 of 2009
and M.P.No.1 of 2009

Elumalai

...Appellant/Defendant

Vs.

Kanthamani Ammal

...Respondent/Plaintiff

Prayer : Civil Miscellaneous Appeal filed under Section Order 43 Rule 1(a) of C.P.C. against the order of remand made by the learned Sub-ordinate Judge, Gingee dated 29.06.2009 made in A.S.No.30 of 2006 reversing the decree/judgment in O.S.No.551 of 1998 dated 30.06.2005 on the file of the Additional District Munsif Court, Gingee.

For Appellant : Mr.V.Bhiman
For Respondent : Mr.D.Ravichander
for M/s.T.R.Rajaraman

J U D G M E N T

1.This Civil Miscellaneous Appeal is preferred against against the order of remand made by the learned Sub-ordinate Judge, Gingee dated 29.06.2009 made in A.S.No.30 of 2006 reversing the decree/judgment in O.S.No.551 of 1998 dated 30.06.2005 on the file of the Additional District Munsif Court, Gingee.

2. The defendant in O.S.No.551 of 1998 on the file of the Additional District Munsif Court, Gingee/ the respondent in A.S.No.30 of 2006 on the file of the Sub-ordinate Judge, Gingee, has come forward with this miscellaneous Appeal, challenging the order of the First Appellate Court remanding the matter back to the Trial Court. The parties would be referred to as per their rank before the Trial Court for narrative convenience.

3. The plaintiff has filed a suit for declaration of title and for recovery of possession with mesne profits. She would allege in her plaint that the suit property originally belonged to her husband Kuppusamygounder, that he had obtained the same partly by inheritance and partly by purchase from one of his co-sharers, that he had settled the property on the plaintiff on

10-08-1973 under a registered deed of settlement and ever since she was in possession and enjoyment of the property. Be that as it may, some dispute arose between the plaintiff and her husband and taking advantage of the same the defendant encroached upon the suit property and hence had laid the suit.

4. Admitting that the suit property as belonging to the plaintiff's husband Kuppusamygounder as well as the mode of his acquisition of title over the same, the defendant in his written statement contended that Kuppusamygounder had not executed any settlement deed as alleged by the plaintiff, that the plaintiff was not in enjoyment of the same and that the property was in fact in the possession of Kuppusamygounder and his sons. While so, on 02-01-1998, Kuppusamygounder and his sons had sold the suit property to the defendant. Since the date of purchase, the defendant has been in peaceful possession of the suit property.

5. The Trial Court, Vide its judgment dated 30-06-2005, dismissed the suit. It is relevant here to mention that during the pendency of the suit, on 21-08-2000, plaintiff, her husband and their sons had executed a sale deed in favour of one Manikandan, a minor at the time of the said sale. This document was marked as Ext.B-5 before the Trial Court. Yet another fact that is required to be mentioned is that before the Trial Court, defendant had examined himself in-chief as DW-1, but despite granting several adjournments for his cross-examination, the plaintiff did not cross-examine the defendant.

6. It is in this setting, the trial Court proceeded to deliver its judgment. In the context of the judgment a fact that requires some attention is that the issues in the case were originally settled on 30.06.2005 and the same were re-cast when judgment was delivered. Inasmuch as the defendant denied the plaintiff's assertion of deriving title under a settlement deed dated 10-08-1973, the trial Court, at the first instance, framed inter alia the following two issues:-

- "1. Whether the plaintiff's husband Kuppusamy Gounder executed a settlement deed dated 10-08-1973 with respect to suit property in favour of his wife?"
2. Whether the suit property belongs to the plaintiff?"

When the issues were recast while delivering judgment, the above mentioned two issues which are pertinent in a suit for declaration of title, were deleted and instead the following issue was framed as the first issue:-

"Whether the plaintiff is in possession and enjoyment of a suit property?"

7. As earlier indicated, the trial Court dismissed the suit and in arriving at its conclusion it believed the validity of the sale deed under which the defendant claimed title. Here, the trial Court spotlighted more on plaintiff's failure to cross-examine DW-1, the defendant. It also relied on Ext.B-5, under which the plaintiff, her husband and children have sold the property to Manikandan pendente lite and touching on it, it entered a finding that inasmuch as the plaintiff had sold the property to a third party the suit itself has become infructuous.

8. Challenging the decree of the trial Court, the plaintiff preferred A.S.No.30/2006. In that appeal, plaintiff filed I.A.No.23 of 2009 under Order XLI Rule 27 CPC to permit the plaintiff to cross-examine D.W-1. The first appellate Court found that not only DW-1 was not cross-examined by the plaintiff, but PW-3 was also not cross-examined by the defendant. Therefore, for rendering substantial justice in the matter, the first appellate court remanded the matter back to the Trial Court. This order of the Appellate Court is now in challenge.

