

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.01.2019
Delivered on : 30.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.2149 of 2018
and
CMP.No.16779 of 2018

Madeva Naicker .. Appellant/Respondent/Defendant

Vs.

1.T.C.Swamyappa

2.S.Santhamani ...Respondents/Appellants/Plaintiff

Civil Miscellaneous Appeal filed under Order 43, Rule 1(4) of CPC against the judgment and decree dated 30.1.2018 passed in A.S.No.11 of 2017 on the file of the Sub-Court, Sathyamangalam remanding the judgment and decree made in O.S.No.200 of 2014 on the file of the District Munsif Court, Sathyamangalam, dated 19.01.2017 and to set aside the same.

For Appellant : Mr.B.Kumarasamy

For Respondents: **Mr.S.Ganesh Kumar**

JUDGMENT

This Civil Miscellaneous Appeal is filed by the appellant against the judgment and decree dated 30.1.2018 passed in A.S.No.11 of 2017 on the file of the learned Sub-Court, Sathyamangalam, remanding the suit in O.S.No.200 of 2014 to the trial Court viz., learned District Munsif, Sathyamangalam, dated 19.01.2017 for fresh disposal.

2. The appellant is the defendant and the respondents are plaintiffs in the suit. The plaintiffs have filed the suit to declare their title for the suit property and for permanent injunction restraining the defendant, his men and agents not to disturb the plaintiffs' peaceful possession and enjoyment of the suit property and for costs.

3. For the sake of convenience, the parties are referred to as per their array in the suit.

4. By the judgment and decree dated 19.01.2017, the suit was dismissed by the trial Court. Aggrieved by the same, the plaintiffs have filed A.S.No.11 of 2017 before the learned Sub-Court, Sathyamangalam. Along with the appeal, the plaintiffs have also filed I.A.No.144 of 2017 seeking to receive additional documents. By the judgment and decree dated 30.01.2018, the lower appellate Court, allowed the appeal setting aside the judgment and decree passed in the suit and remanded the suit to the file of the trial Court for fresh disposal. In the same judgment, the lower appellate Court, allowed I.A.No.144 of 2017 and received the additional documents and also directed to send the same to the trial Court. Challenging the same, the defendant has preferred the present Civil Miscellaneous Appeal.

5. The case of the plaintiffs before the Courts below is that the suit property originally belonged to one Syed Kadar and the legal heirs of Syed Kadar had executed a general power of attorney in favour of one S.Azgar. The plaintiffs have purchased the suit property from S.Azgar and from the date of purchase, they were in peaceful possession and enjoyment of the same by cultivating Horse gram, Maize at the time of rainy season. Before getting the sale deed executed, they had surveyed the suit property and confirmed the extent and verified encumbrance of the suit property and after satisfaction, they got the execution of sale deed for the suit property.

6. Further case of the plaintiffs is that the defendant, who is having land adjacent to east of the suit property disputed the title of the suit property as well as boundary of eastern portion which was mentioned as AB. On 13.4.2014, the defendant interfered with the peaceful possession and enjoyment of the suit property by the plaintiffs. The plaintiffs have made a police complaint on 24.5.2014 before Thalavadi Police Station and the police enquired the complaint and warned the defendant not to disturb the plaintiffs' peaceful possession and enjoyment of the suit property. On 20.11.2014, when the first plaintiff went to the suit property with tractor and ploughed the land for cultivation of the season crops, the defendant unlawfully entered into the suit property and disputed the title of AB portion mentioned in the plaint plan and the defendant's attempt was thwarted by the plaintiffs with the help of tractor driver as well as the neighbours. Further, the defendant proclaimed that he will come again with more men and material in order to disturb the peaceful possession and enjoyment of the suit property by the plaintiffs. Hence, the plaintiffs have filed the suit for declaration and permanent injunction.

7. The defendant resisted the suit by filing written statement contending that he is in possession and enjoyment of the suit property and the plaintiffs were never in possession and enjoyment of the same. Earlier, the defendant's father was in possession of the suit property and thereafter, the defendant was in possession with the knowledge of the plaintiffs and therefore, the defendant acquired title by adverse possession. Adjacent to the suit property, the defendant owned property in S.No.101/1 and 101/2 and on 29.4.2010 and when the defendant was ploughing, the son of power agent of the plaintiffs viz., Azgar and others came to the property and was trying to interfere with the ploughing and the same was prevented by the defendant. In this regard, the defendant lodged a police complaint and had also filed suit in O.S.No.145 of 2010 for declaration and permanent injunction wherein Azgar was arrayed as sixth defendant. By the judgment dated 27.11.2013, the suit came to be decreed. It is stated that no document has been filed in O.S.No.145 of 2010 to show that the property was sold to the plaintiffs. After filing of the suit in O.S.No.145 of 2010, a sale deed dated 19.1.2011 was created and filed the suit.

