(2010) 09 MAD CK 0262

Madras High Court

Case No: C.M.A. No. 323 of 2007 and M.P. No. 1 of 2007

K. Mitchiammal, S. Chitra, S. Murthy and S. Ravikumar		APPELLANT
	Vs	
J. Loganathan		RESPONDENT

Date of Decision: Sept. 3, 2010

Acts Referred:

- Civil Procedure Code Amendment Act, 1976 - Order 41 Rule 23A
- Civil Procedure Code, 1908 (CPC) - Section 151

Hon'ble Judges: B. Rajendran, J

Bench: Single Bench

Advocate: R. Subramanian, for the Appellant; S.K. Raghunathan, for the Respondent

Final Decision: Allowed

Judgement

B. Rajendran, J.

The appellants are the defendants in the suit. The suit was filed by the respondent herein against the appellants for partition and separate possession of half share in the property. The suit was dismissed on the ground that the suit property was not the joint family property of Jothi Gounder, but it was the property of one Lakshmi Ammal. The Plaintiff, even though declared as legitimate son of Jothi Gounder, it was held that the property does not belong to the joint family property and consequently, the relief of partition cannot be granted. Aggrieved against the same, the plaintiff/respondent herein has filed an appeal before the first appellate Court. In the appeal, the present appellants also filed a Cross-appeal challenging the findings rendered by the trial court to the effect that the plaintiff is the legitimate son of Jothi Gounder because, according to them, the plaintiff is the son born through the second wife and therefore, legally, he cannot be called as a legitimate son of Jothi Gounder.

2. The first appellate Court has taken up the first appeal as well as the cross appeal for hearing together. In the course of argument, it was found that apart from the appellant in the first appeal, there were other sisters of the appellant namely daughters of the first wife of Jothi Gounder, who were not impleaded as a parties in the suit for partition. It was also found that one of the witnessess examined on the side of plaintiff/respondent herein before the court below namely PW3 is one of the daughters of Jothi Gounder, but she was also not impleaded as a party to the suit. It was also found that the question of non-impleading the necessary parties namely other daughters of Jothi Gounder in the partition suit was not raised by the defendants nor the plaintiff has chosen to implead them as party knowing fully well that they are interested persons for effective adjudication of the suit. According to the plaintiff/respondent herein, he has already examined one of the daughters of Jothi Gounder namely PW3 before the trial court and therefore, impleading the legal heirs/daughters of Jothi Gounder is not necessary. The first appellate Court taking into consideration the curious position namely the admission of PW3 as daughter of Jothi Gounder, born through his first wife, having not been impleaded as a party but she was examined as PW3 before the trial court, thought it fit to remand the matter back to the trial court for fresh consideration as there are new sharers to be impleaded in a suit for partition and fresh adjudication is warranted.

3. The learned Counsel for the appellants contended that though a finding had been given by the first appellate Court that necessary parties to the suit for partition have not been impleaded, merely because they were not impleaded as a party, the first appellate Court ought not to have remanded the matter back to the trial court for fresh consideration after setting aside the well considered decree and judgment passed by the trial court. Inasmuch as the plaintiff has examined one of the daughters of Jothi Gounder as PW3 in the suit for partition before the trial court, the other daughters of Jothi Goudner may not have a different case to put forward than what was deposed by PW3. In any event, the first appellate Court could have taken up the task of impleading the necessary parties and disposed of the first appeal on merits instead of remanding the matter back to the trial court inasmuch as the only point to be decided in the first appeal is as to whether the property was owned by Jothi Gounder or Lakshmi Ammal. If the property belonged to Jothi Gounder, the plaintiff is entitled to half a share, whereas the share of the respondents will be reduced by virtue of impleading the daughters of Jothi Gounder. It is also stated that the first appellate Court has not rendered any finding or reasons to set aside the well considered judgment and decree of the trial court.

4. Heard both sides. As per the amended provisions of Order 41 Rule 23A of Code of Civil Procedure, when the matter is contested on merits, in case of remand, the first appellate Court should give sufficient reasons for remanding the matter to the trial court and for setting aside the decree and judgment of the trial court. In this case, as the defendants have not raised the plea of non-joinder of necessary parties, the first appellate Court felt that since it is a suit for partition, the daughters are also

necessary parties. But having decided so, the first appellate Court itself could have taken up the task of impleading the legal heirs of Jothi Gounder and decided the appeal on merits and in accordance with law.

