

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.NO.974 OF 2007
AND M.P.NO.1 OF 2007

Irusa Gounder

... Appellant/Plaintiff

Vs.

1.Palanisamy
2.Kumar
3.Elumalai
4.Madhu
5.Thangavel
6.K.Govindan
7.P.Govindan
8.Rajendran
9.Vadivel

... Respondents/Defendants

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of the Civil Procedure Code against the judgment and decree dated 23.06.2006 made in A.S.No.41 of 2006 on the file of the Court of Principal Subordinate Judge, Salem, reversing the judgment and decree dated 14.10.2005 made in O.S.No.689 of 2002 on the file of the Court of Principal District Munsif, Salem and remanding the case to the Trial Court for fresh disposal.

For Appellant : Mr.R.Singaravelan
Senior Advocate
for Mr.N.S.Sivakumar

J U D G M E N T

This Civil Miscellaneous Appeal is directed against the order of remand passed by the Lower Appellate Court.

2. The plaintiff is the appellant herein. The plaintiff filed a suit for permanent injunction restraining the respondents from interfering with his possession and enjoyment of the suit property. Originally, the land in S.No.143 belonged to one Pavayammal. She executed a will dated 22.05.1964 bequeathing the property in favour of her brother's son. From him, the plaintiff purchased the property by virtue of a registered sale deed dated 04.12.1967 measuring an extent of 1.4 acres. The property was sub divided and given re-survey

number as 142/2. Patta was also issued and chitta and adangal stand in the name of the plaintiff. The respondents / defendants are closely related to each other and they had interfered with the possession and enjoyment of the property by damaging the stone fence put up by the plaintiff. The motive for such action was that the plaintiff refused to sell the property to them. On 28.09.2002, the plaintiff lodged a police complaint and subsequently, filed a suit for permanent injunction.

3. The defendants denied the plaint averments and claimed that they have access to their residential houses through the common pathway running from Nalikkal Patty to Parapatti Road. The pathway runs along the burial ground and northern ridge of the plaintiff's land in S.No.143/2 till their house. They have the customary right to use the pathway over 100 years and therefore, the suit shall be dismissed.

4. At the instance of the defendants, a Commissioner was appointed and he filed his report along with the sketch. On the basis of the evidence adduced by the parties as well as on the basis of the report and sketch filed by the Commissioner, the Trial Court decreed the suit in favour of the appellant / plaintiff. Against which, the respondents / defendants have preferred an appeal.

5. The Lower Appellate Court having gone through the materials on record, had found that the Commissioner has not specifically mentioned any alternate pathway to the respondents / defendants' properties for the purpose of ascertaining as to whether any alternate pathway on the western side of the houses of the respondents is available or not and remanded the matter to the Trial Court with a direction to give adequate opportunity to adduce further evidence in support of their respective cases. Accordingly, the appeal preferred by the respondents was allowed and remanded back to the Trial Court for fresh disposal.

6. Aggrieved over the order of remand passed by the Lower Appellate Court, the appellant / plaintiff is before this Court.

7. The learned Senior Counsel appearing for the appellant would draw attention of this Court through the evidence adduced by the parties as well as the Commissioner's report. A perusal of the report filed by the Commissioner would show that there is a pathway having width of 3 feet running on the western side of the property of the respondents / defendants. The sketch also shows the alternative pathway to the properties of the defendants. If at all there is any doubt over the existence of the alternative pathway or if the Lower Appellate Court requires further clarification, it could have provided opportunity to the parties to adduce additional evidence on this particular aspect and decided the matter on

merits. But on the other hand, the Lower Appellate Court has remanded the matter for fresh disposal.

8. In the judgment of the Hon'ble Supreme Court in MUNICIPAL CORPORATION, HYDERABAD VS. SUNDER SINGH [2008 (8) SCC 485] it has been held as follows: -

" 32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order XLI Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order XLI Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33.

34. An order of remand cannot be passed on ipse dixit of the court. The provisions of Order II Rule 2 of the Code of Civil Procedure as also Section 11 thereof could be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas & anr. (Civil Appeal No. 3495 of 2008) disposed of on 12.5.2008."

9. Further, in the judgment of this Court in K.SAMPOORNAM VS. M.KARTHIESWARAN AND OTHERS [2011 (3) MWN (CIVIL) 553] it is observed as under:

" 6. Keeping in view the above submissions and after going through the materials available on record, I find that the lower appellate court has remanded the matter for the purpose of marking the Will filed in the interim application along with the appeal, by examining the witnesses and after affording an opportunity to the parties to let in additional evidence. In my considered opinion, for the purpose of marking a document through a witness, remand is not necessary. It is a well settled principle that an appeal is a continuation of the original proceedings. Under such circumstances, the lower appellate court itself can record the evidence by permitting respondents 1 to 3 herein to mark the document and also by affording an opportunity to the appellant

herein to cross examine the witnesses. In this regard, a reference could be placed on the judgments relied on by the appellant reported in H.P.VEDAVYASACHAR .vs. SHIVASHANKARA AND ANOTHER (CDJ 2009 SC 1594), which reads as follows:

"Such an order of remand could be only in terms of Order XLI Rule 23, Order XLI Rule 23A or Order XLI Rule 25 of the Code. None of the said provisions have any application in the instant case".

