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C.MA.No.1380 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2024

THE HONOURABLE MR.JUSTICE K.RAJASEKAR

**CMA.No.1380 of 2022
and CMP.No.9978 of 2022**

1.S.Murugaiyan

2.S.Sridharan

3.N.Subramaniam

... Appellants

Vs.

Angammal (1st Plaintiff Died)

1.Chinnappan

... Respondent/2nd plaintiff

2.The District Collector,
Emapuram Post,
Namakkal Taluk & District.

3.District Revenue Officer,
Emapuram Post,
Namakkal Taluk & District.

4.Revenue Divisional Officer,
Tiruchengode Town,
Tiruchengode.



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5.Thasildar,
Padamudipalayam,
Velur Post,
Paramathy Velur Taluk.

... Respondents/Defendants 4
to 7

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of CPC, pleased to prefer this appeal against the Judgment and Decree dated 28.02.2022 and made in A.S.No.16 of 2021 on the file of the Subordinate Judge, Paramathy, reversing the Judgment and Decree dated 26.04.2021 and made in O.S.No.11 of 2012 on the file of the District Munsif Court, Paramathy and prays to set aside the same.

For Appellants : Mr.R.Sivaraman

For R1 : M/s.Zeenath Begum

For R2 to R5 : Mr.N.Muthuvel
Government Advocate

JUDGMENT

This Civil Miscellaneous Petition is filed by the defendants 1 to 3 challenging the Judgment and Decree dated 28.02.2022 and made in A.S.No.16 of 2021 on the file of the Subordinate Judge, Paramathy, reversing the Judgment and Decree dated 26.04.2021 and made in O.S.No.11 of 2012 on the



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file of the District Munsif Court, Paramathy and prays to set aside the same.

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2.For the purpose of convenience the parties are referred to as per the litigation status of the Trial Court.

3.The plaintiffs come forward with the suit seeking declaration that the partition of the cart track described as X and X1 in the rough plan and that the plaintiffs are entitled to enjoy the X and X1 portion of the plan and also the declaration that the defendants 1 to 3 were not having exclusive right over the X1 cart tract, consequently cancelled the pata No.687 issued in favour of the defendants.

4.The plaintiffs have shown three schedule of properties in the plaint. According to them item 1 and 2 of the plaint properties are belonging to the plaintiffs, Item No.3 belonging to plaintiffs and some other persons and they were in possession and enjoyment of the suit properties. According to them there is a cart track in S.No.125/1Q situated adjacent to the land of the defendants. This cart track is common to few land owners including the plaintiff herein. Separate patta was also issued in the name of the persons who



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were entitled to use the cart track including Nanjappa Gounder, who is the husband and father of the first and second plaintiffs respectively. On 28.01.2009, the land situated in S.No.125/1P was purchased by one Murugan and in the sale deed the suit cart track was shown as boundary on the eastern side and the purchaser was given 1/4th share in the cart track. Accordingly, the name of the said Murugan was also add in the patta No.440. Subsequently, Murugan sold the said property in favour of the defendants 1 and 2. Subsequently the third defendant has purchased the 1/4th share in the cart track from the defendants 1 and 2. It is also stated that the total extent of the cart track is 12 cents and the defendants 1 and 2 sold 1/4th of the 12 cents of land in favour of the third defendant. Based on that, patta No.647 was issued in favour of the third defendant. The plaintiff after knowing about the issuance of patta in favour of the third defendant, plaintiffs have submitted a petition to the seventh defendant to cancel the new patta and to restore the old patta in the name of the persons who have been given patta No.440. But the seventh defendant has not taken any steps to effect the patta as requested. Hence, they have issued a legal notice to the defendants dated 06.08.2011 to recognise the rights of the plaintiffs. The defendants 1 to 3 issued reply notice on 01.03.2011. Hence they have come forward to file the suit for the reliefs stated



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above.

