

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 19.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A. No.1249 of 2011
and M.P. No.1 of 2011

C.Pandian

... Appellant/Plaintiff

-vs-

Nagarajan

... Respondent/Defentent

Prayer: Appeal filed under Order 43 Rule 1(a) and Section 104 of Civil Procedure Code against the judgment and decree dated 10.08.2010 made in A.S. No.51 of 1995 on the file of the Subordinate Judge's Court at Ariyalur reversing the judgment and decree dated 21.12.1994 made in O.S. No.160 of 1993 on the file of District Munsif Court, Ariyalur.

For Appellant : Mr.K.Venkatasubban
for M/s.Sarvabhsuman Associates

For Respondent : No appearance

JUDGMENT

The Civil Miscellaneous Appeal has been filed against the judgment and decree dated 10.08.2010 made in A.S. No.51 of 1995 on the file of the Subordinate Court, Ariyalur reversing the judgment and decree dated 21.12.1994 made in O.S. No.160 of 1993 on the file of District Munsif Court, Ariyalur.

2.The plaintiff appellant having filed the suit for permanent injunction and getting succeeded before the Trial Court, has come to this Court.

3.Learned counsel appearing for the appellant, placing on record a judgment dated 21.02.2003 passed in L.P.A. No.189 of 2000 in the case of Arulmighu Arasadi Karpaga Vinayagar Temple vs. the Commissioner, H.R.&C.E., would submit that if the Trial Court has disposed of the case otherwise than a preliminary report and the decree has been reversed in Appeal, a re-trial is inevitable, but in the present case re-trial has been ordered stating that the same has not been successfully complied with. Arguing further, learned counsel appearing for the appellant would submit that the appellant filed a suit for permanent

injunction on the file of the learned Principal District Munsif, Ariyalur on the basis of Exs.A1 to A5. Whereas the defendant respondent has filed 14 documents as Exs.B1 to B14. The learned Trial Court, after going through all the documents placed by both parties to the suit, went into the oral evidence placed by the witnesses and decreed the suit holding that the plaintiff appellant has purchased the suit property only on the basis of the Sale Deed dated 16.07.1987 from his vendors Periyammal and her husband Selliah. Aggrieved by the judgment and decree passed by the Trial Court on 21.12.1994, granting permanent injunction, the defendant respondent filed an Appeal in A.S. No.51 of 1995 before the learned Sub Court, Ariyalur. During the pendency of the Appeal, ten more documents were filed. The learned First Appellate Court, mechanically remanded the matter to re-try the suit once again by the Trial Court ignoring the fact that the suit has been pending from 1993.

4.Learned counsel appearing for the appellant would contend that a mere suit for permanent injunction ought not to have been remanded for re-trial and the said exercise could have been easily carried out by the learned Appellate Court on the basis of the reasoning given by the Trial Court along with the additional evidence produced by the defendant respondent before the learned Appellate Court if necessary. In view of the impugned decree passed by the learned Appellate Court remanding the matter back to the learned Trial Court, both parties, namely, plaintiff and the defendant are unable to see the light of the day even after 26 years from the date of filing the suit. Taking support from the judgment of this Court reported in AIR 2000 Madras 259 in the case of S.Umapathy vs. Arunachalam and another (Civil Miscellaneous Appeal No.1691 of 1999 dated 14.01.2000), learned counsel appearing for the appellant argued that the first infirmity committed by the Appellate Court is that there is no specific finding and reason for reception of additional documents at the appellate stage and the Appellate Court failed to consider the claim of the appellants in terms of Order 41, Rule 27 (1)(aa) and (2) of Civil Procedure Code. He would further submit that the learned Appellate Court, taking note of the fact that the issue is pending for past seven years, could have decided and rendered the judgment as it involved only a simply issue for grant of decree of permanent injunction. After satisfying the above mentioned provision viz., Order 41 Rule 27(1)(aa) and (2) of C.P.C., it is open to the learned Appellate Court to consider the additional documents or additional evidence and record evidence and mark documents. As the learned Appellate Court has wrongly abdicated its duty to the learned Trial Court which is impermissible in law, the parties to the suit would be put to grave prejudice in view of the delay in dispensing with justice by the Courts below.

