

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.01.2018

CORAM

THE HON'BLE MR. JUSTICE M.DURAISWAMY

C.M.A.No.1439 of 2015
and M.P.No.1 of 2015

Poovarasan ... Appellant/Defendant

Vs.

Munusamy Kounder ... Respondent/Plaintiff

Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of the Civil Procedure Code against the judgment and decree in A.S.No.67 of 2013 dated 27.03.2015 on the file of the Principal Subordinate Judge, Tindivanam remanding the suit in O.S.No.401 of 2010 dated 07.10.2013 on the file of the Principal District Munsif, Tindivanam.

For Appellant : Mr.N.Suresh
For Respondent : Mr.D.Senthil Kumar

J U D G M E N T

Challenging the judgment and decree passed in A.S.No.67 of 2013 on the file of the Principal Subordinate Court, Tindivanam, setting aside the judgment and decree passed in O.S.No.401 of 2010 on the file of the Principal District Munsif Court, Tindivanam and remanding the matter to the trial Court for fresh consideration, the defendant has filed the above appeal.

2.The plaintiff filed the suit in O.S.No.401 of 2010 for declaration and mandatory injunction.

3.The defendant filed his written statement and contested the suit.

4.Before the trial Court, on the side of the plaintiff, 6 witnesses were examined and 17 documents were marked. However, the trial Court has mentioned only 5 documents in the list of documents in the judgment. On the side of the defendant, 6 witnesses were examined and 2 documents, Exs.B1 & B2 were marked.

5.The trial Court not only mentioned five documents in the list of documents, even in the body of the judgment, it has considered only the 5 documents and also observed that the plaintiff has not produced any evidence to establish his case.

The trial Court proceeded to dismiss the suit based on the 5 documents. The trial Court has not whispered a single word about the remaining 12 documents filed by the plaintiff. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.67 of 2013 on the file of the Principal Subordinate Court, Tindivanam and the Lower Appellate court set aside the judgment and decree of the trial Court and remanded the matter to the trial Court for fresh consideration, since all the documents were not considered by the trial Court. Aggrieved over the order of remand made by the Lower Appellate Court, the defendant has filed the above appeal.

6.Mr.N.Suresh, learned counsel appearing for the appellant submitted that there is no necessity for remanding the matter to the trial Court for the reason that the Appellate Court itself can consider the oral and documentary evidences let in by the parties and decide the matter in accordance with law.

6.1.In support of his contentions, the learned counsel relied upon the following judgments:

(i)AIR 1999 Supreme Court 1125 [Ashwinkumar K.Patel vs. Upendra J.Patel and others] wherein the Hon'ble Supreme Court held as follows:

"...

7.In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary."

(ii)(2002) 2 Supreme Court Cases 686 [P.Purushottam Reddy and another vs. Pratap Steels Ltd.,] wherein the Apex Court held as follows:

"...

10.The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23-A in

Order 41 of the Code of Civil Procedure by CPC Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of Order 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23-A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati* (AIR 1965 SC 364 : 66 Bom LR 681), it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23-A. To wit the superior

court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided."

(iii) 2018 (1) CTC 50 [S.Palanivel and another Vs. P.Natesan and others] wherein a Division Bench of this Court held as follows:

"...
51. It is yet another submission of the learned senior counsel appearing for the Appellants/Plaintiffs that the Trial Court without looking into the evidence of PW2 & PW3 has stated as if they were not examined and thus, erroneously dismissed the suit filed by the plaintiffs for specific performance. But, We are of the opinion that merely because it is stated by the Trial Court in its judgment as if PW2 & PW3 were not examined, there is no need for remanding the matter to the trial Court for fresh consideration. Even if the evidence of PW2 & PW3 are taken into consideration, it will not support the case of the plaintiffs. Therefore, the question of remanding the matter to the trial Court does not arise in this case. In this regard, it would be useful to make a reference in Balasubramania Iyer Vs. Subbiah Thevar and another, AIR 1965 Madras 417, wherein it has been held by the Hon'ble Supreme Court as follows:

"If the Trial Court has not disposed of the Suit on a preliminary point but has delivered Judgment on merits it is the duty of the Appellate Court to deal with the Appeal on its merits. It is only in exceptional cases where the Judgment of the Trial Court is wholly unintelligible or incomprehensible that the Appellant Court can remand the Suit for a fresh trial. The fact that there are some defects and infirmities in the reasoning of the Trial Court is surely not a ground for the Appellate Court not to do its duty of disposing of the Appeal on merits. The Appellate Court will be acting clearly without jurisdiction if it simply and mechanically remands a suit to the Trial Court without applying its mind as to whether the Judgment and the findings of the Trial Court are correct and if not whether it should be reversed or set aside.

...

Ends of justice require that a party litigant who had incurred expenses and undergone all the ordeal and trouble of a protracted trial in the Trial Court should not be deprived of the benefit of the adjudication and be obliged to fight the case, over again for some defect or mistake in the form of expression of the Trial Court."

In the light of the above decision, we are of the opinion that there is no need for remanding the matter to the Trial Court."

