

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2018

Coram:

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

C.M.A.No.2288 of 2012
and
M.P.No.1 of 2012

1.Jagajothi

2.Ganesh

3.Jayaprakash

4.Rajesh

5.Appu alias Suresh

... Appellants/ Respondents

Vs.

Varadaraju

... Respondent/ Appellant

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of C.P.C, against the order of remand in Judgment and Decree made in A.S.No.1 of 2009 dated 08.02.2012 by the Subordinate Court, Arni preferred against the judgment and decree made in O.S.No.198 of 2000 dated 20.10.2008 by the District Munsif Court, Polur, Tiruvannamalai.

For Appellants : Mr.P.Satheesh Kumar

For Respondent : Mr.A.Bharathi

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the judgment of remand made in A.S.No.1 of 2009 dated 08.02.2012 by the Subordinate Court, Arni against the judgment and decree made in O.S.No.198 of 2000 dated 20.10.2008 by the District Munsif Court, Polur, Tiruvannamalai.

2.The appellants prayed for setting aside the order of remand by raising various grounds.

2.1 The original suit was filed for seeking permanent injunction restraining the defendants/appellants herein from interfering in any manner with the plaintiff's peaceful possession except through judicial processes.

2.2 The plaintiff/respondent herein in the original suit has averred that the plaintiff and the defendants/appellants herein had orally exchanged the landed properties before 19 years and there was some amount paid by the plaintiff, each of them have exchanged the possession of the property, no deed was executed since the value of exchange was below Rs.100/-. Plaintiff's property got in exchange was Dry land of 0.51 acres in S.No.198/4B and Wet land of 0.25 acres in S.No.133/4. The defendants property got in exchange was Wet land of 0.47 acres in S.No.132/1B and Wet land of 0.19 acres in S.No.132/3. The plaintiff has submitted that he was enjoying all the above property for more than 19 years by title and by way of adverse possession. He has paid kist also. Substantially the defendants tried to interfere with the possession of the plaintiff and hence the plaintiff approached the R.D.O. Tiruvannamalai. The R.D.O. directed the plaintiff to approach the Civil Court for remedy and accordingly he filed this plaint. He would submit that it was only a oral exchange of properties.

3 The defendants in the original suit filed a written statement stating that the plaintiff/respondent herein and their submission is false and there is no such exchange of lands took place before 19 years and the plaintiff is not in possession of the said property. The defendant's father was in possession of the land and irrigating the same. When he was not well and also due to frequent ill health, the defendant has allowed the plaintiff to irrigate his lands with prior permission only. It is a oral permission given with intervals. The defendant's property measures around 30 Hectares about 76 cents whereas the plaintiff's property measure only 007.5 Hectares i.e.0.18 cents. Since the defendant's property was huge and he did not get his labour investing a lot of money and the plaintiff came forward to cultivate the same and pay something to him. The plaintiff wanted to continue the permissible occupation, which, the defendants refused and hence the plaintiff has come forward with the false allegation.

4 The learned district Munsiff, Pollur, after hearing the matter in full, has decided the case in favour of the defendants and against the plaintiff. When there is

no written documents to establish the plaintiff's case and failure to produce documents to show the possession of the plaintiff, the learned district Munsiff, Pollur has dismissed the O.S.No.198 of 2000. The lower Court also come to the conclusion that the plaintiff should not interfere with the property except under due process of law, which itself will show that the plaintiff is not the owner and the defendants are the owner of the property. Accordingly the same was dismissed.

5 The plaintiff/respondent herein filed an appeal before the Sub Court, Arni, Tiruvanamallai District in A.S.No.1 of 2009. The lower Appellate Court has come to the conclusion that when there is an oral exchange has taken place between the parties which has not been promptly proved by the parties and when the defendants have allowed him to irrigate the property orally and he has been cultivating the same and the plaintiff's contention is that, after the said exchange the plaintiff was in possession of the same and only an year before the filing of the suit the defendants have pre-occupied the property, hence he approached the R.D.O and the R.D.O. directed him to approach the Court and accordingly he filed the suit, cannot be accepted and the suit ought to have been dismissed.

6 The defendants have submitted that there is no exchange deed has taken place and since the father was not well in the meanwhile and died, the legal heirs have been brought on record and the plaintiff has no right over the property and the said property was inherited by the defendants as per the partition deed and since he was not well, the plaintiff was allowed to irrigate the same, since he kept on scouting on the property. When the defendants denied him to irrigate the same, the plaintiff has filed the suit. The defendants have also submitted that as per the deed dated 02.03.1980 which has been marked as Ex-B1, the property in dispute has been inherited by the defendants and there was no such deed produced by the plaintiff to show that he is in possession of the same and since there was no documents to show that the plaintiff was in possession of the said property and the defendants have permitted him to irrigate the same to do the agricultural activities and when the defendants denied the said permission to do the said irrigation, the suit has been filed.