9. The only point for consideration is if the order of the first appellate Court is sustainable?

10. Challenging the correctness of the order of remand, the learned counsel for the appellant argued that:-

(i) when once it is established that the plaintiff had sold the suit property to a third party Manikantan nothing survives for the plaintiff to seek declaration of her title since whatever title that she claimed has already vested in a third party purchaser.

(ii) When right to cross-examine DW-1 is not denied by the trial Court and when the plaintiff by her conduct had forfeited it despite the Court granting several adjournments for cross examination, she should not be allowed a second opportunity as there is a great possibility that she might use this opportunity to fill up the lacuna., and hence remand shall not be ordered.

In law there cannot be any remand merely for the purpose of affording an opportunity to a party to cross examine a witness nor is it given to the appellate court to entertain an application under Order XLI Rule 27 CPC for the said purpose and sought to fortify his submission with an authority of this Court in S.Kuppurathinam and others Vs.A.R.Munirathinam [1993 (1) MLJ 507].

11. Conceding that there is a default or failure on the part of the counsel for the plaintiff /respondent in cross-examining DW-1, the learned counsel for the respondent submitted that it was purely a failure of plaintiff's counsel and plaintiff shall not be made to suffer for the failure of his/her counsel. In aid of his submission, the learned counsel placed reliance on the authority in Prakash Seshmal Jain Vs. Sukhmal & Sons and others [(1998) 9 SCC 718]. He also added that at any rate, the trial Court has not even considered the question of plaintiff's title to the suit property.

12. The last leg of the argument of the plaintiff's counsel is pertinent. It is a rudimentary principle of law that in any suit the initial burden of proving the facts on which the cause of an action rests lies on the suitor and as a corollary to this principle it is also established that a plaintiff should not rely on the weakness of defendant's case to gain an advantage. The instant suit is one instituted by the plaintiff and she claims title to the suit property on the basis of a settlement deed that her husband had executed in her favour in 1973. The defendant admittedly claims title to the same property on the basis of a sale deed executed by the very husband of the plaintiff who the latter alleges as the executant of the settlement deed in her favour. Necessarily if the question plaintiff's title is to be investigated then the validity of the alleged settlement deed (marked Ext.A-2) becomes the crucial issue. Now, without entering a discussion on this fact and understanding the nature and extent of right that the plaintiff claimed to have derived under the settlement deed, the trial Court deviated from the track and dropped an issue critical for deciding the title of the plaintiff and instead came up with a surprise when it framed an issue concerning plaintiff's possession of the suit property, when the plaintiff herself has admitted in the plaint that she was not in possession and that the defendant had entered possession. Indeed, it is on this specific pleading that she has prayed inter alia for delivery of possession of the suit property with mesne profits. Even otherwise inasmuch as the suit property being a vacant open agricultural land, the possession will follow title till the contrary is established.

13. The further reasoning of the trial court that since the plaintiff has sold the property pendente lite she has lost her right to prosecute the suit is also not well rooted in law. No law prevents a suitor from alienating the property which is the subject matter of the suit. The doctrine of lis pendens only envisages that any transfer of a vested interest in an immovable property litigated upon during the pendency of a litigation will be subject to its outcome, and no more. Order XXII Rule 10 CPC

is only an enabling provision and grants an option to a pendente lite assignee of a right in the subject matter of the suit to get himself impleaded in it so as to continue the litigation. Nowhere it is spelt out that his transferor (a party to the suit) will correspondingly lose his locus standi to litigate. This is because notwithstanding the fact that a pendente lite transfer may convey title to the transferee under it, still a litigation involving a subject matter of such conveyance creates a cloud over the title conveyed. If the warranty of title contemplated under Sec.55(2) of the Transfer of Property Act and obligation created under Sec.55(1)(g) of the said Act on the seller of an immovable property (read it also with Sec.13 of the Specific Relief Act, 1963) should be meaningful then it is only expedient to let the transferor-litigant litigate. In other words, an assignee of a property who has acquired title during the currency of a litigation can either be a fence sitter and observe the litigious battle from outside or may himself participate in the litigation, and the choice is for him to choose. It must not be forgotten here that a pendente lite assignee's right to implead is not automatic on his obtaining a sale but only on his obtaining the leave of the Court under XXII Rule 10 CPC. If the right of an assignee of property to implead himself is not automatic then it cannot be presumed that his vendor will lose his right to litigate on his original title. The trial court therefore appeared to have misdirected its approach, misconceived its reasoning and had short circuited its decision in the suit.

