

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

Civil Miscellaneous Appeal No.2661 of 2019

and C.M.P.No.13104 of 2019

M.Abdul Rahim ... Appellant/3rd Respondent/3rd Defendant

-vs-

1.R.Kamalanathan ... Respondent / Appellant / Plaintiff
2.Rajan
3.Loganathan
4.Amudha
5.Muneeswari ... Respondents 2 to 5 / Respondents
1,2,4&5/Defendants 1,2,4&5

PRAYER: Appeal is filed under Order 43 Rule 1(u) of CPC to set aside the judgment and decree dated 05.01.2019 and made in A.S.No.167 of 2018 on the file of XVII Additional Judge, City Civil Court, Chennai remanding and setting aside the judgment and decree dated 08.11.2017 and made in O.S.No.1220 of 2012 on the file of XIII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.N.A.Nissar Ahmed

For R1 : Mr.M.Chidambaram

For R2 to R5 : Mr.C.P.Siva Mohan

J U D G M E N T

This Appeal has been filed to set aside the judgment and decree dated 05.01.2019 made in A.S.No.167 of 2018 by the learned XVII Additional Judge, City Civil Court, Chennai remanding and setting aside the judgment and decree dated 08.11.2017 made in O.S.No.1220 of 2012 by the learned XIII Assistant Judge, City Civil Court, Chennai.

2. For the sake of brevity, the parties would be referred to by their nomenclature as described in the suit in O.S.No.1220 of 2012.

Facts in brief:

3. The plaintiff / 1st respondent had filed a suit in O.S.No.1220 of 2012, seeking for the relief of declaration and permanent injunction in respect of the suit property in question and the said suit was dismissed by the learned XIII Assistant Judge, City Civil Court, Chennai. Aggrieved by the dismissal order, the plaintiff filed an appeal in A.S.No.167 of 2018 before the XVII Additional City Civil Court, Chennai, in which, while setting aside the judgment and decree of the XIII Assistant City Civil Court, the matter was remitted back to the Trial Court for afresh consideration after permitting the parties to adduce further evidence. Challenging the said order of remand, the appellant, who is the 3rd Defendant in the suit, is before this Court.

4. According to the plaintiff, he is the adopted son of one Kamala Ammal and after the demise of the said Kamala Ammal, he became the absolute owner of the property bearing Plot No.21. The property originally belonged to Tamil Nadu Slum Clearance Board and Kamala Ammal got an allotment order on 30.06.1987. It was stated in the plaint that after the death of Kamala Ammal, one K.Mohan had claimed right over the suit property, stating that he is the brother's son of late Kamala Ammal, which forced the plaintiff to file O.S.No.15082 of 1996 for declaration to solve the problem and also sought for a permanent injunction against Mohan. Ultimately, the suit ended in an amicable settlement between the plaintiff and Mohan, pursuant to which, the plaintiff also constructed the suit superstructure on the property, as the same was vested with him in the capacity of one of the legal heirs of Kamala Ammal.

5. It was further stated by the Plaintiff that he had demolished the suit property and decided to construct a building and at no point of time, the appellant herein and other defendants did not object to the right of the plaintiff and in order to ascertain the extent of suit property, appointment of an Advocate Commissioner was sought for with regard to Slum Clearance Board Certificate, on account of which, the property was inspected. It was also stated that the defendants in the suit started troubling the plaintiff with an ulterior motive to usurp the property of the plaintiff and they also illegally trespassed into the property of the plaintiff and threatened the plaintiff with goondas and rowdy elements. It was the case of the plaintiff that he had filed documents numbering 26 and that

Ex.P9 was the compromise decree filed before the Trial Court in O.S.No.15082 of 1996.