7 At this juncture, there is no evidence viz., any lease agreement entered into between the parties has been produced. Since the land was lying near to the lands of

defendants, their father has permitted the plaintiff/respondent herein to do some agricultural work for few years. It is an admitted statement of the plaintiff that the said land has been acquired by him by way of exchange, but the same has been denied by the defendants. In the absence of any evidence to show that there was any lease or rent, the lower Appellate Court ought to have decided the issue based on the documents produced before it, instead the lower Appellate Court has given a finding that since the defendants have permitted the plaintiff to irrigate the lands and the issue could be decided only by perusing the lease documents and other exchange documents, opportunity has to be given to both the parties to let in evidence to substantiate their claim by producing various documents and accordingly remanded the matter back to the District Munsiff to decide the same.

8 The learned counsel for the appellants would submit that remanding the matter back to the trial Court is contrary to law since the mandatory requirements of Order 41 Rule 23 of CPC has not been complied with and the lower appellate Court ought to have considered the necessary documents and evidence available before the appellate Court.

9 Heard, the learned counsel for the appellants and learned counsel for the respondent and perused the available records.

10 Order 41 Rule 23 of Civil Procedure Code is as follows:

"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"

11 The above said case not comes under Order 41 Rule 23 because the matter should not be remanded to the lower Court as a matter of right and there should be a specific finding that, with materials available on records the judgment of trial Court is erroneous and the trial Court has not considered the issues and not given proper reasoning, then only it can set aside the judgment of the trial Court and can remand the matter back to the trial Court for framing such issues. The order of remand should only be decided on preliminary point when the matter has been considered in full and the same has been decided by

the lower Court with the available materials on record.

12 It could be seen that the plaintiff has stated in his plaint that it was only an oral exchange of properties and when he himself has admitted that it is only an oral exchange, why the lower Appellate Court remanded the matter back to the lower Court to decide the issue as per the documents. Regarding the partition deed, the same has been produced by the defendants as Ex-B1 and as per the same, the defendants got title for the property, which need not be decided again by the lower Court as the same has been dealt and decided by the lower Court and has come to the conclusion that the plaintiff is not entitled for the relief prayed for. It could also be seen from the pleadings that the plaintiff has valid title for the property but same has not proved by the plaintiff. Only with the available materials, the issue could be decided. Since the entire plaint is only based on the oral exchange deed, which has been denied, the claim based on the oral exchange is decided only with the available materials by the lower appellate Court itself and the lower Appellate Court ought not to have remanded the matter to the lower Court. If at all any additional evidence should be produced, the same could be taken up by the lower appellate Court itself and decided the issue fresh if it is feel so. This Court is of the opinion that if further documents are necessary to decide the issue, the same can be filed by the parties before the lower Appellate Court itself within a time frame and the same can be decided.

13 When the plaintiff has not raised any question on remand and pleaded for remanding, the lower Appellate Court ought not to have considered the same and passed an order of remand. The power of the Appellate Court to remand the case is restricted and it could not be done mechanically. In the absence of any grounds taken by the plaintiff for remanding, there is no justification on the part of the lower Appellate Court to remand the same to the lower Court to decide the issue by giving opportunity to both parties to let evidence and to produce documents, will pave way to fill up the lacunae of other side. When the plaintiff himself has not have any evidence to produce before the Court to prove his possession of the lower Appellate Court but need not remand the matter to the lower Court for the production of such documents and the same can be decided by the Appellate Court itself if it desires to do so.

14 Accordingly the lower Appellate Court itself can decide all the issues, which have been raising for remanding the matter to the lower Court and pass orders

within a period of four months from the date of receipt of a copy of this judgment. The parties are directed to co-operate with the lower Appellate Court in this proceedings, without seeking adjournments.

In the result, this civil miscellaneous appeal is disposed of. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vji/nsd
To

1. The Subordinate Court,
Arni.
Thiruvannamalai.
2. The District Munsif Court,
Polur,
Tiruvannamalai.
3. The Section Officer,
VR Section,
High Court, Madras

+1cc to Mr.P.Satheesh Kumar , Advocate SR.No. 89313

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2012
and
M.P.No.1 of 2012

A.SK(11/06/2019)

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