(iv) AIR 1965 Madras 417 [Balasubramania Iyer Vs. Subbiah Thevar and another] wherein this Court held as follows:

"...

9. The powers of an appellate court to pass an order of remand and to send the case back for trial is well settled. Under Order 41 Rule 23 C.P.C. the appellate court has got power to remand a suit for fresh disposal (a) if the suit has been disposed of on a preliminary point or (b) if the appellate court considers that it is necessary in the interests of justice that the matter should be disposed of afresh by the trial court. It has been repeatedly pointed out by this court that this power of remand ought not to be lightly exercised by the appellate court, where it has failed to discharge its own duty of disposing of the appeal on merits. Frequent instances are coming to the notice of this court in which orders of remand are passed under O. XLI Rule 23 C.P.C. indiscriminately even though the requirements of law were not satisfied at all. If the trial court has not disposed of the suit on a preliminary point but has delivered judgment on merits it is the duty of the appellate court to deal with the appeal on its merits. It is only in exceptional cases where the judgment of the trial court is wholly unintelligible or incomprehensible that the appellate court can remand the suit for a fresh trial. The fact that there are some defects and infirmities in the reasoning of the trial court is surely not a ground for the appellate court not to do its duty of disposing of the appeal on merits. The appellate court will be acting clearly without jurisdiction if it simply and mechanically remands a suit to the trial court without applying its mind as to whether the judgment and the findings of the trial court are correct and if not whether it should be reversed or set aside. In other words, the appellate court should come to the clear conclusion that the findings of the trial court cannot be supported and must be set aside. Ends of justice

require that a party litigant who had incurred expenses and undergone all the ordeal and trouble of a protracted trial in the trial court should not be deprived of the benefit of the adjudication and be obliged to fight the case, over again for some defect or mistake in the form of expression of the trial court. The tendency of the part of the appellate court to remand a suit on slender grounds cannot but be strongly deprecated."

7. Countering the submissions made by the learned counsel for the appellant, Mr.D.Senthil Kumar, learned counsel appearing for the respondent submitted that the Lower Appellate Court has rightly remanded the matter to the trial Court for the reason that the trial Court has not considered the documentary evidences produced by the plaintiff.

8. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side and also the judgments relied upon by the learned counsel for the appellant, it could be seen that admittedly, the plaintiff has marked 17 documents before the trial Court. However, the trial Court proceeded to dismiss the suit observing that the plaintiff has marked only 5 documents. That apart, in paragraphs 18 & 19 of its judgment, the trial Court observed that the plaintiff has not established his case by oral and documentary evidences. In spite of the fact that the plaintiff has marked 17 documents, the trial Court erroneously ignored 12 documents and dismissed the suit considering only 5 documents. It is total non-application of mind by the trial Court in not considering the documents marked on the side of the plaintiff. It is needless to say that the Courts should consider all the oral and documentary evidences let in by the parties and pass a reasoned judgment. Even without considering the documents marked on the side of the plaintiff, the trial Court has erroneously given a finding that the plaintiff has not proved his case by oral and documentary evidences. The Lower Appellate Court, considering all these aspects, rightly set aside the judgment and decree of the trial Court and remanded the matter to the trial Court.

9. Though there is no dispute with regard to the ratio laid down in the judgment relied upon by the learned counsel for the appellant, since the facts and circumstances of the present case are different, the said judgments are not applicable to the present case.

10. By not considering the documents marked on the side of the plaintiff, he was put to a disadvantageous position by the trial Court. Thus, the said mistake can be rectified by the trial Court if the matter is remanded to the trial Court for fresh consideration. Since the parties had already let in oral and documentary evidences, the trial Court can hear the arguments of the learned counsel on either side and decide the

matter on merits and in accordance with law, after considering the available oral and documentary evidences. It is made clear that the parties shall not let in any fresh oral and documentary evidences before the trial Court.

11.The learned counsel on either side submitted that they shall not let in any fresh oral and documentary evidences before the trial Court.

12.In these circumstances, I do not find any ground to interfere with the judgment and decree of the Lower Appellate Court. The appeal is liable to be dismissed. Accordingly, the Civil Miscellaneous Appeal is dismissed.

13.The learned counsel on either side submitted that their counter-part would appear before the trial Court viz., the Principal District Munsif Court, Tindivanam on 16.02.2018 and make their submissions.

14.In view of the submissions made by the learned counsel on either side, the learned counsel shall appear before the Principal District Munsif, Tindivanam on 16.02.2018 for making their submissions. The Principal District Munsif, Tindivanam is directed to dispose of the suit in O.S.No.401 of 2010, on merits and in accordance with law, with the available oral and documentary evidences let in by the parties, within four weeks from the date of completion of the arguments. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Subordinate Judge,
Tindivanam.

2.The District Munsif,
Tindivanam.

3.The Record Keeper, VR Section,
High Court, Madras(2 copies)

+2cc to Mr.D.Senthil Kumar, Advocate Sr.No.6825/17

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and M.P.No.1 of 2015

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