

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29 /06 / 2018

DELIVERED ON : 27/ 05 / 2020

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

CMA NO.1103 OF 2014

&

M.P.Nos.1,2 of 2014

Syed Amjudullah

.....Appellant/1st respondent

Vs

1. Hamarudeen

2.Abdul Majeed

3.Abdul Hameed

4.Syed Hamanullah

.... Respondents

Prayer: Civil Miscellaneous Appeal filed under Or.41 rule 3 of CPC to set aside the judgment and decree dated 29.11.2013 made in AS.No.101 of 2005 on the file of Principal Subordinate Court, Villupuram and reversing the judgment and Decree dated 18.03.2005 in O.S.No.291 of 2004 on the file of District Munsif Court.

For Appellant : Mr. D.Rajagopal

For Respondents : Mr. A.Neelamegavannan

JUDGMENT

This Civil Miscellaneous Appeal has been preferred against the order of First Appellate Court in remanding the matter for fresh trial to the Trial Court on receiving additional evidence with a view to provide ample opportunity to all the parties therein.

2. The brief facts are as follows:

One Mohamadia Begum filed a suit in O.S.No.119 of 1996 which was renumbered as O.S.No.291 of 2004 on the file of Sub Court, Villupuram for declaration of title, recovery of possession and mesne profits. The first respondent herein/Third defendant therein filed a rival suit in O.S.No. 302 of 2004 against the said Mohamadia Begum and others for declaration of title of the very same property and for injunction.

3. The admitted facts are that the suit property originally belonged to one Dhanalakshmi. She sold the same to one Syed karim by sale deed dated 06.05.1947-(Ex.A.11). The said Syed Karim executed a settlement deed on 14.03.1973- (Ex.A.10) giving life estate to his wife Mohamadia Begum and after her demise absolute right on his son Syed Amanullah.

The settlement was acted upon. On 08.08.1980, the above mentioned Setlees executed a sale deed in favour of one Kuberan Chettiar-(Ex.A.12). The Vendors also entered into a Re-conveyance Agreement on 27.08.1980, for re-conveying the property on repayment of the sale consideration – (Ex.A.8). Since they could not mobilise money, they executed a Relinquishment deed dated 14.06.1982, giving up their right of re-conveyance, in favour of the purchaser namely Kuberan Chettiar vide Ex.A.9. The said Purchaser, namely Kuberan Chettiar initiated eviction proceedings against the defendants 1 to 3 in O.S.No.291 of 2004. Eviction was ordered and the appeal preferred by the tenants was also dismissed. In the meanwhile, Mohamadia Begum purchased the property in her name on 24.07.1984, from Kuberan Chettiar vide Ex.A.13. During the pendency of Civil Revision petition before the High Court, she impleaded herself as Landlady, which is evident from Ex.A.16 to Ex.A.19, pertaining to C.R.P.No.4432 of 1984.

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4. It is relevant to note that after the order of eviction, the third defendant/Hamaruddin and his brothers got a Sale Deed executed on 22.08.1984 by Syed Amanullah son of Syed Karim and Mohamadia

Begum and filed a suit in O.S.No.302 of 2004. In the suit filed by Mohamadia Begum in O.S.No.291/2004, second defendant therein filed a written statement averring that he does not have any title or possession or any claim and that he has nothing to do with the suit property and there is no cause of action against him. Later, the contesting third defendant filed his written statement, which was adopted by the Second defendant, contending that on 22.08.1984 he purchased the suit property from Syed Amanullah/fourth defendant in O.S.No.291/2004 and thereby he is the owner of the property and denied the title of the plaintiff. All other parties including fourth defendant Syed Amanullah remained ex-parte. The Trial Court, finding that the subject matter of the suit and prayer by the respective parties being one and the same taken up both the suits filed by Mohamadia Begum in O.S.No.291 of 2004 and Hamarudeen in O.S.No.302 of 2004 for joint trial, Mohammadia Begum let in evidence as P.W.1 and Hamaruddin as D.W.1 and marked Ex.A.1 to A.19 and B.1 to B.4.

