

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

CIVIL MISCELLANEOUS APPEAL NO.2649 OF 2019

AND

C.M.P.NO.13048 OF 2019

Arumugham

... 1st Defendant/
1st Respondent/Appellant

-vs-

1.Pechammal

... Plaintiff/Appellant/1st Respondent

2.Manivannan

3.Tamil Nadu Industrial Investment Corporation,
Cuddalore by its Branch Manager.

4.Tamil Nadu Industrial Investment Corporation,
Registered Office, Chennai.

5.Ramachandran

... Defendants 2 to 5/
Respondents 2 to 5/Respondents 2 to 5

PRAYER:

Appeal is filed under Order 43 Rule (1) (u) of CPC to set aside the judgment and the decree dated 15.04.2019 passed by the III Additional District and Sessions Court, Vridhachalam in A.S.No.54 of 2018 remanded the judgment and the decree dated 06.11.2017 in O.S.No.67 of 2010 on the file of the Sub Court, Neyveli.

For Appellant : M/s.R.Meenal

For R1 : Mr.T.P.Kathiravan

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O R D E R

This Appeal has been filed to set aside the judgment and decree dated 15.04.2019 passed by the III Additional District and Sessions Court, Vridhachalam in A.S.No.54 of 2018, by which the judgment and the decree dated 06.11.2017 in O.S.No.67 of 2010 passed by the Subordinate Judge, Neyveli was set aside and the matter was remanded to the Sub Court, Neyveli for fresh consideration.

2. It is seen that the III Additional District and Sessions Court, Vridhachalam, while remanding the matter, had directed the Subordinate Judge, Neyveli to appoint an Advocate Commissioner and ascertain the actual owner of the property. Consequent to the direction, an Advocate Commissioner was appointed and he has also filed his report before the Subordinate Court, Neyveli on 30.09.2019 and an affidavit dated 18.12.2019 has been filed before this Court to that effect by the Advocate Commissioner.

3. It is pertinent to mention here that civil matters are pending for years together without any quietus during the lifetime of parties and the Lower Appellate Court Judge, instead of remanding the matter to the Subordinate Judge, Neyveli with a direction to appoint an Advocate Commissioner to inspect the property in question, could have himself inspected the place and arrived at a decision in the light of Order XVIII Rule 18 CPC, which provides for the legal leniency to the Court to personally inspect the property or thing in question and prepare a memorandum of such inspection, which can then be taken upon the records of the case matter.

4. A Division Bench of the Hon'ble Allahabad High Court in the case of Writ-C.No.11830 of 2012 [Sh.Vijender Kumar Garg and Others vs. State Of U.P. and Others] decided on 21.12.2015 had decided to visit the spot by themselves to appraise the correct facts, on the request of the counsel for the parties therein and therefore, there is a precedent that even Sitting Judges of High Courts can inspect the property in question to come to a definite conclusion. The relevant paragraph of the judgment is extracted hereunder:

"9. We have heard the arguments and find that arguments advanced by the NOIDA authority are not satisfactory. On the request of counsel for the parties, this Court will visit the spot on 26.12.2015 to apprise the correct facts for proper decision."

5. At this juncture, learned counsel for the Appellant has submitted that a patta dated 16.08.1981, purported to have been issued by a Village Administrative Officer, has been marked as Ex.A.1 on the side of the respondents herein, whereas there was no such appointment of Village Administrative Officer during the relevant point of time. In reply, learned counsel for the 1st Respondent drew the attention of this Court to Ex.A.9 (computer patta) to repudiate the submission of the learned counsel for the Appellant.

6. Quoting the lines of the Apex Court that "an unwarranted order of remand gives the litigation an undeserved lease of life

and therefore, must be avoided", the learned counsel for the Appellant has further submitted that Order 41 Rule 23 or 23A must be resorted to sparingly as a last alternative in exceptional cases. In support of her submission, she has relied upon a judgment of this Court in the case of Elumalai vs. Kanthamani Ammal, reported in 2017 (1) CTC 307, wherein it has been held as follows:

"14. Before embarking on the correctness or otherwise of the approach of the first appellate court in remanding the matter it is necessary to remember that the Supreme Court in P. Purushottam Reddy v. Pratap Steels Ltd., [MANU/SC/0054/2002 : AIR 2002 SC 771] has declared that "...An unwarranted order of remand gives the litigation an undeserved lease of life and therefore, must be avoided". An order of remand in essence contributes to what may be termed as a recycle-bin syndrome as it leaves the same case rotating within the system without an exit, and stagnates if not adds to the burden that the legal system shoulders. Reference may be had to the authority of the Supreme Court in Lisamma Antony v. Karthiyayani [MANU/SC/0321/2015 : (2015) 11 SCC 782]. It is therefore necessary that an appellate court should resort to remanding of cases to the court below only sparingly and in exceptional cases. In this context principles governing the question of remand may be broadly stated:

- An appellate court must ascertain if the suit is decided on a preliminary point. Here the appellate Court should be cautious not to misconstrue a preliminary point with preliminary issue under Order XIV Rule 2 CPC. Ordinarily, a suit is said to have been decided on a preliminary point if the trial court has either failed to consider all the issues that arise for consideration or has ignored to decide that which the pleadings in the suit require to be decided. This includes cases where burden of proof is wrongly fixed or where the case of one of the parties is failed to be considered on a misconception arising out of it.