7. In yet another case reported in AROCKIAPRAKASH .vs. RANGASAMY (CDJ 2007 MHC 1639), it has been observed as follows:

"The catena of judgments reiterate the following principles of law that the order of remand cannot be passed by the Appellate Court as a matter of course. Remand is permissible only when the Appellate Court in the interest of justice feels that the remand is just and appropriate and that the Appellate Court should arrive at a specific finding on the materials available on record that the judgment of the Trial Court is erroneous and liable to be set aside, which is a conditional precedent. The Appellate Court should not remand the case on the ground that the evidence is not properly assessed. Order of remand should not be made when the defect in the proceeding has been due to negligence or default of the party, who will benefit by the remand. The order of remand should not be made to fill up a lacuna by allowing the party to adduce evidence. If it is possible for the Appellate Court to evaluate the oral and documentary evidence, then it is not open to the Appellate Court to come to the aid of the parties to fill up the lacuna in the

evidence. If material particulars are available, the Appellate Court itself should decide the matter one way or the other. Remanding the matter for fresh adjudication gives the litigation a fresh lease of life in the protraction of proceedings".

8. From the judgments relied on by the learned counsel for the appellant, it is clear that the order of remand could be made only in terms of Order 41 Rule 23 C.P.C. But, I find that none of the terms of Order 41 Rule 23 C.P.C. is available in the present case. Under such circumstances, the judgments relied on by the learned counsel for the appellant are not applicable to the facts of this case."

10. For the purpose of clarifying the sketch, it is not necessary to remand the matter for fresh disposal. But on the other hand, additional evidence can be taken by the Lower Appellate Court by itself. The order of remand will lead to filling up of lacuna by the parties and therefore, such a course will lead to miscarriage of justice. Therefore, the order of remand for the purpose of finding out whether there existed a pathway in the disputed survey numbers and to find out alternative pathway, the matter need not be remanded. The remand order passed by the Lower Appellate Court is not correct and not sustainable in the eye of law.

11. In such circumstances, the order passed by the Lower Appellate Court in A.S.No.41 of 2006 dated 23.06.2006 is set aside and the Lower Appellate Court is directed to dispose of the appeal on merits, if required, after taking additional evidence on this aspect, within a period of two months from the date of receipt of a copy of this order.

12. In fine, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

TK

To

1.The Principal Subordinate Judge
Salem.

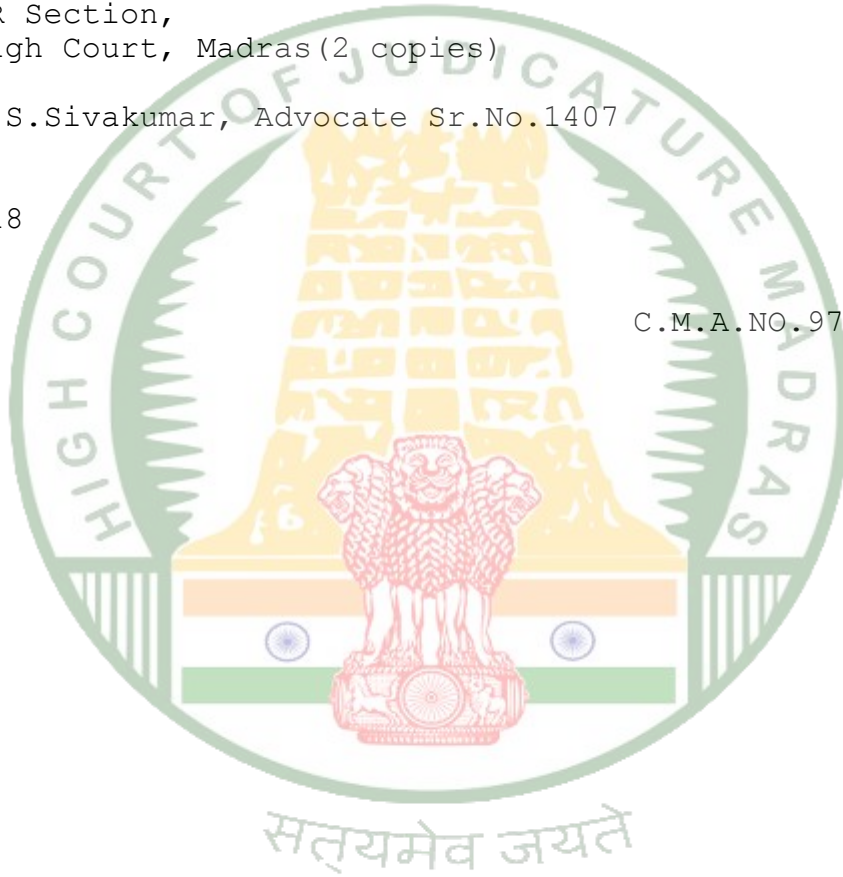
2.The Principal District Munsif
Salem.

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VR Section,
High Court, Madras(2 copies)

+1cc Mr.N.S.Sivakumar, Advocate Sr.No.1407

MG(CO)
sm:3.5.2018

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