5. The Trial Court ultimately declared title in favour of the said Mohamadia Begum and allowed O.S.No.291 of 2004 and dismissed the O.S.No.302 of 2004. Against which third defendant in O.S.No.291 of

2004 and plaintiff in O.S.No.302 of 2004 filed two appeals vide A.S.No. 101 of 2005 against O.S.No.291 of 2004 and A.S.No. 11 of 2010 against O.S.No.302 of 2004.

6. Before the Lower Appellate Court the appellant filed applications I.A.No.93 of 2013 to receive additional evidence under Or.41 R.27 and I.A.No. 129 of 2013, to receive additional pleading under Or.8 R.9 of CPC. In the meanwhile the said Mohamadia Begum died and one Syed Amjadullah was impleaded as her legal heir. He filed I.A.No.700 of 2013 to receive two additional documents under Or.41 R.27 of CPC. While so, the fourth defendant Syed Amanullah filed an interim application under Or.9 R.9 of CPC for restoration of the suit with a delay of 1150 days. The said interim application was dismissed against which C.M.A.No.4 of 2009 was preferred. The said CMA was also taken along with the appeals by the Lower Appellate Court.

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7. Lower Appellate Court allowed all the above interim applications to receive additional evidence and additional written statement and also allowed the C.M.A.No.4 of 2009. In view of the order passed in the

Interim applications and Civil Miscellaneous Appeal, remanded the appeal back to the Trial Court for providing ample opportunity to all the parties with a direction to complete the trial within three months.

8. Now, the point to be considered is as to whether the First Appellate Court is right in remitting the appeals to the Trial Court for fresh trial or not?.

9. It is well settled in the judgment of Hon'ble Supreme Court in J.Balaji Singh vs Diwakar Cole and Others, 2017 SAR (Civil) 670, wherein it has been held thus:

“

21. Now coming to the facts of the case, we are of the considered opinion that once the first Appellate Court allowed the application under Order 41 Rule 27 of Code and took on record the additional evidence, it rightly set aside the judgment/decreed of the Trial Court giving liberty to the parties to lead additional evidence in support of their case which, in turn, enabled the Trial Court to decide the civil suit afresh on merits in the light of entire evidence. The

first Appellate Court was, therefore, justified in taking recourse to powers conferred on the Appellate Court under Order 41 Rule 23-A for remanding the case to the Trial Court. We find no fault in exercise of such power by the first Appellate Court.

22. In our considered view, the only error which the first Appellate Court committed was that it went on to record the findings on merits. In our view, it was not necessary to do so while passing the order of remand. The reason is that once the first Appellate Court formed an opinion to remand the case, it was required to give reasons in support of the remand order as to why the remand is called for in the case. Indeed, the remand was made only to enable the Trial Court to decide the case on merits. Therefore, there was no need to discuss much less record findings on several issues on merits. It was totally uncalled for.

23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under

Order 43 Rule 1(u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

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25. It is well settled law that the jurisdiction to decide the appeal on merits can be exercised by the Appellate Court only when the appeal is filed under Section 96 or 100 of the Code against the decree. Such was not the case here.

26. In the light of abovementioned discussion, we are of the opinion that the High Court had no jurisdiction to consider much less deciding the entire case of the parties on merits in such appeal.

27. We are also unable to agree with the High Court when it held that the first Appellate Court instead of remanding the case to the Trial Court should have heard the appeal on merits. This finding, in our view, is bad in law for the reason that firstly, it was not possible for the first Appellate Court to have recorded the evidence at the appellate stage. Secondly, having regard to the nature of factual controversy involved and keeping in view the nature of additional evidence filed which too needed to be

proved in evidence, it was not possible to retain the appeal to itself and invite finding only on additional evidence by taking recourse to powers under Rule 25; and lastly, wholesome remand, as directed by the first Appellate Court, would enable the Trial Court to appreciate the entire evidence in its proper perspective while deciding the suit afresh on merits.

