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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:04.02.2021

CORAM:

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

C.M.A.Nos.2371 and 2372 of 2013
and
M.P.Nos.1,1 of 2013

D.Lenin

.. Appellant in both CMA No.2371/13/
Respondent/Plaintiff
and
Appellant in CMA.No.2372/2013/
Respondent/Plaintiff

Vs.

1.T.Raji

.. 1st Respondent in
CMA No.2371/13/appellant/Plaintiff
and
Respondent in CMA.No.2372/2013/
Appellant/Plaintiff

2.R.J.Iyyanar

.. 2nd Respondent
in CMA.No.2371 of 2013/
2nd Respondent/2nd Defendant

PRAYER in CMA.No.2371 of 2013 : Civil Miscellaneous Appeal is filed under 43 Rule (1) (a) of Civil Procedure Code, against the judgment and decree dated 25.03.2013, passed in A.S.No.12 of 2012 on the file of the District Court, Tiruvannamalai, setting aside the judgment and decree dated 28.11.2011 passed in O.S.No.45 of 2009, on the file of the Additional Subordinate Court, Tiruvannamalai and remanding the matter back to the Trial Court.

PRAYER in CMA.No.2372 of 2013 : Civil Miscellaneous Appeal is filed under 43 Rule (1) (a) of Civil Procedure Code, against the judgment and decree dated 25.03.2013, passed in A.S.No.13 of 2012 on the file of the District Court, Tiruvannamalai, setting aside the judgment and decree dated 28.11.2011 passed in O.S.No.147 of 2008, on the file of the Additional Subordinate Court, Tiruvannamalai and remanding the matter back to the Trial Court.



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For Appellants : Mr.K.Goviganesan
in both CMAs

For Respondents :M/s.Krishnaprasad
in both CMAs for M/s.Sarvabhauman Associates.

C O M M O N J U D G M E N T

The appellant is the defendant in the suit in O.S.No.147 of 2008 filed by the plaintiff/respondent herein for the relief of declaration, permanent injunction and other consequential reliefs. Subsequent to the suit, the defendant/appellant filed another suit in O.S.No.45 of 2009 against this respondent and one Iyyanar for the relief of declaration and consequential enjoyment. Since the property involved in both suits are same, both suits were tried together and common judgment was passed by the trial Court.

2. For the sake of convenience, the parties are referred to as per their original ranks in O.S.No.147 of 2008.

3. Accordingly, the suit was filed by the respondent in O.S.No.147 of 2008 was dismissed and the suit was filed by the appellant in O.S.No.45 of 2009 was decreed.

4. Aggrieved by the order passed by the trial Court, this respondent preferred first Appeals in A.S.Nos.12 and 13 of 2012 respectively, before the District Judge, Tiruvannamalai. In that appeal, the respondent herein filed I.A.No.34 of 2012 under Order 41, Rule 27 of C.P.C., praying to permit him to receive the additional documents, stating that he was not given proper opportunity by the trial Court, to mark those documents which are vital in nature. This appellant also contested the said application. After full enquiry, the first Appellate Judge allowed the interlocutory application and the common judgment passed by the trial Court is set aside and the matter was remitted back to the trial Judge/Additional Subordinate Judge, Tiruvannamalai, with a direction to dispose the case after giving opportunity to both parties to adduce additional evidence.

5. Aggrieved by that order, the defendant in O.S.No.147 of 2008 and plaintiff in O.S.No.45 of 2009 preferred this appeal.

6. The respondent also contested this appeal.

7. The brief facts of the case are as follows:
The plaintiff/respondent herein filed a suit for declaration and other reliefs in respect of the suit property



situated in Meyyur Village, Tiruvannamalai Taluk in new Survey No.104/1A with four boundaries as vested in the plaint schedule. According to him, the suit property belongs to him by way of purchase from his brother Chinna Durai who insisted him to sell the property for which, he refused. Aggrieved by that he started to give trouble to the plaintiff and at this instigation, the defendant kidnapped the plaintiff and forcibly taken to Sub Registrar's Office, Tiruvannamalai and by out of force and coercion, the sale was executed from him in favour of the defendant who is close relative of his brother Chinna Durai. On 07.07.2008, without any consideration, this plaintiff borrowed a sum of Rs.1,50,000/- and to satisfy the repayment, the property was transferred as per the pronote date as stated in the sale deed. Immediately, after they left from the clutches of the defendant, he gave the complaint to the police about the kidnap and forcible transaction. Thereafter, he filed the suit in O.S.No.147 of 2008 against the defendant to declare that the alleged sale deed was executed by fraud and undue coercion and also prayed to declare the plaintiff is the owner of the property.

8. The learned counsel for the defendant submits that prior to the sale deed, the plaintiff created shame and nominal document in favour of one Iyanar. So, in order to strengthen, he filed for a suit in O.S.No.45 of 2009, against this plaintiff and the said Iyanar.

9. Both suits were tried together. On the side of the plaintiff, he was examined as PW.1 and the said Iyanar was examined as PW.2 and other witness was examined as PW.3 and PW.4 and documents Ex.P1 to P10 were marked and on the side of the defendants, DW.1 and DW.2 and documents Exs.D1 to D6 were marked and Commissioner report was marked as Ex.C1 and C2.

10. Based upon the oral and documentary evidence, the trial Judge dismissed the suit filed by this plaintiff and decreed the suit filed by the defendant.

