



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.12.2017
Delivered on : 18.12.2017

CORAM:

THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

C.M.A(MD)Nos.1119 and 1120 of 2011
and
M.P.(MD)Nos.1 to 4 and 1 and 2 of 2011

Lakshmikanthan

... Appellant in both appeals

Vs.

1. S.Rengasamy

2. Babu @ Kaliaperumal
(2nd respondent as he was set
exparte before the lower
Appellate Court)

... 1st and 2nd respondents
in both appeals

3. The Sub Registrar,
Sub Registrar's Office,
Dr.Moorthy Road,
Kumbakonam Town,
(no relief is claimed against
respondents 2 and 3 as they
were set exparte before the
lower Appellate Court)

.... 3rd Respondent
in C.M.A.(MD)No.1120 of 2011

COMMON PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (U) of Civil Procedure Code, against the Decree and Judgemnt passed in A.S.Nos.24 and 26 of 2010, dated 28.10.2010 by Additional Subordinate Court, Kumbakonam, Reversing and remanding the Decree and Judgment passed in O.S.Nos.487 and 608 of 2006, dated 31.10.2009, on the file of Principal District Munsif Court, Kumbakonam.

For Appellant : Mr.V.K.Vijayaraghavan
For R1 : Mr.G.Venugopal
for Mr.M.P.Senthil
For R2 : Exparte in both appeals
For R3 : Exparte
in C.M.A.(MD)No.1120 of 2011

**COMMON JUDGMENT**

This Civil Miscellaneous Appeals are filed as against the order of remand passed in A.S.Nos.24 and 26 of 2010, on the file of the Additional Subordinate Court, Kumbakonam, The appellant here in filed in O.S.No.487 of 2006, for permanent injunction. The first respondent here in filed O.S No 608 of 2006 to declare that he is the legal heir of one Saroja and also for permanent injunction. O.S.No 487 of 2006 filed by the appellant here in was decreed and the suit filed by the first respondent herein in O.S.No.687 of 2006 was dismissed. Against the said orders, the first respondent here in filed appeals A.S No 24 of 2010 and A.S No 26 of 2010. The above appeals are allowed and remanded back to the trial court for fresh disposal. Against the said orders the present Civil Miscellaneous Appeals were filed by the appellant.

2.For the sake of convenience, the parties are referred in these appeals also with reference to the suit in O.S.No.487 of 2006.

3.The Learned counsel for the Appellant argued that the Lower Appellate Court can record the further evidence in respect of additional document it self or direction may be given to the Trial court for recording evidence in the light of new documents and submit the same to the Appellate Court for perusal and determination of rights of parties and the Lower Appellant court did not see that conducting trial again is totally onerous time consuming. The first respondent did not prove the reversionary right nor filed any documents for proving the genealogy and it is not necessary to amend the prayer for declaration of title and was totally devoid of merits. The order of remand passed by the lower Appellate Court was not tenable and against Judicial precedence. Parties cannot be permitted to fill up the lacuna and without entire evidence is available on record for deciding rights of parties order of remand will not arise. Saroja is the exclusive owner of the suit property and the appellant alone is the legal heir and he is only entitled to his suit properties. The lower Court has unnecessarily assumed that the suit properties were neither self acquired properties nor ancestral property of Chinnayan husband of Saroja The first respondent has not filed any documents to prove that he was related to Saroja's family or the properties in the name of Saroja came from her father's family to claim right. There is no question of title involved in this case and hence it is not necessary to file the suit for declaration. The Judgment passed by the Trial Court is correct and hence it is not necessary to remand the case for fresh disposal and prays that these Civil Miscellaneous Appeals are liable to be allowed.

4.On the other hand, on the respondent side it is argued that once the first Appellate Court come to the conclusion to remand the case and it was required to give reasons in support of the remand order as to why the remand is called for in the case and the remand was made only to enable the Trial Court to decide the case on



merits. It is not necessary to adduce additional evidence before the first Appellate Court when the first Appellate Court admitted additional evidence then the case can be remanded to Trial Court to decide the suit a fresh on merits by considering additional evidence adduced by the parties. Hence the order of remand passed by the first Appellate Court is correct and there is no hardship caused to the appellant when the case was remanded to Trial Court and prays that Civil Miscellaneous Appeals may be dismissed. For that the learned counsel for the first respondent submitted that the ruling reported in **2017 (4) CTC page 690, J.Balaji Singh vs. Diwakar Cole and others.**