But in the instant case, contrary to ratio laid down by Hon'ble Supreme Court, the first appellate court ventured to record its finding on merits of the appeal and made observations on the right of the Vendor of the appellant and about the knowledge of the appellant about the rent control proceedings. Such exercise of power under Sec 96 of CPC while remanding the matter is contrary to law and the ratio laid down in the above judgment.

10. Further, it was contended that the documents, which were sought to be received as additional evidence were already marked as exhibits and evidence was recorded on the same. In such a situation the Lower appellate court shall record reasons as to the requirement of recording further evidence and as to why the appeal cannot be retained

and it requires wholesome remand. The First Appellate Court has neither recorded reasons for receiving additional evidence nor recorded reasons for remand.

11. While deciding the appeals, the Civil Miscellaneous Appeal filed by the fourth defendant with a delay of 1150 days, was also taken up along with the regular appeals and a common judgment was delivered. The order in the miscellaneous appeal is one of the reasons for remand. Refusal to condone the delay and rejection of the petition on the grounds of maintainability are entirely different issues. Even assuming that the petition was filed to set aside the ex-parte decree and it was allowed by the appellate court, it will entitle a parte only to participate in the future proceedings and he cannot be relegated to old position. But the trial court passed a blanket order of reopening the suit for fresh trial for the purpose of providing opportunity to all the parties.

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12. It is well settled that in civil litigations Code of Civil Procedure will have to be followed and the courts cannot proceed on the principles of natural justice de hors the statutory provisions. In so far as the remand of

appeals is concerned Or.41 Rule 23, 23-A and 25 of CPC govern the procedure. Under Rule 23 Whenever a decree passed by the lower court on a preliminary point is reversed or while reversing or setting aside the decree the appellate court considers it necessary to remand the case in the interest of justice, shall direct what issue or issues shall be framed and direct determination of suit. Under Rule 23-A, Where the suit decreed otherwise than on a preliminary point and when the decree is reversed in appeal and a retrial is considered necessary it can be remanded, which means that issues were framed and answered by the court which passed the decree, yet the appellate court considers it necessary that a retrial should be conducted it can be remand the case. Rule 25 will come into play in a situation the trial court omitted to frame or try any issue or determine the question of fact, the appellate court can direct the court to take additional evidence and send it back or to proceed to try the issue and return the evidence along with its findings and the reasons thereon within a specified time.

13. The present order under challenge will fall within the purview of Rule 23-A. The trial court framed appropriate issues and there is no

adverse finding or discrepancy pointed out. But the order proceeds on the basis that the appellant did not have opportunity to defend. But a perusal of the judgment of the trial court shows that the appellant appeared before the trial court, filed his written statement, examined himself as a witness and marked documents in support of his case. In a joint trial for declaration of title, parties will not be examined and cross examined for each suit. If they are examined twice there is no purpose for taking up the suit for joint trial. The very purpose is to avoid filling up of lacuna in the later suit and thereby conflicting decisions. The lower appellate court proceeded on the basis that the appellant has not participated in the trial and remained ex-parte in one suit is erroneous.

14. Secondly, the remand is made on the ground that additional evidence has been permitted. The order passed under the above provision is also part and parcel of the remand order. Or 41 Rule 27 of CPC clearly set out the exceptions to produce additional evidence. i) when the court passed decree refused to accept the document, which ought to have been admitted; ii) When the document was not within the knowledge of the party or in spite of due diligence it could not be produced iii) power of the

appellate court to require production of documents or evidence. It is not the case of the appellant that he produced the document before the trial court, but it was not admitted. Nor there is any finding by the appellate court that the appellant was precluded from producing the document, in spite of his diligent efforts. On the other hand they were already marked as exhibits and evidence adduced on the same. Sub rule (2) Rule 27 of Order 41 mandates that appellate court shall record its reasons for admission of additional evidence. But as discussed above the lower appellate court has not recorded any reasons for admission, but allowed the applications with a view to give opportunity of hearing.