8. According to the defendant, it is false to state that the defendant interfered with the peaceful possession and enjoyment of the suit property by the plaintiffs. Knowing that in respect of suit property already suit is pending, the plaintiffs have purchased the property on 19.1.2011 and the same cannot be entertained. There was no cause of action for the suit and thus, prayed for dismissal of the suit.

9. Before the trial Court, the first plaintiff examined himself as P.W.1 and Exs.A1 to A11 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Exs.B1 and B2 were marked. Court exhibits C1 to C3 were marked.

10. The trial Court dismissed the suit, against which, the plaintiffs have preferred an appeal being A.S.No.11 of 2017. By the judgment dated 30.01.2018, the lower appellate Court remanded the matter to the trial Court by directing the parties to adduce oral and documentary evidence. Further, the lower appellate Court was directed to find out whether the defendant acquired title by adverse possession and whether the suit is hit by the principles of res judicata and also find out whether the suit property in the present suit includes the suit property in O.S.No.145 of 2010.

11. Assailing the remand of the suit by the lower appellate Court, the learned counsel for the appellant contended that the lower appellate Court failed to note that the plaintiffs have introduced a new case in the first appeal and after a lapse of

four years of filing of the suit, they have filed petition to receive additional evidence introducing a new case at the appellate stage. He would submit that the lower appellate Court failed to note that already the defendant got decree in his favour in respect of the suit property in O.S.No.145 of 2010 on the file of the learned District Munsif Court, Sathyamangalam.

12. The learned counsel further submitted that the lower appellate Court under Order 41, Rule 23 of CPC cannot remand the matter to enable parties to make good their lapse, which causes unnecessary delay and prejudice to the defendant. According to the learned counsel order of remand should not be passed as a matter of course. Further, the defendant is an aged person and the first appeal was pending for 5 years and after 5 years, the matter was remanded to the trial Court without any valid reason whatsoever. In fact, the judgment in the appeal will act as res judicata to the appeal filed by the plaintiffs and thus, prayed for setting aside the judgment of the lower appellate Court. In support, the learned counsel relied upon the decisions in Sundarajan @ Pichaikaran v. Aanji, reported in 2010 (6) CTC 612 and M.Mani and another v. Cuddalore Municipality, rep. by its Commissioner, reported in 2011 (1) CTC 239.

13. Per contra, the learned counsel for the plaintiffs submitted that during the course of trial, the defendant had marked only the judgment and decree passed in O.S.No.145 of 2010 as exhibits in the present suit, but failed to produce the plaint, written statement, exhibits A1 and X1 and depositions of P.W.1 to 3 and D.W.1 to 3, which are all entirely against the defendant's case in respect of the present Civil Miscellaneous Appeal. Therefore, pendency of the appeal in A.S.No.11 of 2017, the plaintiffs have filed the petition to receive additional documents, which the lower appellate Court has rightly allowed. According to the learned counsel, the subject matter of property in both the suits are entirely different. The subject matter of O.S.No.145 of 2010 is S.F.No.101/1 and 101/2, whereas the subject matter of the present appeal is S.F.No.99/2.

14. Stating that the appellant did not produce any document to show that the suit property in S.No.99/2 is within S.No.101/1, 2, the learned counsel for the plaintiffs submitted that the defendant had conveniently mislead the trial Court by marking the copy of judgment as Ex.B1 and B2 by using principles of res judicata. However, the learned counsel prayed for setting aside the judgment and decree of the Courts below and also praying to decree the suit in O.S.No.200 of 2014 in entirety.

15. This Court need not go to into the claims made by the

defendant and the plaintiffs and the merits of the case. Suffice it to decide whether the lower appellate Court is justified in remanding the matter to the trial Court for further trial.

16. For better appreciation, it is relevant to extract the provision of Order 41, Rule 23 of CPC:

"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.

23A. 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."

Thus, it is clear that if the appellate Court is of the view that the trial Court decided the case otherwise and the decree is reversed in appeal, a re-trial is inevitable.

