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C.M.A.Nos.1080 and 1081 of 2003

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.10.2023

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.Nos.1080 and 1081 of 2003

- 1.Rajagopal [Deceased]
- 2.R.Selvi
- 3.Swaminathan
- 4.Iyyappan
- 5.Ganesan
- 6.Mariammal

(Appellants 2 to 6 brought on record
as L.Rs. of the deceased sole appellant
vide order of Court dt.15/6/10 made in
CMP Nos.1111, 1112 & 1114 of 2009 in
CMA No.1080 of 2003)

(Appellants 2 to 6 brought on record
as L.Rs. of the deceased sole appellant
vide order of Court dt.15/6/10 made in
CMP Nos.1113, 1114 & 1115 of 2009 in
CMA No.1081 of 2003)

... Appellants in both the C.M.As.

Vs.

- 1.Nataraja Mudaliyar [Deceased]
- 2.N.Selvakumar
- 3.N.Ilangovan
- 4.Tamilarasan
- 5.Kalaiselvi
- 6.Punitha

(RR2 to 6 brought on record as LR
of the deceased sole Respondent viz.
Nataraja Mudaliyar vide Court order



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dated 04/08/2017 made in CMP
Nos.4513 to 4515/2017 in
CMA No.1080/2003)

(RR2 to 6 brought on record as LR
of the deceased sole Respondent viz.
Nataraja Mudaliyar vide Court order
dated 19/10/2023 made in
CMA Nos.1080 & 1081/2003)

... Respondents in both the C.M.As.

Common Prayer:

Civil Miscellaneous Appeals filed under Order 45 Rule (1)(U) of C.P.C. to set aside the judgment and decree dated 18.03.2003 in A.S.Nos.99 and 98 of 2002 respectively, on the file of the Court of Principal District Judge at Nagapattinam and remand the judgment and decree dated 24.09.2002 in O.S.Nos.173 and 179 of 1999 respectively, on the file of the Court of District Munsif at Nagapattinam.

For Appellants : M/s.R.T.Shyamala

For Respondents : Mr.V.Chandrasekaran for R2 to R6

COMMON JUDGMENT

These appeals have been filed seeking to set aside the judgment and decree dated 18.03.2003 in A.S.Nos.99 and 98 of 2002 respectively, on the file of the Court of Principal District Judge at Nagapattinam and remand the judgment and decree dated 24.09.2002 in O.S.Nos.173 and 179 of 1999 respectively, on the file of the Court of District Munsif at Nagapattinam.

2.The learned counsel appearing for the appellants submitted



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that the appellant filed a suit in O.S.No.173 of 1999 for permanent injunction against the respondent for not to interfere with the A Schedule property and remove obstruction made in E Schedule property. The respondent filed a suit in O.S.No.179 of 1999 for mandatory injunction directing the appellant to remove the encroachment made in A Schedule property and not to interfere with the peaceful possession of the C Schedule property. Both the suits were clubbed together and common judgment and decree was passed dismissing the suit filed by the respondent and decreeing the suit filed by the appellant. Aggrieved by the same, the respondent preferred appeal before the lower Appellate Court in A.S.Nos.98 and 99 of 2002. The lower Appellate Court without deciding the appeals, remanded the matter back to the lower Court for fresh adjudication without deciding the preliminary point and without framing any issues under Order 41 Rule 23, 23A of C.P.C. Hence, the order of the lower Appellate Court remanding back the matter to the lower Court for fresh trial is liable to be interfered with. Accordingly, the learned counsel prayed for allowing the appeals.

3.The learned counsel appearing for the respondents submitted



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that the present dispute inbetween the parties with regard to the pathway of the property situated in the Eastern side of the property.

It is purely a pathway dispute, however, there is a confusion with regard to the enjoyment of the pathway, thereby the lower Appellate Court remanded the matter back to the lower Court for fresh trial, which cannot be interfered with. Accordingly, the learned counsel prayed for dismissal of the appeals.

4.Heard the arguments advanced on either side and perused the materials available on record.

5.Admittedly, the appellant filed a suit in O.S.No.173 of 1999 for permanent injunction against the respondent and the respondent filed a suit in O.S.No.179 of 1999 for mandatory injunction. It is equally undisputed fact that the suit filed by the respondent was dismissed and the suit filed by the appellant was decreed in his favour. Aggrieved by the same, the respondent preferred appeal before the lower Appellate Court in A.S.Nos.98 and 99 of 2002. The lower Appellate Court without deciding the appeals, remanded the matter back to the lower Court for fresh adjudication.



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6.The point for consideration in these appeals is that whether the impugned order is justified in terms of Order 41 Rule 23, 23A of C.P.C. or not?

7.It is useful to extract hereunder Order 41 Rule 23, 23A of C.P.C.:

"R. 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 the judgment and order to the Court from whose decree the appeal is preferred, with 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.*

R. 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.”

8.A perusal of the above Rule makes it clear that 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 the judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, however, in the present case, the lower Appellate Court without framing any issues simply remanded the matter back to the lower Court which is not sustainable.

9.As per Order 41 Rule 23, 23A of C.P.C., the lower Appellate Court has to frame the issues and direct the lower Court to re-admit the suit and proceed to determine the suit. Hence, the impugned judgment and decree dated 18.03.2003 in A.S.Nos.99 and 98 of 2002



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respectively, is not in terms of Order 41 Rule 23, 23A of C.P.C.

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10.In view of the above, the judgment and decree dated 18.03.2003 in A.S.Nos.99 and 98 of 2002 respectively, is set aside and the matter is remanded back to the Court of Principal District Judge at Nagapattinam. The Court of Principal District Judge at Nagapattinam shall decide the issue inbetween the parties and dispose of the appeal suits within a period of twelve weeks from the date of receipt of a copy of this order.

11.It is now represented by the learned counsel appearing for the appellants that the sole respondent in C.M.A.No.1081 of 2003 viz., Nataraja Mudaliyar passed away and the respondents 2 to 6 in C.M.A.No.1080 of 2003 are the L.Rs. of the deceased respondent in C.M.A.No.1081 of 2003 and hence, the very same respondents may be impleaded as respondents 2 to 6 in C.M.A.No.1081 of 2003 also and prayed for appropriate orders.

12.The learned counsel appearing for the respondents raise no objection.



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M.DHANDAPANI,J.
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13.The submission made by the learned counsel appearing for the appellants is recorded. Registry is directed to carry out the necessary amendment in C.M.A.No.1081 of 2003.

14.The civil miscellaneous appeals are allowed. No costs.

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Note: Registry is directed to carry out the necessary amendment in C.M.A.No.1081 of 2003.

Speaking Order/ Non Speaking Order

Index: Yes/ No

Internet: Yes/ No

To

1.The Court of Principal District Judge at Nagapattinam.

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