15. The course adopted by the lower appellate court is subversive of the statutory procedure laid down by the code. When a particular procedure is laid down by the statute, it shall be strictly adhered to and it cannot be thrown to air under the pretext of natural justice. If such a course is permitted it will render the provisions under Civil Procedure Code to set aside the ex-parte order, to set aside ex-parte decree, receiving of additional evidence, principles of Res-Judicata and other procedures meaningless. The order passed under Or41Rule 27 of CPC is an integral

part of the order under challenge. Even if that order is not under challenge, this court under Art 227 of the Constitution of India has power of superintendence over the sub ordinate courts to set aside such erroneous orders.

16. In fine, the order passed by the lower appellate court is contrary to the judgment of the Hon'ble Supreme Court and statutory provisions and is not sustainable in law. Accordingly, the judgment and decree passed in A.S.No.101 of 2005 dated 29.11.2013 is set aside and the matter is remanded back to First Appellate Court with a direction to decide the Interim applications, Civil Miscellaneous Appeal and the first appeals in accordance with law recording reasons and to pass order within a period of three months from the date of receipt of a copy of this order. No Costs. Connected miscellaneous petition is closed.

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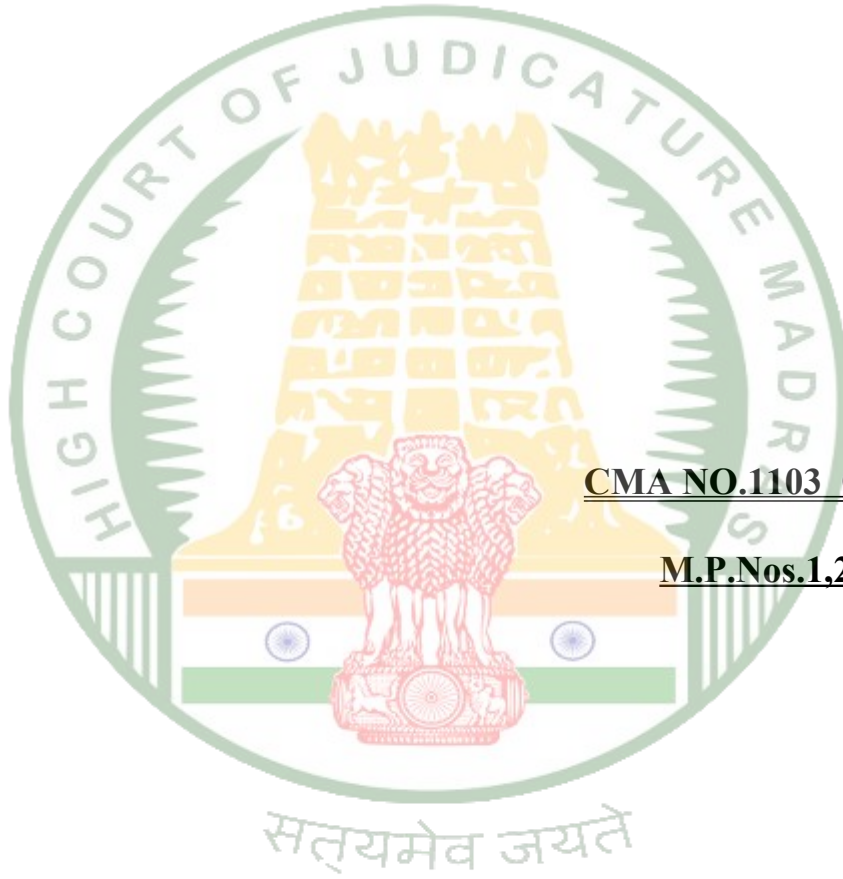
Index : Yes/No
Internet : Yes
Speaking / Non speaking order

To
The Principal Subordinate Judge, Villupuram.

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M.GOVINDARAJ, J.

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