

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.07.2018

CORAM:

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

CMA.No.2400 of 2015
and MP.No.1 of 2015

1.Kathija Bi
2.Sheik Basha
3.Murthuja
4.Sharmila
5.Reshma

.. Appellants

Vs.

Shakila Banu

.. Respondent

Prayer : Civil Miscellaneous Appeal filed under Order 42 Rule 1 (u) CPC against the order of remand made in judgment and decree dated 23.03.2015 made in A.S.No.14 of 2014 on the file of Sub Court, Kallakurichi, reversal of the judgment and decree dated 20.11.2013 made in O.S.No.139 of 2007 on the file of the learned III Additional District Munsif Court, Kallakurichi.

For Appellants : Mr. N.Manokaran
For Respondent : Ms.R.Meenal

JUDGMENT

The appellants as plaintiffs in O.S.No.139 of 2007 on the file of the III Additional District Munsif, Kallakurichi, had obtained a decree before the Trial Court. This decree was set aside in an appeal filed by the defendant by the first Appellate Court in A.S.No.14 of 2014 on the file of Sub Court, Kallakurichi, which remanded the matter to the Trial Court with a direction to address as many as seven issues.

2.1 The brief facts may have to be stated: The suit property is stated to be in Survey No.76/1A of Kallakurichi Taluk, Thyagadhurugam Town. The first plaintiff, and the mother of the plaintiffs 2 to 5, had earlier instituted O.S.No.600/1985 before District Munsiff court, kallkurichi Court against a certain Gudu Sahib for declaration of title and recovery of possession of the suit property. On 21.08.1990, the District Munsif Court,

Kallakurichi returned the plaint for presentation before the appropriate Court. On 20.09.1990, this was represented before the Sub Court, Vriddhachalam which took the suit on file in O.S.No.203 of 1990. Subsequently, owing to bifurcation of Sub Court jurisdiction and establishment of independent Sub Court at Kallakurichi, the suit was transferred to the second mentioned Court where it was taken on file in O.S.No.33 of 1996.

2.2 In the meantime, when the aforesaid suit was pending before the District Munsif Court, Kallakurichi, and before it ordered return of the plaint on 21.08.1990, Gudu Sahib (the defendant in that suit) sold the property to one Meharuniza under a sale deed dated 22.01.1987, marked Ext.B-1. Subsequently, on 31.01.2005, under Ext.B-2, Meharunisa sold the property to certain Selvi, who in turn sold the property to the defendant herein (in the present suit) on 14.09.2005, under the sale deed marked as Ext.B-3. Between the sale in Ext.B-1 and the one under Ext.B-2, on 28.09.2001, the trial court decreed O.S.No.33 of 1996. Subsequently, the plaintiffs herein filed E.P.No.69 of 2002 for taking delivery of the suit property and on 20.10.2004, delivery was effected. The delivery list is marked in the present suit as Ex.A.2.

3.1 According to the plaintiffs, after taking delivery of the property under Ex.A.2, the defendant encroached into the property on the strength of the sale deed he had obtained from Selvi and began to assert title. This has necessitated the filing of the present suit for declaration of title and for recovery of possession.

3.2 The trial Court in its judgment has held that the first sale that Gudu Sahib had executed under Ext.B-1 itself was hit by lis pendens and consequently, all the subsequent sales including the one under which the present defendant claims title too are hit by lis pendens.

3.3 The defendant challenged this decree before the first Appellate Court in A.S.No.14 of 2014 before Sub Court, Kallakurichi. Vide impugned order, the Sub Court set aside the decree of the Trial Court, and framed as many as seven issues and remanded the matter back to the Trial Court. Aggrieved by this order, the plaintiffs have come forward with the present appeal.

4. The learned counsel for the appellants argued that even though the trial Court may not have framed specific issues, yet the evidence available to decide those issues are available before the Trial Court, and hence, the Trial Court has considered them in its judgment. So far as the approach of the first appellate court is concerned, all the issues that it has

now raised in its order of remand, except issue No:6, others are issues on questions of law merely, and since the evidence necessary to decide them already available before the first Appellate Court, the first Appellate Court itself can raise necessary points for consideration and address the same.