6. The appellant, who is one of the defendants in the suit had filed a written statement, stating that the suit got to be dismissed on the ground of non joinder of necessary party and that at no point of time, the property was encroached and it was the property of defendants and that it was the plaintiff, who had been creating trouble to neighbours, though he is not the owner. It was stated in the written statement that the compromise decree in O.S.No.15082 of 1996 was not a contested one and that the same would not be binding on the parties. It was also stated that the plaintiff is not a legal heir of Kamala Ammal and that the plaintiff, being a Government Servant continued to retain the name of his original mother without even substituting the name of Kamala Ammal in the records. It was averred in the written statement that the plaintiff was trying to construct a building on the property belonging to the defendants and that the matter has subsequently gone before the Civil Court by means of declaration filed by the plaintiff. In the written statement, it was further stated that it was the plaintiff, who attempted to encroach the property of the defendant, which was stalled not only on the ground that the plaintiff is not a legal heir of Kamala Ammal, but also that he has no right to encroach the property of the defendants.

7. The Trial Court, after looking into the pleadings of the parties, framed six issues, which read as under:

- 1) Whether the plaintiff is the adopted son of Tmt.Kamala?
- 2) Whether the plaintiff is entitled to the relief of declaration and for possession as prayed for?
- 3) Whether the plaintiff is entitled to the relief of permanent injunction restraining the defendants from interfering the plaintiff's peaceful possession and enjoyment in the schedule mentioned property as prayed for?
- 4) Whether the plaintiff is entitled to the relief of permanent injunction restraining the defendants from interfering the plaintiff's construction work in the schedule mentioned property as prayed for?
- 5) Whether the suit property is correctly valued and proper court fees paid or not?
- 6) To what such other relief, the plaintiff is entitled?

8. Out of six issues, four issues have been combined and it was held that the plaintiff did not establish the case as pleaded by him. It was further held that the plaintiff did not produce any oral and documentary evidence to establish the relief of declaration and possession as sought for.

9. Learned counsel for the plaintiff argued that on the basis of the Advocate Commissioner's report, the Trial Court ought to have accepted the case of the plaintiff that there was an encroachment made by the defendants. It was also argued that the Trial Court should have answered all the issues together instead of rendering its finding on Issue Nos.1 to 4 as extracted supra.

10. Per contra, it was contended by the learned counsel for the 3rd defendant / Appellant that the compromise decree (Ex.P9) would be binding only between the parties and it will not bind the defendants. Even assuming for the sake of argument that there is a decree, certainly it will not bind the 3rd defendant / appellant herein to contend that he is not the legal heir and that there is no encroachment at all. It was further contended that the plaintiff will definitely try to fill up the lacuna, if the case is remanded to the Trial Court.

11. The Lower Appellate Court considered the issues raised by the plaintiff and rendered a finding that the documents referred to by the plaintiff are essential documents and ten documents will have to be scrutinized by the Trial Court and in terms of Order 41 Rule 23 and 23-A, the matter has been remanded for fresh disposal and that the issues already framed have got to be answered in toto. The documents that are produced by the plaintiff are as follows:

- 1) Allotment Order of the suit property dated 30.06.1987
- 2) Adoption Deed dated 5.1.1990
- 3) Voter list in the suit property
- 4) Bank Pass book of Tmt.Kamala Ammal
- 5) Joint Photo - Kamala Ammal & Appellant
- 6) Death Certificate of Tmt.Kamala Ammal dated 5.9.1996
- 7) Sworn Affidavit of the appellant dated 25.10.1996
- 8) Will Document No.11/1997 executed by Mr.M.Ramasamy
- 9) Judgment in O.S.No.15082/96
- 10) Legal heirship certificate dated 8.9.2011.

12. It was submitted that those documents would establish that the plaintiff is the legal heir of the deceased Kamala Ammal and that since he was having a judgment and compromise decree in his favour, the plaintiff thought that there is no need to produce those 10 documents in support of his contention. According to the plaintiff, he, due to oversight and on wrong impression that the compromise decree is suffice to establish his case, did not produce the documents.