17. It is settled that 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 23A of Order 41 of CPC 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 Code of Civil Procedure 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. The object and 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 re-trial is not warranted, which would lead to elongation of the trial proceedings indefinitely.

18. In a catena of decisions, the Hon'ble Supreme Court held that if the scope of remand is out of the parameters adumbrated under Rules 23 and 23A of Order 41 of CPC, then the remand has to be discountenanced.

19. In *P.Purushottam Reddy v. M/s.Pratip Steels Limited*, reported in 2002 SC 771, the Hon'ble Supreme Court held:

"In cases where additional evidence is required to be taken in the event at any one of the clauses 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 sent it to the appellate court. In 1976, Rule 23-A has been inserted in O.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 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rules 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 v. Sushila*, A.I.R. 1965 S.C. 365 at 399, it is well settled that inherent powers can be availed *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 *dehors* the Rule 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 O.20, Rule 3 or O.11, Rule 31 of the C.P.C and hence it is no judgment in the eye of law it may set aside the same and send the matter back to 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 C.P.C. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

20. Following the decision of the Hon'ble Supreme Court in the above cited case, it has to be held that the order of remand

could be justified if the purpose for which it would come within the purview of Rules 23, 23A or 25 of Order 41 of CPC.

21. Coming to the instant case, the lower appellate Court has given adequate findings in its judgment as to the rights of the parties to be adjudicated. The lower appellate Court has also remanded the matter particularly on the points whether the defendant acquired title by adverse possession and whether the instant suit is hit by the principles of res judicata and also whether the suit property in the present suit includes the suit property in O.S.No.145 of 2010 filed by the defendant.

22. It is apposite to mention that before the lower appellate Court, the respondents herein have filed I.A.No.144 of 2017 to receive additional documents. By the impugned judgment itself, the lower appellate Court held that additional evidence is required to be taken and for the said purpose, the documents listed out in I.A.No.144 of 2017 are ordered to be send to the trial Court and the trial Court was directed to afford an opportunity to both sides to let in oral and documentary evidence. Only in the interest of justice and also to resolve the controversy between the parties, the lower appellate Court remanded the suit to the trial Court. This Court finds no error in the findings of the lower appellate Court.

23. As per Order 41, Rule 23 and 23A of CPC, a clear finding has to be furnished by the appellate Court for remanding the matter. As per Order 41, Rule 23 of CPC, if the appellate Court considers it necessary in the interest of justice to remand the case, it can be done and as per Rule 23A of Order 41 of CPC, if the Court considers a re-trial is necessary, the remand could be ordered. Bearing in mind the aforesaid provision, the lower appellate Court has expressed its view unambiguously that there are sufficient grounds for re-trial and the remand could be in the interest of justice. This Court endorses the view expressed by the lower appellate Court.

24. In the facts and circumstances of the case, the decisions relied upon by the learned counsel for the defendant before this Court will not be applicable to the case on hand, as the order of remand passed by the lower appellate Court is not as a matter of course and, therefore, the said decisions are distinguishable on facts. In fact, the lower appellate Court, after appreciating the submissions made by the learned counsel appearing on either side and also upon evaluation of the oral and documentary evidence produced by the parties has passed such an order.

25. Since this Court reached a conclusion that the lower appellate Court's order of remand is justified, which has

satisfied the requirement envisaged in Rules 23 and 23A of Order 41 of CPC, the judgment and decree under challenge need not be interfered and there is no legal infirmity in the same, and as such it deserves to be confirmed and is accordingly confirmed.

26.*In the result, (a) this Civil Miscellaneous Appeal is dismissed by confirming the order passed in A.S.No.11 of 2017 dated 30.01.2018 on the file of the learned Sub-Court, Sathyamangalam;

(b) the documents filed by the plaintiff has been marked as Court Exhibits-C1 to C3 and the suit is decreed as prayed for."

No costs. Consequently, connected miscellaneous petition is closed.

vs

*** Corrected as per the order of this Court dated 15.03.19 made in C.M.A.No.2149/18**

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Sub-Judge,
Sathyamangalam.

2.The District Munsif,
Sathyamangalam.

+1cc to Mr.B.Kumarasamy, Advocate, S.R.No.7312

+1cc to Mr.S.Ganesh Kumar, Advocate, S.R.No.8885

C.M.A.No.2149 of 2018
and
CMP.No.16779 of 2018

kak(18/03/2019)