11. Aggrieved by that, the plaintiff preferred an appeal before the Additional Subordinate Judge, Tiruvannamalai in A.S.Nos.12 and 13 of 2012. In that appeal, he preferred I.A.No.33 of 2012 under Order 41 Rule 27 of CPC. The defendant was also contested the petition.

12. Heard both sides. The first Appellate Judge remanded the matter to the trial Court by setting aside the judgment passed by the Additional Subordinate Judge, Tiruvannamalai. He also directed to complete the trial within a period of four months from the date of receipt of the case bundle and parties are given liberty to adduce additional evidence, if any, as they



may be so advised.

13. Aggrieved by that order, the defendant preferred this appeal.

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14. The learned counsel for the appellant submits that the first appellate Court has no power to remand the entire case by setting aside the judgment passed by the trial Judge in the application filed under order 41 Rule 27 of CPC. Further he also argued that if the Appellate Judge satisfied that additional evidence is required for that purpose alone, the case may be sent to trial to record the evidence. Thereafter, the matter has to be sent back to the first appellate Court and based upon the additional evidence, the Appeal has to be disposed of. But the learned counsel for the appellant also pointed out that the first Appellate Judge ignored the essential ingredients as defined under Article 41 Rule 27 of CPC and remanded the matter to the trial Court as erroneous and prayed to set aside the said order.

15. On combined reading of all this provision of law reveals that if the Appellate Court satisfies that after the exercise of due diligence, such evidence was not within his enjoy or could not be produced at the time of trial, then the parties are permitted to adduce additional evidence, either in the Appellate Court itself or to record the same, it can be sent only for that purpose to the trial Court.

16. By way of reply, the counsel for the respondents, based upon coercion, he filed O.S.No.147 of 1998 and with regard the said coercion, he gave a police complaint and FIR was lodged. The said FIR, the documents related to criminal proceedings were vital documents to prove his contention. So, he sought permission before the first Appellate Court in I.A.No.34 of 2012. He also mentioned crime No.726 of 2008, filed under Sections 323, 342, 363, 420, 506(ii) of IPC and the criminal case also conducted before the learned Judicial Magistrate No.I, Tiruvannamalai. So, he sought permission to mark those documents as additional evidence.

17. As per the amended provisions of Order 41 Rule 23A of CPC, when the matter is contested on merits, in case of remand, the first appellate Court should give sufficient reasons for remanding the matter to the trial Court and for setting aside the decree and judgment of the trial Court. In this case, since respondent/plaintiff has came up with a new set of facts by filing additional documents to strengthen his case, the first appellate Court could have taken up the case on merits and dispose of in accordance with law instead the first appellate Court have chosen to remand back the case to the trial Court. In



view of the above the judgment and decree of the learned District Judge remanding the suits to the trial Court are also require to be set aside.

+The Hon'ble Supreme court in P.Purushottam Reddy v. Pratap Steels held at para 9 as follows:

"9. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of Order 41 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause 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 send it to the appellate court. In 1976, Rule 23A has been inserted in Order 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



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covered by Rule 23 and 23A. 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* (AIR 1965 SC 365 at p. 399), it is well settled that inherent powers can be availed of *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 *de hors* the Rules 23 and 23A.

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 Order 20 Rule 3 or Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for 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 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided."

18. But in his affidavit, he has not stated the reason for non-production of those documents before the trial Court. But, on perusal of the plaint averments his cause of action falls upon the alleged kidnap, execution of sale deed with coercion. Hence to establish the case, those documents are just and necessary but for that purpose the entire judgment passed by the trial Court need to be set aside. The documents may be marked and the first appellate Court based upon the evidence shall dispose the appeal on merits.

19. In view of the dictum laid down by the Hon'ble Supreme Court in 2002 (2) SCC 686 it is clear that the power of remand to be exercised by the lower appellate Court must be in conformity with any of the said provisions and a remand is not to be ordered if the case does not fall under any of the aforesaid provisions. Hence, the lower appellate Court itself can appreciate the oral and documentary evidence and come to its own conclusions. Therefore, the impugned common judgment and decree of remand of the lower appellate Court directing remand of the suit for fresh consideration is required to be set aside and the appeals are required to be restored to the file of the lower appellate Court.



20. In view of the above position and considering the old pendency of the case, the following directions are issued: The respondent/plaintiff in O.S.No.147 of 1998 is permitted to adduce oral and documentary evidence and the defendant in that case is permitted to cross examine those witnesses, if any. Both the parties are permitted to adduce additional evidence before the trial Judge. After recording the evidence and the documents submitted by both parties, if any, the matter shall be sent to the first Appellate Court. The first Appellate Judge on considering the additional evidence adduced on the side of both parties shall dispose the appeals on merits as early as possible.

21. Considering the old pendency of the case, the respondent is directed to adduce the evidence as early as possible, without seeking any adjournment and trial Judge is also directed to record the evidence within a period of three months from the date of receipt of the copy of the judgment and send the matter to the first Appellate Court for disposal.

22. Accordingly, these Civil Miscellaneous Appeals are allowed and the order of the first appellate Court is set aside. No Costs. Consequently, connected Miscellaneous Petitions are closed. Total time granted to dispose the case 6 months.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To,

1.The District Judge, Tiruvannamalai

2.The Additional Subordinate Judge, Tiruvannamalai.

Copy to:

The Section Officer,
VR Section, High Court, Madras.

+2ccs to Mr.K.Goviganesan, Advocate SR.Nos.6581 6582

C.M.A.Nos.2371 and 2372 of 2013

A.SK(23.09.2021)