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5.The defendants 1 to 3 filed written statement and contended that the land in S.No.125/1Q are in possession and enjoyment of the defendants in which no other is having any right. They admitted that there is a cart track described as X and X1. The plaintiffs are having separate ways to reach their lands and they are not entitled to use the cart track in 125/1Q. Since the plaintiffs are not having any right in S.No.125/1Q and they are not entitled for any relief as claimed in the suit. The Official defendants 4 to 7 filed separate written statement and reported that based on the documents submitted by the defendants new patta has been issued. Originally S.No.125 has been subdivided as the land in S.NOs.125/1D, 125/1H, 125/1L is belonging to plaintiffs. 125/1A, 125/1E, 125/1F, 125/1Q are common pathway for the lands in S.No.125. The plaintiffs and the defendants 1 to 3 are having right to enjoy the S.No.125/1Q, based on the sale deed executed by the defendants 1 and 2 and patta was issued in favour of the third defendant. Patta No.440 was issued in favour of the Nalliya Gounder, Kaaliyanna Gounder, Periyanna Gounder, Raakiya Gounder, Ramasamy, Nanjappa Gounder for the land in S.Nos.125/1A, 125/1E, 125/1F, 125/1Q and 128/2. Based on the pleadings, the trial Court has



framed the following issues.

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1. Whether the suit is bad for non-joinder and necessary parties?

2. Whether the plaintiffs are entitled for declaration declaring that they are entitled to use X and X1 portion of the suit land for taking men, cattle, vehicle etc?

3. Whether the plaintiffs are entitled for declaration or injunction as prayed for?

4. Whether the plaintiffs are entitled for cancellation of patta No.687 in relating to S.No.125/1Q issued in favour of the third defendant and for restoration of the patta No.440 by including the name of the plaintiffs?

5. What are the other reliefs claimed for?

6. After considering all the facts, the trial Court held that the suit is bad for non-joinder and some more parties who are having right in the land and also persons whose names found in patta No.440. It also held that the plaintiffs are failed to prove the case and they are having the right over the land in S.No.125/1Q, more particularly, the cart track X and X1 portion. Aggrieved



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over the same, the plaintiffs have filed an appeal before the Sub Court, Paramathy. The Appellate Court after considering the evidence on record has taken a view that S.No.125/1Q is having an extent of 12 cents, whereas the defendants 1 and 2 had purchased the 1/4th share of the 125/1Q and based on this patta was issued exclusively in favour of the third defendant which is not permissible. However, some more parties have to be included in the suit and also found that both parties have suppressed the materials relating about to the rights of other parties, thereby re-examination of witnesses of the trial Court is necessary and accordingly remanded the matter to the trial Court, with a direction that both the parties shall given opportunity to adduce further evidence and pass Judgment. Aggrieved over the said order of remand, the defendants 1 to 3 have filed this appeal.

7.The learned counsel for the appellants submits that the plaintiffs were not able to establish their right in the suit cart track. It is the specific case that S.No.125/1Q is the cart tract whereas they have also given X and X1 portion as a cart track. The remaining share holders are none other than the defendants and they are having both sides of land of the cart track. Since, they themselves have purchased the remaining portion which was earlier with the plaintiff's



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father has been purchased by the defendant No.3, and a patta was issued in his name and there is no infirmity in issuing new patta exclusively in the name of the third defendant only for the land covered in S.NO.125/1Q. This was not properly appreciated by both the Courts. However, admittedly the plaintiffs pleas that their 1/4th share was sold by the second plaintiff's father and the second plaintiff to one Murugan, having transferred their right in the land in S.No.125/1Q and subsequently based on the same, after revenue records have mutated, the plaintiffs herein are not entitled and contended that they are having right and interest in the very same land. There is no evidence placed on record that the suit cart track is the common land used by the general public or the villagers. The issuance of patta is sufficient to show that the cart track is in private land and it is not treated as common public cart track. Since the persons who are residing around the cart track are having exclusive right over the cart track. In this case, the lands around the cart track belongs to the defendants and they alone having right to use the cart track to reach their lands. The claim of the plaintiff is based on suppression of fact and also on misconception that the cart track is a public cart track. There is an ample evidence placed before the trial Court and the same has been properly appreciated by the trial Court. The lower appellate Court has not considered those evidence and without passing



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orders just remanded the case once again for adducing both side evidences or place their case before the Court is unwarranted. Hence, he prayed to set aside the order passed by the lower appellate Court.

