

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

CMA.NO.135 OF 2011

M.P.NO.1 OF 2011

1.Vijayaraghavan
2.Rajeswari
3.Thilagavathy

... Appellants

Vs.

Boopathy

... Respondent

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of CPC. against the judgment and decree dated 16.09.2010 made in A.S.No.32 of 2009 on the file of Learned Sub-Judge, Cuddalore, in remanding and confirming the judgment and decree made in O.S.No.11 of 2007 dated 05/08/2009 on the file of the Principal District Munsif, Cuddalore.

For Appellants : Mr.D.Ravichander

For Respondent : Mr.R.Gururaj

J U D G M E N T

This Civil Miscellaneous Appeal is preferred against the order of remand made by the lower appellate Court for the purpose examining the advocate commissioner to find out as to whether the hut is inside the property or outside the property.

2. The suit properties are poromboke lands. The title of the Government is admitted by both the parties. The plaintiff claims that he is in long and continuous possession of the properties for over 35 years, which is sought to be disturbed by the defendant. Per contra, the defendant claims that he is in possession. Both parties let in oral evidence and marked documents to prove possession. The trial Court on the basis of the evidence, declared the possession of the plaintiff and decreed the amount. Aggrieved over the same the defendant preferred the appeal and contended that the trial Court erroneously believed the documents marked by the plaintiff, which are fraudulent and forged. The lower appellate Court has accepted the claim of the plaintiff with respect to item 2 of

the suit property and held that it could not find an valid reason to interfere with the judgment and decree of the lower Court.

3. However with regard to the I-First item of the property, the advocate Commissioner has not mentioned as to whether the hut belonged to the defendant was inside or outside the property. Government is not a party to the suit and Commissioner has not measure the property with the assistance of a surveyor. Both the parties have not chosen to examine the Commissioner, whereas evidence of the advocate Commissioner is essential to come to a decision. Hence, the appeal was remanded back in respect of I-First item of the property, after confirming the decree in respect of the 2nd item of the property.

4. This appeal is against the remand made by the Lower Appellate Court.

5. From a careful perusal of the judgments of the lower Court, it could be noted that parties have let in evidence prove their respective possession. Both parties admit the supreme title of the Government, but claim possessory title through payment of penalty to the Government. The defendant has let in evidence with regard to the hut in I item of the suit property. In so far as the report of the advocate Commissioner, the plaintiff has filed his objections and the same was taken note of by the trial Court. In such circumstance, the Lower Appellate Court ought to have given a finding on merits rather than remitting the matter back to the Trial Court for clarifying the doubts. It is nobody's case that the evidence adduced is not sufficient or the suit is for declaration of title. The Trial Court instead exercising its power vested in it simply, shirked the responsibility of deciding the issue on the evidence adduced.

6. The Lower Appellate Court having found that the evidence is sufficient in respect 2nd item of property cannot take a different stand in respect of the I item of the property. When both the parties do not choose to examine the advocate commissioner it shall be deemed that the parties are satisfied with the evidence adduced by them is sufficient to prove their case. But, without giving reasons for finding the judgment of the Trial Court is erroneous, and that the valuable rights of the parties are deprived of for insufficient evidence, the lower appellate Court cannot simply remand the matter.

7. The Hon'ble Supreme Court in MUNICIPAL CORPORATION, HYDERABAD VS. SUNDER SINGH [2008 (8) SCC 485] has observed as follows:

"17. Order XLI Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate court must disagree with the findings of the trial court on the said issue. Only when a decree is to be reversed in appeal, the appellate court considers it necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the appellate court.

18. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties."

In the instant case also, the Lower Appellate Court ought to have restricted itself from remanding the matter. On the other hand, it has ample power to examine the advocate Commissioner and recorded the required evidence.

8. A Hon'ble Division Bench of this Court S.SHANMUGHAM VS. S.SUNDARAM AND OTHERS [2005 (2) MLJ 552] in a similar situation, held as under:

"12. On a perusal of the judgment of the lower appellate Court, it is revealed that on the basis of both oral and documentary evidence available on record, the lower appellate Court came to the conclusion that the third defendant is also entitled to a share in 'A' Schedule property and in the sketch of the Commissioner also when it is made clear that as to how 'A' Schedule property could be partitioned and especially when the provisions under Order 41 Rules 23 to 29 of C.P.C. are not a bar to take further evidence or to appoint a Commissioner, if so necessary, and to try the appeal, as rightly pointed out by the learned counsel for the appellant, we are of the view that there is no necessity to remand the matter back to the trial

Court and that the lower appellate Court itself can try the matter after taking further evidence as to the point to be decided and it can dispose of the appeal on merits and in accordance with law."

9. Therefore, it is clear that the order of remand made by the Lower Appellate Court for the purpose of examining the Advocate Commissioner is totally unwarranted and erroneous. The order of the Lower Appellate Court stands set aside. The Lower Appellate Court is directed to decide the issue on merits, if required, by taking additional evidence.

10. The Civil Miscellaneous Appeal stands allowed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

dna/tk

To

1.The Subordinate Judge
Cuddalore.

2.The Principal District Munsif
Cuddalore.

+1cc to Mr.Gururaj, Advocate sr.no.85638

+1cc to Mr.D.Ravichander, Advocate sr.no.85606

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