- Even where a suit is decided on a preliminary point but where the evidence is still available to decide the material points in controversy in a suit, an appellate court should normally take recourse to Order XLI Rule 24 CPC and decide the case. Even if proper issues are not framed but if those who litigate have understood what they are litigating and have adduced necessary evidence, an appellate Court must attempt to finally

adjudicate the case. An order of remand should be read as an exception to what is contemplated under Rule 24. The first attempt is to proceed under Order XLI Rule 24, and if it is found not possible then to explore if the case at hand falls within Rule 25 situations and only if neither is possible, should an appellate court contemplate on resorting to remand under Rule 23 or 23-A. For the scope of Rule 25 refer Jaganathan v. Raju Sihamani [MANU/SC/0300/2012 : (2012) 5 SCC 540: 2012 (4) MLJ 314]

- Mere appearance of a disposal on a preliminary point should not automatically be construed as a sufficient ground to remand a case. It must be founded on circumstances such as for instance where evidence adequate to decide a case is found lacking, or where parties have been misled by the omission to frame appropriate issues resulting in their failure to provide necessary evidence, or where any of the parties are denied an opportunity to adduce evidence, or where an appellate court considers that the evidence on any of the issues germane for final adjudication of the case is insufficient.

- Where an appellate court encounters any exceptional situations arising out of the facts of the case that makes a final adjudication difficult to achieve is a situation when a case can be remanded. It may include any change of circumstances arising out of any subsequent events impacting the original cause of action; or discovery of a new fact requiring amendment of the pleadings within the scope of Order VI Rule 17 other than those that may render a suit bad for formal defect within the meaning of Order XXIII Rule 1 CPC or production of a new evidence subject to the limitations in Order XLI Rule 27 CPC, both of which may be of such nature that they are either inconsistent with any fact in issue or relevant fact already proved, or, which either by itself or in connection with other facts available on record make the existence or non-existence of any proved fact in issue or relevant fact highly improbable and hence require proof; These are only illustrative and not exhaustive.

- A remand should not be made to reconstruct a case, but only to prevent failure of justice. A litigant's recalcitrance and default cannot not be counted as a ground per se to remand.

- A remand is not required merely because of change of substantive law or advent of new law affecting the original cause of action, unless it also requires addition of parties or probe on facts."

7. I find much force in the contention raised by the learned counsel for the Appellant, inasmuch as the Lower Appellate Court ought not to have remanded the matter to the Lower Court, instead the case could have been decided finally by the Lower Appellate Court itself with the available materials, as the present case does not fall within the ambit of exceptional cases. Moreover, both the Lower Court and the Lower Appellate Court have powers to inspect a property by invoking Order XVIII Rule 18 of CPC, apart from taking photograph and videograph of the place in question and the costs shall be borne by the litigants for this purpose. While hearing a Writ Petition in W.P.No.12383 of 2004 [Annai Indira Gandhi Hut Dwellers Welfare Association, Reg.No.416/90, Vijaya Nagar, Velacherry, Chennai-42, Rep. by their President Dhananjayan vs State of Tamil Nadu, Rep. by its Secretary, Revenue Department, Fort St.George, Chennai-9 and others] decided on 23.02.2018, I had discussed the empowerment of Courts to inspect a property Order XVIII Rule 18 of CPC. For the sake better understanding, the relevant paragraph of the judgment is extracted hereunder:

"46. Before parting with this case, it is to be noted that during the hearing of the present Writ Petition, the petitioner-Association has filed an affidavit dated 01.02.2018 along with letter/complaint dated 01.02.2008 addressed to the Hon'ble Chief Justice, stating that I should recuse from hearing the present Writ Petition. The matter has already been argued at length and only at the request of the petitioner, sitting was there for two days after 5 p.m. that had last for nearly two hours each day. It is pointed out that there are lots of encroachments and in the light of Order 18 Rule 18 CPC, this Court made observations and that if there is prima-facie case, the Court is also empowered to inspect the site in question to ascertain the correctness of the report. As it is stated that commercial complex had also been constructed in the place allotted to the members of the petitioner-Association, and if there is any inspection, this Court may cull out more details as to who is residing in the place and whether there is any sale of the property, etc. The conversation made by this Court between the petitioner's counsel and the respondent's counsel, had been extracted in the said letter/complaint of the petitioner addressed to the Hon'ble Chief Justice. The Apex Court has held