8.The learned Government Advocate appearing for the official respondents submits that the suit cart track is a public cart track which was used by the persons who are having lands on northern side and western side of the suit cart track. Patta No.440 was issued in favour of various persons, including in the name of the second plaintiff's father. It is true that the second plaintiff's father has sold the 1/4th share in the cart track along with the land in S.No.125/1P. It does not mean the right of using the common cart track as public cart track which has also been given up. Therefore the trial Court has dismissed the suit only on the technical ground that other persons who are having interest in the property have not been impleaded in the suit. He further submitted that during the pendency off the suit, plaintiffs have file an I.A.No.266 of 2018 for appointment of Advocate Commissioner and the same was also dismissed by the trial Court, challenging the above said order they have filed a CRP before this Court in CRP.No.1823 of 2019 and this Court vide order dated 11.01.2023, directed the trial Court to restore I.A.No.56 of 2018



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and also directed to appoint Advocate Commissioner and to deal with the suit on its own merits. The said order has not been executed. In the mean time, the suit was also disposed of and the appeal has also been decided. Since, this Court has also granted liberty to appoint an Advocate Commissioner to note down the physical features of the property and file a report along with the plan, within the time fixed by the Court below and the order of remand has also been passed, it is proper to give direction to the trial Court to provide sufficient opportunity to adduce evidence on both sides.

9.I have heard both sides and perused the materials placed on record.

10.While deciding the appeal the lower appellate Court exercising the power of ordering remand is very limited only in certain circumstances it can be used. The Lower appellate Court in its Judgment has invoked Order 41 and Rule 23 A and remand the matter for fresh consideration of the trial Court.

11.The point for consideration arise in this appeal is that whether the lower appellate Court was right in remanding the matter for adducing further



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evidence on both sides, when there is already evidence recorded on both sides.

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12. On careful perusal of the Judgment passed by the trial Court, the case of the plaintiffs is that originally for the land in S.NO.125/1Q, a patta was issued in the name of several persons including the second plaintiff's father Nanjappa Gounder. On perusal of the patta No.440 (Ex.B3), it shows that this patta was not issued only for the single Survey number in S.No.125/1A, it was issued for various lands such as S.Nos.125/1A, 125/1E, 125/1F, 125/1Q and 128/2 in favour of 25 persons. This shows that this patta was issued for various persons for different lands including S.No.125/1Q. Admittedly the second plaintiff's father have right in S.Nos.125/1Q and 125/1P, it was transferred in the name of one Murugan and he in-turn sold the same to defendants 1 and 2, subsequently defendants 1 and 2 have retained the land i.e. S.No.125/1P and sold their right in S.No.125/1Q i.e. 1/4th share. It is true that the defendants have not been able to establish the fact that who are all the persons having remaning 3/4th share in the S.No.125/1Q. But admittedly, the plaintiffs who come forward for declaration is having right in the cart track and also seeking cancellation issued in favour of the third defendant, who had purchased the same from the defendants 1 and 2, has not produce any documentary evidence



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to show that what right they are having in the suit cart track and the burden is on the plaintiffs to prove the right over the suit cart track. In the trial Court, this issue is decided against the plaintiffs. Whereas on perusal of the order of the lower appellate Court it shows that the lower appellate Court accepted that the plaintiff has failed to prove his right over the suit cart tract and observed at the same time the defendants have not properly proved their right over the suit cart track. Based on the same, the lower appellate Court decided the matter and remanded the matter for fresh consideration. I am of the view that there is no such re-examination of the witnesses by the trial Court is necessary since the plaintiffs have not sought for filing any additional evidence. Accordingly, I am of the view that the reasons made for remand the matter is not sustainable and the lower appellate Court is directed to consider the appeal on merits from the available materials and pass orders on merits and in accordance with law.

13. Accordingly, this Civil Miscellaneous Appeal is allowed. Consequently, the connected miscellaneous petition is closed. However there shall be no order as to costs.

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Index: Yes/No

Speaking order : Yes/No

Neutral Citation : Yes/No

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- 2.The District Munsif Court, Paramathy.
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- 4.District Revenue Officer,
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- 5.Revenue Divisional Officer,
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- 6.Thasildar,
Padamudipalayam,
Velur Post,
Paramathy Velur Taluk.
- 7.The Section Officer,
V.R.Section,
High Court, Madras.

K.RAJASEKAR, J.

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