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C.M.A.No.2548 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.10.2023

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.No.2548 of 2011

P.V.Pillai

...Appellant

Vs.

Samivel @ Samuel

...Respondent

PRAYER: The Civil Miscellaneous Appeal filed under Order XLIII Rule 1(t) of C.P.C, against the judgment and decree in A.S.No.30 of 2008 on the file of the Sub Court, Arni, Tiruvanamalai dated 14.12.2009 in remanding and reversing the judgment and decree in O.S.No.296 of 2000 on the file of District Munsif Court, Polur, dated 20.12.2007.

For Appellant : Mr.Sunny Sheen for
Mr.V.Srimathi

For Respondent : Mr.P.Satheesh Kumar

JUDGMENT

The Civil Miscellaneous Appeal has been filed against the order and decreetal order dated 09.10.2017 made in C.M.P.No.10 of 2017 in A.S.No.361 of 2013 on the file of XV Additional Judge, City Civil Court,



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2.The case of the appellant is as follows :

(i) The respondent / plaintiff filed a civil suit in O.S.No.296 of 2000 on the file of District Munsif Court, Polur, Thiruvannamalai District against the appellant herein seeking permanent injunction in respect of the suit schedule property. The said suit was dismissed vide order dated 20.10.2007. Challenging the same, the respondent preferred an appeal in A.S.No.30 of 2008 before the Sub Court, Arani, Thiruvannamalai District, however, the lower appellate Court had set aside the order passed by the lower Court and remanded the same to the lower Court with a direction to conduct re-trial on the ground that the Advocate Commissioner's report is bad in law and it also sought to adduce further evidence. Challenging the order of remand, the present appeal has been filed by the appellant herein.

3. The learned counsel for the appellant submits that as per the provisions of Order 41 Rule 23 of the Code of Civil Procedure, where a decree of the trial court, passed on a preliminary point, is reversed in appeal, the lower appellate court, if it thinks fit, may remand the case for



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adjudication of issue or issues that are to be tried. Under Rule 23-A, where the decree is passed otherwise than on a preliminary point, and where retrial is considered necessary, only in such cases, remand of the matter needs to be made. However, in the case on hand, the appellate Court without framing any issues has remanded the matter to the lower Court arrived at a conclusion that the Advocate Commissioner's report is bad in law and thereby directed to appoint fresh advocate commissioner and sought to adduce further evidence which is *per se* unsustainable. He further submits that this Court may direct the lower appellate Court to appoint fresh advocate commissioner with the help of the town surveyor.

4. The learned counsel for the respondent submits that as per the provisions of Order 41 Rule 23 of the Code of Civil Procedure, the lower appellate court remanded the matter back to the lower court, which cannot be interfered with.

5. Heard the learned counsel for the appellant as well as the learned counsel for the respondent.



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6. Order 41 Rule 23 of the Code of Civil Procedure deals with the power of the appellate court to remand the suit to the trial court on an appeal. It specifically provides that an appeal arising out of a decree of a trial court in a suit, which has been disposed upon a preliminary point, which is reversed in appeal by the lower appellate court, only such of the cases, be remanded to the trial court with the issues that shall be tried in the case along with a copy of the order to the trial court with direction to re-admit the suit and proceed to determine the suit.

7. Rule 23A relates to remand in other cases by the lower appellate court, against a decree, which is otherwise than on a preliminary point and in such cases, if the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

8. Therefore, from the above, it is clear that for the purpose of remand, the requirements mandated in Rule 23 and 23A ought to be fulfilled and only in such cases, either invoking Rule 23 or 23A, the matter could be



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remanded to the trial court by the lower appellate court, that too, by framing of issues, if the matter was dealt with only on preliminary point by the trial court and if it is otherwise as well, the trial court has to frame the issues and remand it to the trial court for retrial. However, in the case on hand, a perusal of the order passed by the lower appellate court reveals that no issues have been framed, but the matter has been merely remanded back to the trial court. Neither there is any finding as to the points in issue, which were considered by the trial court, whether it is on a preliminary issue or a full fledged trial was conducted.

9. Therefore, the order of remand passed by the lower appellate court in A.S.No.30 of 2008 dated 14.12.2009 is against the tenor and mandate of Order 41 Rule 23 CPC and the same is set aside. The lower appellate Court is directed to appoint a fresh Advocate Commissioner with the assistance of the town surveyor within a period of two (2) weeks from the date of receipt of a copy of this order. Thereafter, after receipt of the report of the Advocate Commissioner, the lower appellate court shall proceed with the appeal and dispose of the appeal within a period of twelve (12) weeks from the date of



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receipt of the report of the Advocate Commissioner.

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10. With the above observation, this Civil Miscellaneous Appeal is allowed. No costs.

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rap/RR

Speaking Order : Yes/No

Index : Yes/No

NCC : Yes/No

To

1. Sub Court, Arni, Tiruvanamalai
2. District Munsif Court, Polur
3. The Section Officer, V.R. Section, High Court, Madras.



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