13. The contention raised by the defendants before the Lower Appellate Court that the plaintiff, having failed to file these documents before the Lower Forum, sought to introduce the same to fill up the lacuna so as to bring out a fresh case, was

rejected by the Lower Appellate Court and according to the defendants, that is not the purpose of Order 41 Rule 23 & 23-A. It was put forth by the defendants that all the four issues have been jointly answered apart from answering Issue Nos.5 & 6 separately and therefore, the argument advanced by the plaintiff that only four issues have been answered and other issues have not been answered, cannot be accepted.

14. Heard the learned counsel for the parties and perused the material documents available on record.

15. It is seen that the Lower Appellate Court has remitted the matter back to the Trial Court in terms of Order 41 Rule 23 of C.P.C. For the sake of convenience, Order 41 Rule 23 & 23-A is extracted hereunder:

"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, which directions to re-admit 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."

16. It is true that when the preliminary issues were answered without reference to the documents, certainly the plea of the plaintiff is justified and the matter has got to be remanded. However, a reading of the judgment and decree of the Trial Court reveals that there was an observation by the Trial Court that the plaintiff did not produce any documents to establish his case and therefore, in order to overcome the lacuna, the plaintiff is trying to introduce the documents, though those documents may be genuine documents to establish the case. The appellate court, while remanding the matter, should be more

cautious whether such remand is well within the ambit of Rule 23 or Rule 23-A, because an unwarranted order of remand gives the litigation an undeserved lease of life.

17. In the case on hand, the First Appellate Court remanded the matter back to the trial court for fresh consideration summarily on the only ground that vital documents were not taken into consideration by the Trial Court and it leads to an inference that the First Appellate Court had not at all considered the judgment of the Trial Court in a proper perspective nor pointed out any infirmity. There was a hint in the judgment of the Trial Court that no sufficient documentary evidence was produced by the plaintiff to substantiate his case and if the contention of the plaintiff is accepted by this Court and the matter is remanded to the Trial Court, there is every possibility of the plaintiff filling up the lacuna in order to suit his case and in that process, there will be a miscarriage of justice.

18. This Court in the case of D.Arulraj vs. D.Vijayalakshmi and another, reported in CDJ 2010 MHC 5300 held as follows:

"13. In (Kannathal and four others vs. Arulmighu Kanniammal Karuppasamy Thirukoil, Pothanur Chettipalayam, Coimbatore, rep. by its Executive Officer and another) 2007 (2) CTC 49, a learned single Judge of this Honourable Court held in para No. 15 and 17 as follows:-

"15. It is also settled law that if the issues arising in the suit could be decided on the evidence available on record, the lower Appellate Court itself should decide the case on merits without unnecessarily ordering remand. A perusal of the pleadings in the case shows that all the necessary pleadings are available on record. Even if the Lower Appellate Court was of the opinion that it was necessary to give an opportunity to the plaintiff to amend the pleadings, that opportunity could have been given in the First Appellate Court itself and for that purpose, the remand is not needed.

16.....

17. In the light of the law laid down by the Apex Court in the decisions reported in Ishwardas vs. State of Madhya Pradesh and others, AIR 1979 SC 55 and P. Purusottam Reddy and another vs. Pratap Steels Limited, 2002 (2) CTC 686, this Court is of the considered view that the Lower Appellate Court has committed an error of law in remanding the matter only for the purpose of affording an opportunity to the plaintiff to amend the pleadings and to adduce additional evidence. As laid down by the Apex Court it is not proper for the

Appellate Court to remand the case to enable the parties to make good their lapse.

14. In (Sujatha vs. Vijay Anand and another) (2007) 4 MLJ 447, a learned single Judge of this Court in Para No.15 and 16, held as follows:-

15. In the case on hand, the learned District Judge has not reversed or set aside the finding of the trial court. It is only to give opportunity to the plaintiffs to prove the Will dated 12.08.1982, the lower Appellate Court has remanded that suit to the trial court. The procedure adopted by the learned District Judge is not correct. The District Judge himself got jurisdiction and powers under Order 41 and Section 151 of C.P.C.