that it is open for the Court to pose questions or suggest settlement to give a quietus to the matter, more particularly in the light of mediation/conciliation, etc. The entire arguments have been addressed in this matter and I have earlier observed that if required, the matter will be posted for further hearing. After going through the documents and the photographs/videograph, it throws light about the illegal buildings being constructed in the lands given to the Railways for MRTS, Phase-II Project. This Court has decided not to go for any inspection and fearing inspection, such communication has been addressed. Moreover, during the pendency of this Writ Petition, the authorities have inspected the place in question and have filed inspection report, which has been discussed supra."

8. The aforesaid judgment has been duly confirmed by the Hon'ble Division Bench of this Court in W.A.No.687 of 2018 dated 19.12.2018 and the Apex Court also dismissed the Special Leave Petition filed by the Association.

9. In view of what is stated herein-above, this Civil Miscellaneous Appeal is allowed and the matter is remanded to the III Additional District and Sessions Judge, Vridhachalam for hearing the matter afresh. The III Additional District and Sessions Judge, Vridhachalam shall at first inspect the property in question, by invoking Order XVIII Rule 18 of CPC to ascertain the actual position, with the assistance of the Advocate Commissioner appointed earlier, if needed, thereafter frame appropriate points and decide the matter on merits and in accordance with law. The Lower Appellate Court is directed to complete the entire exercise and dispose of the Appeal within a period of six months from the date of receipt of a copy of this order. Registry is directed to transmit the material papers, if any, received in this case to the First Appellate Court forthwith without any delay. In the meanwhile, it is open to the parties to make necessary application before the Lower Appellate Court in this regard. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(AD I-MDU)

//True Copy//

Sub Assistant Registrar

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To:

1.The III Additional District and Sessions Judge,
Vridhachalam.

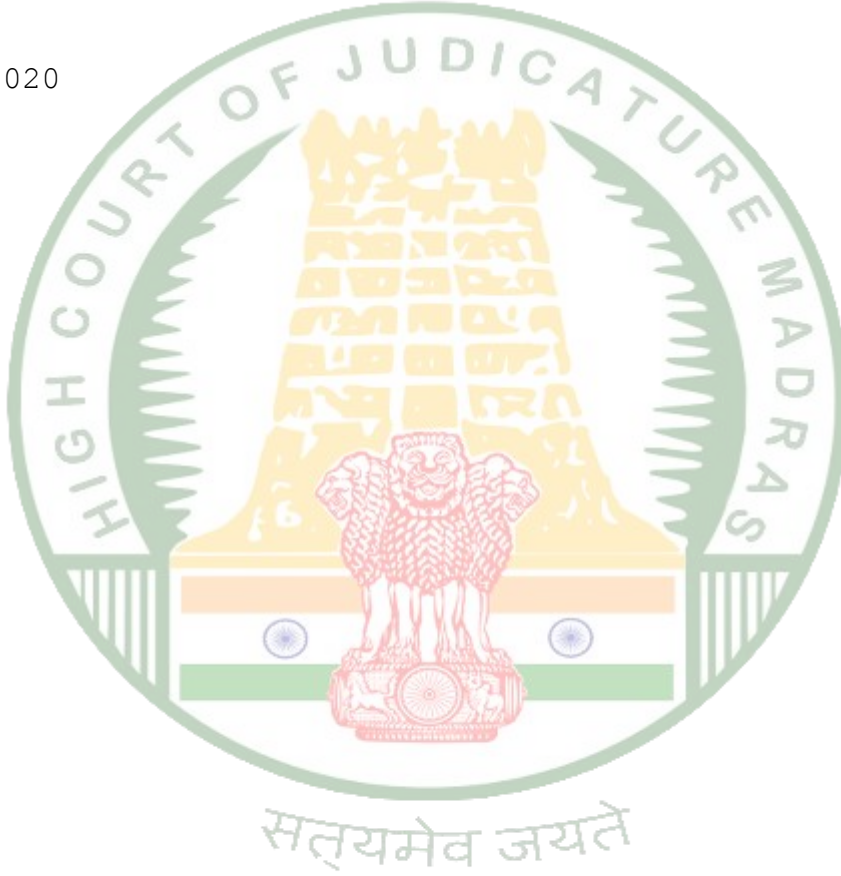
2.The Subordinate Judge,
Neyveli.

+1cc to Mr.R.Meenal, Advocate, S.R.No.2998

+1cc to Mr.T.P.Kathiravan, Advocate, S.R.No.2917

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