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C.M.A.No.3246 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2023

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.No.3246 of 2006

And

M.P.No.1 of 2006

The Executive Officer,
Arulmighu Audikesava Perumal
And Peyalwar Temple Devasthanam,
Chennai – 4.

... Appellant

Vs.

1.S.Arumugha Nainar @ S.A.Nainar (Deceased)

2.The Commissioner,
Corporation of Chennai,
Chennai – 3.

3.Padmavathy
4.Kanagaraj
5.Ravindran
6.Kannan
7.Karnan
8.Maheswari

(R3 to R8 brought on record as
LR's of the deceased R1 viz.,
S.Arumugha Nainar @ S.A.Nainar
vide court order dated 06/02/2018
made in CMP.16978/17 in
CMA.3246/2006 (MGRJ))

... Respondents



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Prayer:

Civil Miscellaneous Appeal filed under order 43 Rule (u) of the Code of Civil Procedure, to set aside the judgment and decree dated 21.02.2006 and made in A.S.No.588 of 2005 on the file of II Additional Judge, City Civil Court, Chennai, remanding and setting aside the judgment and decree dated 18.03.2005 and made in O.S.No.3735 of 2000 on the file of III Assistant Judge City Civil Court, Chennai.

For Appellant : Mr.P.B.Sampath Kumar
One of the Trustee in the Appellant Temple
Party – In – Person

For Respondents : R1 – Died (steps taken)
R2 and R3, R4, R5 & R8 – No Appearance
R7 – Died (steps due)

J U D G M E N T

This appeal has been filed seeking to set aside the judgment and decree dated 21.02.2006 made in A.S.No.588 of 2005 on the file of II Additional Judge, City Civil Court, Chennai, remanding and setting aside the judgment and decree dated 18.03.2005 and made in O.S.No.3735 of 2000 on the file of III Assistant Judge City Civil Court, Chennai.



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2.The first respondent/ plaintiff filed the suit in O.S.No.3735 of 2000 before the lower Court for permanent injunction restraining the appellant/ first defendant and the second respondent/ second defendant from disturbing the usage of the 30 feet road by the plaintiff, not to sell the property on the road to the encroachers and to not to allow the second respondent to return the said property to appellant. The said suit was dismissed on the ground that the 30 feet road is not approved or recognized by CMDA and in the un-approved property no rights could be sought. Challenging the same, the first respondent filed A.S.No.588 of 2005 before the lower Appellate Court, however, the lower Appellate Court set aside the judgment and decree and remand the suit back to the lower Court in terms of Order 41 Rule 23 of C.P.C. Challenging the same, the present appeal has been filed.

3.The Party – In – Person appearing on behalf of the appellant submitted that the lower Court arrived at the conclusion that the road which was mentioned in the plan is not approved or effected in favour of the appellant. Hence, the suit was dismissed. However, the lower Appellate Court remanded the matter on the ground that any aggrieved person can file a suit for his redressal and no specific issue



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was framed as to whether right is vested on the trustees or purchasers of the plot. Without framing issues the lower Appellate Court set aside the decree and judgment and remand the matter back to the lower Court is not sustainable one.

4.The Party – In – Person appearing on behalf of the appellant further submitted that as per Order 41 Rule 23, 23 A of C.P.C. 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, 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 and is contrary to Order 41 Rule 23, 23A of C.P.C.

5.The Party – In – Person appearing on behalf of the appellant further submitted that for removal of encroachments, similarly situated persons like the appellant have filed public interest litigation before this Court and the same is pending.



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6. Heard the Party – In – Person appearing on behalf of the appellant and perused the materials available on record. There is no representation for the respondents 2, 3, 4, 5 and 8. The appellant has not taken any effective steps to bring on record the legal representatives of the deceased seventh respondent.

7. The plaintiff/ first respondent is alleged to have purchased the disputed property, however, no document was produced before the lower Court and hence the lower Court dismissed the suit filed by the plaintiff. Assailing the same, the plaintiff filed appeal suit before the lower Appellate Court and the lower Appellate Court without framing any issues simply remanded the matter back to the lower Court. The lower Appellate Court could have decided the issue inbetween the parties by affording opportunity to the plaintiff as well as the defendants in the original suit, without doing so, the lower Appellate Court simply remanded the matter back to the lower Court, which is not sustainable one.

8. In ***Lisamma Antony – Vs – Karthiyayini & anr. (2015 (11) SCC 782***), the Hon'ble Apex Court held that where the suit was decided by recording findings on all the issues and in the appellate



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judgment under appeal, findings have been recorded on some of the issues, not preliminary and additional issues framed leaving them to be tried and decided by the trial court is wholly not justified. The Hon'ble Apex Court held that neither Rule 23 nor 23A of Order 41 of C.P.C. applies. It further held that an Appellate Court should be circumspect in ordering remand when the case is not covered by either Rule 23 or Rule 23 A or Rule 25 of C.P.C. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

9. In the case on hand, the issues, which have been dealt with by the lower Court are not preliminary issues. Findings have been rendered on all spheres of the issue and the appeal has been dealt with on merits. Such being the case, the rigors of Rule 23 or 23-A of Order 41 of C.P.C. stands squarely attracted and the lower Appellate Court ought not have remanded the matter to the lower Court to decide the relief that is to be granted to the second defendant/appellant herein. The lower Appellate Court ought to have taken up the issue and decided the same on merits on the basis of the materials available on record and, if need be, could have even taken additional evidence to arrive at a conclusion. However, erroneously



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the lower Appellate Court had remanded the matter to the lower Court, which deserves to be set aside.

10.In view of the above, the judgment and decree dated 21.02.2006 made in A.S.No.588 of 2005 by the learned II Additional Judge, City Civil Court, Chennai, is set aside and the matter is remanded back to the learned II Additional Judge, City Civil Court, Chennai, for fresh consideration. The learned II Additional Judge, City Civil Court, Chennai, shall consider the matter afresh and decide the issue and pass appropriate orders, as expeditiously as possible.

11.The civil miscellaneous appeal is allowed on the above terms. No costs. Consequently, the connected miscellaneous petition is closed.

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Speaking Order/ Non Speaking Order
Index: Yes/ No
Internet: Yes/ No

To

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

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

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