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C.M.A.NO.356 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.07.2023

CORAM :

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

C.M.A.No.356 of 2022
and C.M.P.No.2431 of 2022

1.Pappal	...4 th Plaintiff/Appellant/1 st Appellant
2.Pichamuthu	
3.Annapoorani	
4.Dhanam	...Plaintiffs 1 to 3/Respondents 3 to 5/ Appellants 2 to 4

Versus

1.Arumugam	
2.Perumayee	...Defendants 1 & 2/ Respondents 1 & 2/Respondents

PRAYER : Civil Miscellaneous Appeal filed under Section 43 Rule 1(u) Civil Procedure Code against the Judgment and decree dated 23.09.2019 in A.S.No.84 of 2017 on the file of the II Additional Subordinate Judge, Salem, reversing the Judgment and decree dated 30.03.2016 passed in O.S.No.916 of 2009 on the file of the I Additional District Munsif Court, Salem and remanding the same back to the trial Court.



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For Appellants : Mr.D.Shivakumaran
For Respondents : Mr.R.Subramanian

JUDGMENT

This appeal has been filed challenging the Judgment and Decree dated 23.09.2019 in A.S.No.84 of 2017 on the file of the II Additional Subordinate Judge, Salem and remanding the case to the Trial Court.

2. The plaintiffs filed a Suit for Partition claiming 3/4th share in the first item of the Suit Schedule Property. The second prayer in the Suit was for a declaration that the second item of the Suit Schedule Property belonged to the 4th plaintiff in the Suit. The defendants had filed a written statement and thereafter, remained ex-parte.

3. The Trial Court/I Additional District Munsif Court, Salem, found that the plaintiffs 1 to 3/appellants 2 to 4 herein were entitled to 3/4th share in the first item of the Suit Schedule property and passed a Preliminary Decree. The Trial Court found that the 4th plaintiff/1st appellant herein did not establish an exclusive right over the second item of the Suit Schedule Property and hence, dismissed the Suit as regards the second prayer.



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4. The fourth plaintiff aggrieved by the said finding of the Trial Court filed by an appeal in A.S.No.84 of 2017 before the lower Appellate Court/learned II - Additional Subordinate Judge, Salem. The plaintiffs 1 to 3 were shown as respondents in the said appeal along with the defendants/respondents herein. Before the Appellate Court, the 4th plaintiff filed an application under Order 41 Rule 27 in I.A.No.22 of 2019, seeking to receive certain additional documents. Likewise, the defendants/respondents herein also filed an application under Order 41 Rule 27 in I.A.No.35 of 2019. The Appellate Court found that both the applications deserve to be allowed. However, after holding so, the lower Appellate Court held that the case has to be remanded back to the Trial Court for fresh trial and directed the Trial Court to receive the additional evidence and documents of both the parties and decide the Suit in accordance with law.

5. Mr.D.Shivakumaran, the learned counsel for the appellants submitted that the Suit had two prayers; that the first prayer was allowed by the Trial Court; that since the second prayer was not allowed, the 4th plaintiff/1st appellant had filed the appeal before the lower Appellate Court; that by remanding the matter and ordering fresh trial, the Decree passed in favour of the plaintiffs 1 to 3 /appellants 2 to 4 herein also was set aside; that



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the order of the remanding is contrary to the well settled principle that remand should not be made in a routine manner; that the lower Appellate Court was entitled to examine witnesses, permit additional evidence and decide the appeal; and that there there was no necessity for remand. The learned counsel relied upon the Judgment of the Honourable Supreme Court in *Uttaradi Mutt Vs. Raghavendra Swamy Mutt* reported in (2018) 10 SCC 484 and *Shivakumar and others vs. Sharanabasappa and others* reported in 2021 (11) SCC 277 in support of his submission that remand for re-trial should not be resorted to unless the Trial Court had failed to determine one or more material issues/questions.

6. Mr.R.Subramanian, the learned Counsel for the respondents, *per contra*, submitted the order passed by the lower Appellate Court is in accordance with law and need not be interfered with; that no prejudice would be caused to the appellants, if the Trial Court decides the Suit afresh since both the parties have filed applications to adduce additional evidence. Hence, he prayed for the dismissal of the appeal.

7. This Court finds that the Suit was filed for two reliefs. The first relief has been claimed by the plaintiffs 1 to 3 /appellants 2 to 4. The Trial



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Court held that the plaintiffs are entitled to 3/4th share in the first item of the Suit Schedule Property and passed a Preliminary Decree.

8. As regards the second relief claimed by the fourth plaintiff, which was for a declaration that the Suit Schedule Property belonged to her, the same was denied by the Trial Court. The 4th plaintiff filed an appeal in A.S.No.84 of 2017. Both the 4th plaintiff and the defendants/respondents filed I.A.Nos.22 and 35 of 2019 seeking to produce additional documents.

9. The lower Appellate Court/II Additional Subordinate Judge, Salem after allowing both the applications remitted the matter to the Trial Court/I Additional District Munsif Court, Salem for a fresh trial. The lower Appellate Court ought to have seen that the power of remand is not to be resorted to ordinarily. It is well settled that the said power can be resorted to only if the Trial Court had omitted to try any material issue or to determine any question of fact. In this regard, the observations of the Honourable Supreme Court in *Shivakumar and others vs. Sharanabasappa and others* (cited supra) is extracted hereunder for better understanding:



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“25.2...The power of remitting is ordinarily to be resorted to when the Trial Court has omitted to try any material issue or to determine any question of fact. In other words, the proper procedure in a case where the Trial Court, while disposing of the suit on merits, had failed to determine one or more of the material issue/question(s) is to remit the issue/question(s) under Rule 25 and not to remand the whole case for re-trial.”

10. Therefore, since the Trial Court had not omitted to try any material issue or to determine any question of fact, the order of remand by the lower Appellate Court is unwarranted. Further, it is also seen that by ordering fresh trial, the decree in favour of plaintiffs 1 to 3 is also set aside which would cause prejudice and hardship to the parties. The Honourable Apex Court had held that where there are two options available to the lower Appellate Court, when additional documents are sought to be produced, the lower Appellate Court may first record the evidence itself by permitting the parties to produce evidence before it as per Rule 27 Order 41 of C.P.C. The Honourable Apex Court in ***Uttaradi Mutt Vs. Raghavendra Swamy Mutt***



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(*cited supra*) had observed as follows:

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“15.In other words, there are two options available to the Appellate Court. First, it may record the evidence itself by permitting the parties to produce evidence before it as per Rule 27 of Order XLI or direct the Court from whose decree the appeal under consideration has arisen, to do so.”

11. Therefore, this Court is the view that the Appellate Court ought to have taken additional evidence on its own or in any event directed the Trial Court to record the evidence and send it back to the Appellate Court. There was no necessity for an order of remand only because the parties had filed an application under Order 41 Rule 27 to let in additional evidence.

12. Hence, this Court sets aside the order passed by the learned II Additional Subordinate Judge, Salem in A.S.84 of 2017 and directs the learned Judge to permit all the parties concerned to adduce evidence and mark the documents which were allowed to be marked in I.A.Nos.22 and 35 of 2019, and decide the appeal on its merits.



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WEB COPY 13. With the above observations, Civil Miscellaneous Appeal is allowed. Consequently, the connected Miscellaneous Petition is closed.
No Costs.

20.07.2023

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Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

To

- 1.The II Additional Subordinate Judge, Salem.
2. I Additional District Munsif Court, Salem.



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SUNDER MOHAN, J

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