5.The documents filed and the evidence of both parties carefully perused. The plaintiff filed O.S.No.487 of 2006 for injunction as against the first respondent not to disturb his possession. The plaintiff stated that the suit properties were inherited by Saroja from her husband Chinnaian. Saroja and Chinnaian died issueless. Hence the plaintiff stated that due to close relatives of Chinnaian, he is entitled to the suit properties. But on the other hand the first respondent side it is argued that Saroja inherited the suit property from her father Panchunathan Padaiyachi. Saroja and her husband Chinnaian died issueless. The first respondent is the son of the brother of Panchunathan Padaiyachi. The first respondent is only alive. All other close relatives of Panchunathan Padaiyachi died. The first respondent is the cousin brother of the Saroja. Hence he is entitled to the properties of Saroja.

6.The learned counsel for the appellant argued that when the first Appellate Court record the additional evidence then it cannot remand the case to Trial Court and in this case already the first Appellate Court decided the case on merit and hence there is no need to remand the case. For that the learned counsel for the appellant relied on the ruling reported **2017 (4) CTC 690 page 695, J.Balaji Singh vs. Diwakar Cole and others.** The learned counsel particularly relied on paragraph numbers 23 and 24. In the above citation in paragraph numbers 23 and 24 it was stand as follows:

"23. So far as the impugned Order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the Judgment of the First Appellate Court and restored the Judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the Remand Order in an Appeal filed under Order 43, Rule 1 9u

0 of the Code. Indeed, once the High Court came to a conclusion that the Remand Order was bad in law then it could only remand the case to the First Appellate Court with a direction to decide the First Appeal on merits.



24. The High Court failed to see that when the First Appellate Court itself did not decide the Appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the Appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the Remand Order of the First Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of Remand Order, as is clear from Order 43, Rule 1 (u) which reads thus:

"1(u) . An Order under Rule 23 or Rule 23-A of Order 41, remanding a case, where an Appeal would lie from the Decree of the Appellate Court.""

7. The plaintiff stated that he is entitled to the suit properties as a legal heir of deceased Saroja and he was in possession. But first respondent stated that he is entitled to the suit properties as the legal heir of Saroja and he was in possession. In this case Title was in dispute. Hence without the prayer for declaration of title the suit for injunction is not maintainable. In this case the parties claim right of succession in two different ways without deciding the incidental question of title that the question of actual possession cannot be decided without reference to the title. The evidenciary value given to the revenue records by the Trial Court is not correct. In this case there is dispute in respect of title. Already the first respondent filed Interlocutory Application to amend the prayer for declaration of title in respect of suit properties and for adducing additional evidence. On careful perusal of the ruling reported in **2017 (4) CTC 690, J. Balaji Singh vs. Diwakar Cole and others.** It is categorically stated that once the Court came to the conclusion to remand the case, the first Appellate Court cannot record additional evidence it has to remand the case to Trial Court for disposal on merits. In this case the first Appellate Court came to the conclusion that there is a title dispute in respect of the suit property. Hence it is necessary to decide the question of title. Since both parties claim title from one and the same person. For deciding the title dispute in respect of suit property adducing of additional evidence is essential. For deciding title it is necessary to adduce additional evidence on both parties. Further the first respondent filed petition for amendment for declaration of title in respect of the suit property. For deciding the title it is necessary to give opportunity to both parties to adduce evidence and to produce documents. For that the case is to be remanded back to the Trial Court. In this case first Appellate Court has not decided the case on merits. It simply given reasons for remand the case. Hence the order of remand passed by the first Appellate Court is



correct. Hence there is no infirmity in the finding of the lower Court. Hence no need to interfere in the findings of the lower Court.

8. In the result, the Civil Miscellaneous Appeals are dismissed. The order passed by the first Appellate Court is confirmed. No Costs.

Sd/-
Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

To

1. The Additional Subordinate Judge,
Kumbakonam.
2. The Principal District Munsif Court,
Kumbakonam.
3. The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.V.R.VIJAYARAGHAVAN, ADVOCATE IN SR No. 93686
+ 1 CC TO Mr.M.P.SENTHIL, ADVOCATE IN SR No. 93750

GSP

TE/SKN-RSK/SAR-1 : 10/01/2018 : 5P/6C

Order made in
C.M.A(MD)Nos.1119 and 1120 of 2011 and
M.P.(MD)Nos.1 to 4 and 1 and 2 of 2011
18.12.2017