

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.09.2019

CORAM:

THE HON'BLE MR. JUSTICE T.RAJA

C.M.A.No.2337 of 2013

1.Sasivarnam

2.R.P.S.Santhosh

... Appellants/Respondents

Vs

1.Valliammal

2.Rathinasamy

3.Sumathi

4.Rasathi

5.Raju

6.Sulochana

7.Palanisamy

... Respondents/Defendants

Prayer : Civil Miscellaneous Appeal is filed under Order 43 Rule 1(U) of the Civil Procedure Code against the decree and judgment dated 22.02.2013 passed in A.S.No.3 of 2012 on the file of Sub Court, Udumalpet, remanding the judgment and decree dated 20.12.2011 passed in O.S.No.559 of 2005, on the file of the District Munsiff Court, Udumalpet.

For Appellants : Mr.R.Subramanian

For Respondents : Mr.A.C.Susheelkumar

JUDGMENT

The appellants herein are the plaintiffs and the respondents herein are the defendants before the learned trial Court. The present appeal is filed against the judgment and decree dated 22.02.2013 passed in A.S.No.3 of 2012 on the file of the learned Sub-Court, Udumalpet, reversing and remanding the judgment decree dated 20.12.2011 passed in O.S.No.559 of 2005, on the file of the learned District Munsif Court, Udumalpet.

2. Learned counsel appearing for the appellants/plaintiffs submitted that the learned first appellate Court has misconstrued the provisions of Order 41 Rule 23 of the Civil Procedure Code, for the reason that there cannot be an order of remand to enable the parties to fill up the lacuna.

Moreover, the learned first appellate Court has not even framed the proper points for determination under Order 41 Rule 31 CPC, inasmuch as when the respondents/defendants have not even disputed the title of the plaintiffs as established under Exs.A1 to A10, the order of remand made by the learned first appellate Court is going to give a chance to the defendants/respondents to fill up the lacuna before the trial Court which is impermissible in law.

3. Adding further, learned counsel for the appellants submitted that when the defendants have clearly admitted in their evidence that the suit property belongs to the plaintiffs/appellants as per their title deeds and that the defendants have no right in the suit property, the learned first appellate Court ought not to have committed an error in remanding the matter back to the learned trial Court. It is further submitted that even the report of the Advocate Commissioner marked as Exs.C1 and C2, showing that the suit property lies within the plaintiffs' patta lands has been overlooked. When there was no any reference made in the report of the Advocate Commissioner with regard to any cart track or in the revenue records, the order of remand is erroneous and therefore, the same is liable to be set aside.

4. Referring to the judgment of the Hon'ble Apex Court in the case of Uttardi Mutt Vs. Raghavendra Swamy Mutt [(2018) 10 SCC 484], learned counsel for the appellants argued that the learned first appellate Court dealing with the appeal cannot remand the matter back to the learned trial Court as this would further cause more delay affecting the faith and confidence of the litigants on the Court, therefore, the Hon'ble Apex Court has held that it would be appropriate for the appellate Court to frame the points on which the additional evidence could be adduced by the defendants/respondents and call upon the lower Court record, the additional evidence and also consider the question of genuineness and authenticity of the additional evidence including as to whether the contents thereof have been proved by the party relying thereon, and thereafter, to return the evidence to the appellate Court hearing the appeal together with its findings thereon and reasons therefor. This guidelines given by the Hon'ble Apex Court have been completely overlooked by the learned first appellate Court while remanding the matter back to the learned trial Court.

5. Adding further, learned counsel for the appellants further argued that when the suit was filed in the year 2005, it was dismissed after a period of six years on 20.12.2011, and thereafter, when appeal was filed in A.S.No.3 of 2012, the learned first appellate Court, by taking note of the time consumed by the learned trial Court for disposal of the suit, ought not to have remanded the matter back to the learned trial

Court. As per Order 41 Rule 23, the Appellate Court, may, by order of remand, direct what issue or issues shall be tried in the case so remanded and whether any further evidence shall or shall not be taken after remand, and shall send a copy of its judgment or order to the Court from whose the 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.