16. I am of the opinion that the order of remand of the suit cannot be sustained and therefore, the judgment and decree of the learned District Judge remanding the suit to the trial court are set aside. The learned District Judge is directed to take the first appeal and I.A. No. 53 of 2001 on its file and give opportunity to both parties with regard to the proof of the said document dated 12.08.1982 and dispose of the first appeal on merits.

15. In the aforesaid decisions, it was categorically held that order of remand should not be passed as a matter of course and without giving a finding as to how the decree and judgment of the trial court is perverse, illegal, especially, after amendment to Order 41 Rule 23A of CPC. In the case on hand, the First Appellate Court remanded the matter back to the trial court for fresh consideration summarily on the only ground that the first respondent only to give an opportunity to the first defendant, who remained exparte before the trial court. No finding has been given by the First Appellate Court as to how the decree and judgment passed by the trial court is vitiated warranting it to pass an order of remand. Under those circumstances, the Judgment and Decree dated 07.07.2006 in A.S. No. 7 of 2005 on the file of the Subordinate Judge, Thiruvarur is set aside. The matter is remanded to the First Appellate Court for disposing of the first appeal on merits and in accordance with law after giving sufficient opportunity to both sides to prove their case.

16. In the result, the civil miscellaneous petition is allowed. No costs. Consequently, connected miscellaneous petition is closed."

19. In the aforesaid judgment, this Court also observed that before passing an order of remand, the First Appellate Court has to record reasons that re-trial is necessary and also give finding that the decree and judgment passed by the trial Court is liable to be reversed and only then, an order of remand should be passed and the order of remand cannot be passed on ipse dixit of the Court. The First Appellate Court had merely held that additional documents are required for effective disposal of the appeal and the case of the plaintiff on the sole ground that he had not proved his adoption by valid documents, even though those documents are very much available. Thus, it is clear that the First Appellate Court did not find any infirmity in the judgment and decree of the Trial Court and invoked the provision of remand in a casual manner. It is pertinent to mention here that no prejudice is going to be caused to both the parties, if the documents are filed before the First Appellate Court and tried based on the pleadings available before it (at the most, the parties may be deprived of one round of appeal after remand), which is not the case herein, as the plaintiff is endeavouring to mould the entire pleadings by introduction of those documents.

20. The provisions of CPC is intended to give a quietus to the issue on all aspects and that is the purpose for which Order 41 Rule 23 is in existence. The remand is not a matter of right and it is also not a discretion of the Court. The remand is permissible and mandatory, when the main issue has not been answered and the finding has been rendered only on the preliminary issue. Since a composite judgment and decree has been passed by the Trial Court in the present case on hand, in the considered opinion of this Court, there is no need for remanding the matter to the Trial Court by the First Appellate Court, as the First Appellate Court itself is empowered to take up the appeal afresh after taking the documents on file, giving an opportunity to the plaintiff and defendants / respondents before it and consider the veracity and relevancy of the documents, while rendering a finding on merits.

21. In the result, the Civil Miscellaneous Appeal is allowed and the judgment and decree dated 05.01.2019 made in A.S.No.167 of 2018 by the learned XVII Additional Judge, City Civil Court, Chennai, remanding and setting aside the judgment and decree dated 08.11.2017 made in O.S.No.1220 of 2012 by the learned XIII Assistant Judge, City Civil Court, Chennai, is hereby set aside. The First Appellate Court is directed to conduct the case on day-to-day basis without adjourning the matter beyond 15 working days at any point of time and bring the issue to a logical end within a period of one year from the date of receipt of a copy of this order. It is made clear that any observation made herein-above, touching upon the merits of the matter, is only

for the purpose of disposal of the present Appeal and the matter has to be decided by the First Appellate Court purely on merits, without being influenced by the observation made herein-above. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To:

1.The XVII Additional Judge,
City Civil Court,
Chennai.

2.The XIII Assistant Judge,
City Civil Court,
Chennai.

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The Section Officer,
V.R.Section, High Court Madras.

+1 cc to M/s.N.A.Nissar Ahamed, Advocate Sr.No. 12343
+1 cc to M/s. M.Chidambaram, Advocate Sr.No. 12258
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