

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.2867 of 2007
and M.P.No.2 of 2007

Sri Thiruvikrama Narayana
Perumal Temple,
Thadalan Koil
Sirkali

rep.by its Sthanikar
K.K.C.Vedanthachariar Swamy
rep.by its Power Agents
1.Dr.R.Kodandaraman
2.K.V.Balasubramaniam

..Appellants/Plaintiff

Vs

G.Pakkirisami ..Respondent/Defendant

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of C.P.C., against the Judgment and decree passed in A.S.No.118 of 2004 dated 22.03.2005 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai reversing the judgment and decree made in O.S.No.23 of 1999 dated 23.06.2004 on the file of the Court of District Munsif Court, Sirkali.

For Appellant : Mr.A.Muthukumar
For Respondents: Mr.R.Subramanian
for Mr.S.Govindaraman

J U D G M E N T

Aggrieved by the order of remand passed in A.S.No.118 of 2004 by judgment dated 22.03.2005, the appellant/plaintiff preferred this appeal.

2. The suit was filed by the appellant for recovery of possession of the suit schedule properties and for the arrears of rent and damages. The suit property comprise of 2 cents of land for putting up a thatched hut to reside; 65 sq.ft to put up a thatched shed to run a cycle shop and 9 coconut trees.

3. According to the plaintiff, the defendant entered into lease deed in respect of the suit properties by three lease deeds. Since the defendant committed default in payment of lease amount as agreed, the above suit for recovery of possession and damages was filed.

4. The trial Court after finding that the tenancy was accepted in the written statement and proved through documentary evidence, decreed the suit. On appeal by the defendant/tenants, the lower Appellate Court has set aside the decree and judgment and remanded the matter for fresh consideration of the trial Court, on the grounds that an opportunity to prove the case of the defendant was not given to prove the identity of the property by appointing an Advocate Commissioner and if necessary to add Government as a party to prove the assignment in favour of the defendant.

5. The learned counsel for the appellant would contend that necessary issues were framed and sufficient evidence was also given. For the purpose of identifying the property, the well considered judgment of the trial Court ought not to have been set aside and the remand is unwarranted.

6. A perusal of the judgment of the lower Appellate Court shows that the evidence was not properly appreciated by it. The trial Court has framed necessary issues, recorded evidence, discussed all the issues and rendered its finding. If at all the lower Appellate Court finds that certain vital issues were not framed or material aspects were omitted, which may prejudice to one side and without evidence on the issue, there will be miscarriage of justice, can remand the matter. On the other hand, for the purpose of identifying the suit property, whether it form part of Ex.B1 or not, the order of remand is not warranted.

7. It is useful to refer the judgment of the Hon'ble Supreme Court in LISAMMA ANTONY VS. KARTHIYAYANI [2015 (11) SCC 78] wherein the Hon'ble Supreme Court has framed the guidelines, governing the questions of remand as under:-

" i) 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 14, Rule 2, C.P.C. 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.

ii) 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 41, Rule 24, C.P.C., 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 41, 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 V. Raju Sihamani, 2012 (5) SCC 540:2012 (4) MLJ 314.

iii) 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.

iv) 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 6, Rule 17, other than those that may render a suit bad for formal defect within the meaning of Order 23, Rule 1, C.P.C., or production of a new evidence subject to the limitations in Order 41, Rule 27, C.P.C., 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.

v) A remand should not be made to reconstruct a case, but only to prevent failure of justice. A litigant's recalcitrance and default cannot be counted as a ground per se to remand.

vi) 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.

8. A reading of the above principles laid down by the Supreme Court, it is seen that only in exceptional cases where issue needs to be decided and there is no evidence and the relevant issue was not framed depriving opportunity to the parties to adduce evidence and not decided, the matter can be remanded by recording the reasons.

9. In the instant case, the Lower Appellate Court has remanded the matter for the purpose of local inspection to identify the property and also to decide the issue afresh by impleading the third parties. Such order of remand, is contrary to the well considered and well settled principles laid down by the Hon'ble Supreme Court governing the questions of remand. Therefore, this Court is inclined to interfere with the order passed by the lower Appellate Court and accordingly, the judgment and decree passed in A.S.No.118 of 2004 dated 22.03.2005 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai, is set aside and direction is issued to the lower Appellate Court to decide the matter on merits, if required, after recording additional evidence and pass orders, in accordance with law, within a period of three months from the date of receipt of a copy of this order.

10. This Civil Miscellaneous Appeal is disposed of on the above terms. No costs. Consequently, connected MP is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The Additional Subordinate Judge,
Mayiladuthurai

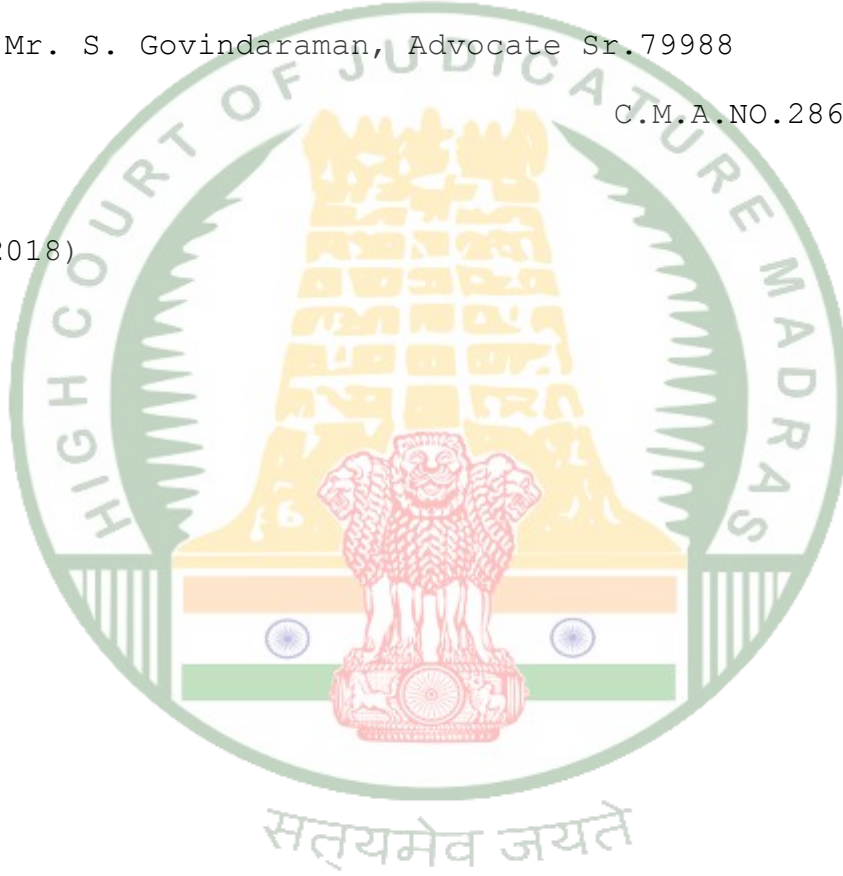
2.The District Munsif Court, Sirkali

Copy to: The Section Officer,
VR Section, High Court, Madras.

+ 1 cc to Mr. S. Govindaraman, Advocate Sr.79988

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