6. Again, referring to Rule 23-A of Order 41 CPC, learned counsel for the appellants further argued that 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 the appeal and a re-trial is considered necessary, the appellate Court shall have the same powers as it has under Rule 23. While exercising such discretion, the learned first appellate Court is duty bound to keep in mind Rules 25 and 26 of Order 41 CPC, which clearly say that when the appellate Court has got the power of remand, such appellate Court may frame issues and refer the same for trial to the Court from whose decree the appeal is referred and after doing so, the learned trial Court shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor within such time limit. Therefore, in the case on hand, when the parties to the suit are litigating from the year 2005, learned first appellate Court, in the year 2013 i.e., after a period of eight years from the date of initiation of the suit, ought not to have remanded the matter back for reconsideration contrary to Order 41 Rule 23, inasmuch as the delay would defeat the justice and also faith of the litigants on the judiciary. Therefore, the order of remand is liable to be set aside with a direction to the learned first appellate Court to decide the issue with available records.

7. Per contra, learned counsel for the defendants/respondents herein submitted that earlier, when one Mr.Muthusamy Gounder, who is the adjacent owner of the suit property, has filed a suit against the very same defendants with regard to the suit cart track, the said suit was dismissed for default. Similarly, the suit filed by the defendants against Mr.Muthusamy Gounder in respect of the suit cart track was decreed in favour of the defendants. That proves the case of the defendants that the right of the defendants was already approved by the Court against the said Muthusamy Gounder. Secondly, when the plaintiffs/appellants herein have themselves admitted that the disputed portion was used as cart track, the Revenue Authorities passed an order with regard to disputed portion and the same was also served on the plaintiffs. Even thereafter, the plaintiffs/appellants have not even challenged the said order. Therefore, when the revenue records show the

existence of cart track of disputed portion, the suit itself is not maintainable, hence, it is pleaded, the learned first appellate Court should have confirmed the judgment and decree passed by the learned trial Court.

8. Heard the learned counsel appearing on either side and perused the materials available before this Court.

9. It is seen from Ex.B1-Suit Register Extract that one Mr.Muthusamy Gounder had already filed a suit in O.S.No.458 of 2005 seeking for decree of declaration and injunction with regard to the same disputed portion, however, the said suit was dismissed for default on 15.02.2008. Similarly, the defendants had also filed a suit against the said Muthusamy Gounder in O.S.No.485 of 2005 seeking for declaration and consequential injunction in respect of the same disputed portion and on perusal of the same, it is seen that in the said suit, Muthusamy Gounder was set exparte and thereby, an exparte judgment and decree dated 09.01.2009 was also passed in favour of the defendants. By taking note of those two documents, the learned trial Court also, accepting the admission made by the plaintiffs/appellants that the disputed portion was used by them as way to reach other properties, held that the disputed portion lies within the extent of the plaintiffs. Therefore, while deciding the consequential question whether the defendants have any right over the said cart track, the learned trial Court has come to the conclusion that the defendants have not claimed any absolute right over the said disputed portion. That shows that the cart track appears to be a common road.

10. Besides, what is more impressing upon this Court is that when there is a revenue record issued by the Tahsildar, Udumalpet, marked as Ex.B3, going to the route of the disputed portion, such proceeding issued by the Tahsildar, Udumalpet, has not been challenged. Secondly, the said proceedings also show the existence of cart track in the disputed portion. When there is a cart track, it is a common cart track, therefore, it does not warrant the learned first appellate Court to remand the matter, since there are ample materials, like Exs.B1 and B2 (earlier suit filed by the defendants and one Mr.Muthusamy Gounder) and Ex.B3-proceedings of the Tahsildar, Udumalpet, showing the existence of cart track. With all these vital documents, the learned first appellate Court ought to have decided the appeal on merits. Therefore, in such view of the matter, I do not find any merit in the order of remand passed by the learned first appellate Court.

11. Accordingly, for the reasons stated above, the judgment and decree dated 22.02.2013 passed in A.S.No.3 of 2012 by the learned Sub-Court, Udumalaipettai, is set aside.

Consequently, the learned Sub-Court, Udumalaipettai, is directed to decide the issue afresh in accordance with law, with the available documents, without being influenced by any one of the observations of this Court. The said exercise shall be done within a period of three months from the date of receipt of a copy of this judgment, as the suit was filed in the year 2005. With this direction, the Civil Miscellaneous Appeal stands disposed of. No Costs. M.P.No.1 of 2013 is closed.

Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

rkm

To

- 1.The Sub Judge, Udumalpet.
- 2.The District Munsiff Court, Udumalpet.

Copy To
The Section Officer,
VR Section,
High Court, Madras

+1cc to Mr.R.Subramanian, Advocate SR.No.79957

C.M.A.No.2337 of 2013

SVU (CO)
GMY (10/02/2020)

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