5. Heard the learned counsel for the respondent/defendant, whose arguments are along the lines of the reasoning of the first appellate court. In particular, Mrs.Meenal, learned counsel for the respondent, would argue that the suit is not hit by lis pendens since the plaint in the earlier suit itself was returned by the Court before it was presented before the appropriate Court. This implies that the suit was instituted before a Court which had no jurisdictions. Therefore, the suit itself is non-est and doctrine of lis pendens will not operate.

6. The critical question is whether the sale by Gudu sahib, the defendant in O.S.No.33 of 1996, in favour of Meharuniza under Ext.B1 is hit by the doctrine of lis pendens. The second issue the learned Judge has raised is whether issue-estoppel operates against the respondent/defendant in seeking a claim of title. Yet another issue raised was, if the defendant has perfected title by adverse possession. Here the defendant attempts to sustain her title both independently and also based on adverse possession. While the defendant is permitted to take alternate and inconsistent pleas, still she may have to elect one, and this should have been already been done during trial of the suit. This therefore, cannot be a point for fresh trial, and a remand for this purpose would amount to granting an undeserving opportunity to the defendant at this stage.

7.1 The first appellant herein, and the mother of the plaintiffs 2 to 5 have earlier laid a suit in O.S.No.600/1985 against one Gudu Sahib and this suit was instituted on 29.07.1985. During the pendency of the suit on 22.1.1987, Gudu Sahib had sold the property to a certain Meharuniza under Ext.B-1. After sale, on 21.8.1990, the suit was returned by the trial Court for its representation before an appropriate Court. On 20.09.1990 the suit was represented before an appropriate Court. The point here is whether the sale under Ext.B-1 which admittedly is a pendent lite sale, is saved from the doctrine of lis pendens due to the subsequent return of the suit on 21.08.1990. Another point is, will not its representation on 20.9.1990 restored status quo ante to invite an application of the doctrine of lis pendens on Ext.B-1 sale. This is a matter on which even the First Appellate Court can pronounce its judgment, for it is a pure question of law since the facts required to test the application of lis pendens are not disputed.

7.2 Secondly, the point on issue-estoppel. Inasmuch as it is a rule of evidence, it has to be again decided based on pleadings and proved by the judgment in O.S.No.33 of 1996. Plea of adverse possession is also one that falls in this category and here the First Appellate Court may have to first investigate whether the defendant has already elected one of the two inconsistent pleas that she has put forward in her written statement. For deciding this issue, a remand to the trial Court is unnecessary.

7.3 So the only point that now requires to be considered is whether there is any mis-description of the suit property giving rise to an issue on the identity of the property involved in the suit and the one that was conveyed by Gudu Sahib under Ext.B-1. A reading of the decree in O.S.No.33 of 1996 alongside the sale deeds would indicate that they do not give rise to any disputed question of the identity of the suit property. Therefore, that issue does not arise for consideration.

8. In Elumalai Vs. Kanthamani Ammal, [2017 (1) CTC 307] it is held :

"14. It is therefore necessary that an appellate court should resort to remanding of cases to the court below only sparingly and in exceptional cases. In this context principles

governing the question of remand may be broadly stated:

- 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 XIV Rule 2 CPC. 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.
- 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 XLI Rule 24 CPC 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 XLI 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 Vs Raju Sihamani [(2012) 5 SCC 540: 2012 (4) MLJ 314].

- 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.
- 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 VI Rule 17 other than those that may render a suit bad for formal defect within the meaning of Order XXIII Rule 1 CPC or production of a new evidence subject to the limitations in Order XLI Rule 27 CPC, 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.

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

On the touch stone of the above, the order of remand of the first appellate court cannot be sustained.

9. In the result, this Court finds merit in the case of the appellants and accordingly set aside the order of the First Appellate in A.S.No.14 of 2014 on the file of Sub Court, Kallakurichi dated 23.03.2015, remanding the matter to the trial Court. The First Appellate Court/Sub Court, Kallakurichi is now directed to dispose of all the relevant points involved in this case, and is further directed to dispose of this matter within eight weeks from the date fixed for the appearance of the parties herein before the said court. The parties are directed to appear before the Sub Court, Kallakurichi on 25.07.2018. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Sub Judge, Kallakurichi.
2. The III Additional District Munsif Court, Kallakurichi.
- 3.The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.42910
+1cc to Mr.R.Meenal, Advocate, S.R.No.42986

CMA.No.2400 of 2015
and MP.No.1 of 2015

(CO)
GSP(10/07/2018)