5.The impugned judgment and decree passed by the learned Appellate Court clearly shows that the learned Appellate Court has not even applied its mind to record the reasons of remanding the matter back to the learned Trial Court. However, the defendant respondent herein, who has lost the case before the learned Trial Court, although filed 14 documents, the learned Appellate Court has not even mentioned single reason for remanding the matter back to the learned Trial Court. That also clearly shows that the learned Appellate Court has failed to discharge its duty to hear the Appeal. However, the ingredients mentioned in Order 41 Rule 23 and 23-A of C.P.C. has been completely ignored. It is necessary to refer the same as under:

'23.Remand of case by Appellate Court - Where the court from whose decree an Appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in Appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the Appeal is preferred, with directions to readmit the suit under its original number in the register of Civil Suits and proceed to determine the suit; and the evidence (if any) recorded during the original Trial shall, subject to all just exceptions, be evidence during the trial after remand.

23-A.Remand in other cases - 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.'

6.In the light of the above, if the Trial Court decided the case otherwise than a preliminary report, the finding should have been given for reversing the same and also for remanding the case for re-trial. It is necessary in this context to refer para 9 of the judgment dated 11.02.2009 passed by this Court in the case of Ramasamy vs. Ramachandran (C.M.A. Nos.647 and 648 of 2002) reported in 2009 (3) CTC 241 as under:

'9.If the Appellate Court is of the view that the Trial Court decided the case otherwise than a preliminary report and the decree is reversed in Appeal a re-trial is inevitable. As per law settled by the Hon'ble Supreme Court, the powers of the Courts are restricted to direct remand of the matters to the Trial Court. Before passing the order of remand, the Appellate Court has to ensure that the circumstances set out in Rules 23 and 23-A of Order 41 of the Civil Procedure Code are

satisfied. If the purpose of remand outside the scope of these provisions, is discerned, then the Appellate Court shall avoid remand. The Sections have been incorporated in the Civil Procedure Code, to restrict the power of the Appellate Courts to remand several matters in which the Appellate Court finds doubts with regard to certain points which in fact could be decided by the Appellate Court itself on the available materials. To put it differently, the object of introduction of these provisions is to circumvent the powers of the Appellate Courts to take liberal view in remanding the matters to the Trial Court, where retrial is not warranted, which would lead to elongation of the Trial proceedings indefinitely.'

7.A clear perusal of the above observation vividly shows that the learned Appellate Court has not even assigned single reason for remanding the matter back to the Trial Court when retrial is not warranted. Secondly, from the date of filing the suit in 1993 for bare injunction, 26 years have gone by, ignoring this delay, the learned Sub Judge should have avoided the remand by addressing the issue, whenever any old matter is adjudicated by the Appellate Court, to gain the confidence of the litigants on the justice delivery system, the lower Appellate Court should ensure that there is no further delay, hence, the impugned judgment and decree passed by the Appellate Court are set aside and the learned Sub Judge is directed to take up the matter and decide the issue raised by the learned Trial Judge, on merits, if necessary, by framing additional issues. Such exercise shall be done within a period of six months from the date of receipt of a copy of this order. Accordingly, the Civil Miscellaneous Appeal is allowed. Consequently, M.P. No.1 of 2011 is closed. No costs.

Sd/-
Assistant Registrar(CS)

//True copy//

Sub Assistant Registrar

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To

1.The Subordinate Court, Ariyalur.

2.The District Munsif Court, Ariyalur.

+1cc to M/s.Sarvabhsuman, Advocate SR.No.49961

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and M.P. No.1 of 2011

RSI (CO)
GMV 15/06/2020