14. Before embarking on the correctness or otherwise of the approach of the first appellate court in remanding the matter it is necessary to remember that the Supreme Court in P. Purushottam Reddy Vs Pratap Steels Ltd., [AIR 2002 SC 771] has declared that "...An unwarranted order of remand gives the litigation an undeserved lease of life and therefore, must be avoided". An order of remand in essence contributes to what may be termed as a recycle-bin syndrome as it leaves the same case rotating within the system without an exit, and stagnates if not adds to the burden that the legal system shoulders. Reference may be had to the authority of the Supreme Court in Lisamma Antony Vs Karthiyayani [(2015) 11 SCC 782]. It is therefore necessary that an appellate court should resort to remanding of cases to the court below only sparingly and in exceptional cases. In this context principles governing the question of remand may be broadly stated:

- An appellate court must ascertain if the suit is decided on a preliminary point. Here the appellate Court should be cautious not to misconstrue a preliminary point with preliminary issue under Order XIV Rule 2 CPC. Ordinarily,

a suit is said to have been decided on a preliminary point if the trial court has either failed to consider all the issues that arise for consideration or has ignored to decide that which the pleadings in the suit require to be decided. This includes cases where burden of proof is wrongly fixed or where the case of one of the parties is failed to be considered on a misconception arising out of it.

- Even where a suit is decided on a preliminary point but where the evidence is still available to decide the material points in controversy in a suit, an appellate court should normally take recourse to Order XLI Rule 24 CPC and decide the case. Even if proper issues are not framed but if those who litigate have understood what they are litigating and have adduced necessary evidence, an appellate Court must attempt to finally adjudicate the case. An order of remand should be read as an exception to what is contemplated under Rule 24. The first attempt is to proceed under Order XLI Rule 24, and if it is found not possible then to explore if the case at hand falls within Rule 25 situations and only if neither is possible, should an appellate court contemplate on resorting to remand under Rule 23 or 23-A. For the scope of Rule 25 refer Jaganathan Vs Raju Sihamani [(2012) 5 SCC 540: 2012 (4) MLJ 314]
- Mere appearance of a disposal on a preliminary point should not automatically be construed as a sufficient ground to remand a case. It must be founded on circumstances such as for instance where evidence adequate to decide a case is found lacking, or where parties have been misled by the omission to frame appropriate issues resulting in their failure to provide necessary evidence, or where any of the parties are denied an opportunity to adduce evidence, or where an appellate court considers that the evidence on any of the issues germane for final adjudication of the case is insufficient.
- Where an appellate court encounters any exceptional situations arising out of the facts of the case that makes a final adjudication difficult to achieve is a situation when a case can be remanded. It may include any change of circumstances arising out of any subsequent events impacting the original cause of action; or discovery of a new fact requiring amendment of the pleadings within the scope of Order VI Rule 17 other than those that may render a suit bad for formal defect within the meaning of Order XXIII Rule 1 CPC or production of a new evidence subject to

the limitations in Order XLI Rule 27 CPC, both of which may be of such nature that they are either inconsistent with any fact in issue or relevant fact already proved, or, which either by itself or in connection with other facts available on record make the existence or non-existence of any proved fact in issue or relevant fact highly improbable and hence require proof; These are only illustrative and not exhaustive.

- A remand should not be made to reconstruct a case, but only to prevent failure of justice. A litigant's recalcitrance and default cannot not be counted as a ground per se to remand.
- A remand is not required merely because of change of substantive law or advent of new law affecting the original cause of action, unless it also requires addition of parties or probe on facts.

The bottom line is, can the case be finally decided on all material points in controversy without an order of remand? If it can be then there is no need for ordering remand of a case. In all cases, it is necessary for the appellate court to give reasons for the course it adopts.

15. Now, turning to the impugned order of the first appellate Court, in the context of the principles stated above it would have been appreciable if the first appellate Court had engaged in an investigation on the alleged title of the plaintiff at least to the extent she had discharged her burden of proving the same before dealing with the aspect of non cross-examination of DW-1 by the plaintiff or of PW-3 by the defendant. This is the minimum and this is not appeared to have been done. All other principles requiring consideration for remanding a case follows this first step. Inasmuch as this endeavour is yet to be attempted, the impugned order of remand cannot be sustained.

16. To conclude I find merit in the appeal and the same is allowed but for reasons other than those argued before me. The first appellate court is directed to hear the matter afresh, frame appropriate points and ascertain if the case can be decided finally with the available materials, and if for reasons that it is required to record it finds a need to remand the matter consistent with the law on the subject, it may so do it. The first appellate court is directed to dispose of the appeal

within two months from the date of receipt of the material papers of this case. No costs. The registry is directed to transmit the material papers received in this case to the first appellant court without any delay.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kmi

To:

1. The Sub-ordinate Judge,
Gingee.
2. The Additional District Munsif Court,
Gingee.

Copy to:

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

+1cc to Mr.Bhiman, Advocate, S.R.No.76036

+1cc to Mr.Ravichandar, Advocate, S.R.No.76120

PA(CO)
RS(06/02/2017)

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C.M.A.No.2625 of 2009

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