5. The first appellate Court, in a case where re-trial was considered necessary, will have the powers to remand the matter to the trial court. But, the first appellate Court should give a finding that the decree and judgment of the court below is vitiated and thereafter remand the matter. In the absence of such a finding by the first appellate Court, the order of remand passed by the first appellate Court is liable to be set aside as it is against the provisions of Order 41 Rule 23A of Code of Civil Procedure.

6. In this connection, I am fortified by the decision of the Division Bench of this Court reported in S. Shanmugham Vs. S. Sundaram, S. Vasudevan, Valliammal, Saraswathy and Leelavathy, , it was held in para-12 as follows:

12. On a perusal of the judgment of the lower appellate Court, it is revealed that on the basis of both oral and documentary evidence available on record, the lower appellate Court came to the conclusion that the third defendant is also entitled to a share in ''A'' schedule property and in the sketch of the Commissioner also when it is made clear that as to how the ''A'' schedule property could be partitioned and especially when the provisions of Order 41, Rules 23 to 29 of CPC are not a bar to take further evidence or to appoint a commissioner, if so necessary, and to try the appeal, as rightly pointed out by the learned Counsel for the appellate, we are of the view that there is no necessity to remand the matter back to the trial court and that the lower appellate Court itself can try the matter after taking further evidence as to the point to be decided and it can dispose of the appeal on merits and in accordance with law.

7. It is also relevant to look into the decision of the Division Bench of this Court reported in V. Munusamy (deceased) and Others Vs. M. Suguna, wherein this Honourable Court held as follows:

7. Based on the averment in the affidavit filed in support of I.A. No. 7745 of 1987, filed u/s 4(1) of the Act, the trial court, after satisfying itself, gave a finding that the petitioner therein/appellant herein is entitled to purchase the suit property on such finding satisfies one of the conditions prescribed u/s 4(1) of the Act. No doubt, the trial court has not arrived the value of the shae purchased by the transferee i.e., plaintiff. However, as rightly pointed out by the learned senior counsel for the appellant, on this ground, the lower appellate court set aside the order of the trial Court, including the finding of the entitlement of the appellant to purchase undivided share alienated by the family member to stranger alienee. As rightly argued, the principles underlying the exercise of the power of remand by the appellate Court has not been properly applied or exercised by the lower appellate Court. Courts have held that only in exceptional cases where the judgment of the

trial Court is wholly unintelligible or incomprehensible, the appellate Court can remand the matter for fresh disposal. Order 41, Rule 23 give ample power to the lower appellate Court to decide all issues, including appointment of a Commission for local inspection, secure finding from the trial Court. Even if certain mistakes crept in in the order of the trial court, the same can be rectified by the appellate Court itself, unless there are very compelling circumstances to make an order of remand. An order of remand should not be taken to be matter of course and the power of remand should be sparingly exercised. There should be always endeavour to dispose of the case by the appellate Court itself, when the commissions and omissions made by the first Court could be corrected by the appellate Court. In the case on hand, even if there is omission by the trial court regarding determination of the value of the share purchased by the plaintiff, in the light of the above discussion coupled with the mandate provided under Order 41 Rules 23 and 27, the appellate Court itself can ascertain the value either by appointment of a Commissioner or by getting a report from the trial Court. As said earlier, Section 4 91) of the Act gives option to any member of the family who is a co-sharer in respect of a dwelling house, a portion whereof has been transferred to a person who is not a member of such family, to purchase the share of such transferee if a suit for partition is filed by that transferee. On such option being exercised, the valuation of such share has to be determined. The crucial date for the purpose of fixing the valuation of the share of such transferee is the date when option to purchase in accordance with Section 4 of the Act is exercised by the defendant co-sharer.

8. In both the decisions of the Division Bench mentioned above, presided by Hon''ble Mr. Justice P. Sathasivam, as he then was, it was categorically held that First Appellate Court has got right to take further evidence, or appoint an advocate commissioner, if so necessary and there is no necessity for remanding the matter back to the trial court as the lower Appellate Court itself can try the matter and dispose of the appeal on merits and in accordance with law.

9. In the decision reported in Municipal Corporation, Hyderabad Vs. Sunder Singh, it was held by the Honourable Supreme Court that an order of remand should not be passed by the First Appellate Court as a matter of course. In fact, the Court should be slow in exercising the discretionary powers conferred under Rule 23. Further, before passing an order of remand, the first Appellate Court has to record reasons that re-trial was necessary and also give finding that the decree and judgment passed by the trial Court is liable to be reversed and only then, an order of remand should be passed. In Para Nos. 17, 18, 32, 33 and 34, it was held as follows:

17. Order 41 Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate court must disagree with the findings of the trial court on the said issue. Only when a decree is to be reversed in appeal, the appellate court considers it necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the

appellate court.

18. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order 41 Rule 23 of the CPC and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41 Rule 23A of the CPC is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code.

34. An order of remand cannot be passed on ipse dixit of the court. The provisions of Order 2 Rule 2 of the CPC as also Section 11 thereof could be invoked, provided of course the conditions precedent therefore were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas.

10. In Bhuvaneswari Vs. Saraswathi Ammal, , the Division Bench of this Court in para 3, held as follows:

3. We went through the judgment of the lower appellate Court. As already noted, enough oral and documentary evidence had been let in on the side of the plaintiff as well as on the side of the defendant. An order of remand cannot be for the mere purpose of remanding a proceeding to the lower Court. It is governed by the provisions of the Code of Procedure, commencing from Order 41 Rule 22 onwards. The appellate Judge''s view that in order to enable the parties to have the suit properties identified, an Advocate Commissioner had to be appointed and for that purpose the suit must be remanded to the trial court, in our considered opinion, is not warranted on the facts of the case. If it is possible for the appellate Court to evaluate the evidence made available on record and come to its own conclusion one way or the other, then it is open to the lower appellate Court to come to the aid of the parties for filling up a lacuna which is found wanting in the recoreds.

11. In this connection, I am also fortified by the decision rendered by the Honourable Supreme Court reported in P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., wherein in para-10 and 11, it was stated thus:

10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the CPC by the CPC Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 Code of Civil Procedure. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction u/s 151 CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 Code of Civil Procedure. In cases where additional evidence is required to be taken in the event of any one of the clauses of Sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati (AIR at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand dehors Rules 23 and 23A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering

a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 Code of Civil Procedure. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision.

12. In M/s Sekaran Real Estates Vs. Punjab National Bank, a learned single Judge in para No. 4, held as follows:

It is clear from the above decisions as well as the provisions contained in Order 41, Rules 23 to 29, CPC that duty is cast on the appellate Court to find that the decree of the trial court should be set aside. Even the fact that there are some defects or infirmities in the reasoning of the trial court is not a ground for the appellate court to remand the same to the trial court. The appellate Court should come to the clear conclusion that the findings of the trial court cannot be supported and must be set aside. Only in exceptional cases where the judgment of the trial court is wholly

unintelligible or incomprehensible that the apprllate Court can remand the suit for fresh trial. A reading of the judgment of the appellate Court would show that it has not at all considered the judgment of the trial court nor pointed out infirmity or defect in the conclusion. Further, the learned appellate Judge has not borne in mind any of the principles mentioned above. A careful scrutiny of the judgment also shows that he never felt that the judgment of the trial court must be set aside or reversed. After allowing the amendment petition, the appellate court has simply directed the trial court to try the matter once again, after affording further opportunity to the parties, the directions contained in the order of remand are vague and too general in character. The fact that the lower appellate Court has not considered the reasoning or merits of the decree of the trial court has not been disputed by the learned Counsel for the respondent-Bank.

13. In Kannathal and Others Vs. Arulmighu Kanniammal Karuppasamy Thirukoil and State of Tamil Nadu, , a learned single Judge of this Honourable Court held in para No. 15 and 17 as follows:

15. It is also settled law that if the issues arising in the suit could be decided on the evidence available on record, the lower Appellate Court itself should decide the case on merits without unnecessarily ordering remand. A perusal of the pleadings in the case shows that all the necessary pleadings are available on record. Even if the Lower Appellate Court was of the opinion that it was necessary to give an opportunity to the plaintiff to amend the pleadings, that opportunity could have been given in the First Appellate Court itself and for that purpose, the remand is not needed.

16. ....

17. In the light of the law laid down by the Apex Court in the decisions reported in Ishwardas v. State of Madhya Pradesh and Ors. AIR 1979 SC 55 and P. Purusottam Reddy and Anr. v. Pratap Steels Limited 2002 (2) CTC 686, this Court is of the considered view that the Lower Appellate Court has committed an error of law in remanding the matter only for the purpose of affording an opportunity to the plaintiff to amend the pleadings and to adduce additional evidence. As laid down by the Apex Court it is not proper for the Appellate Court to remand the case to enable the parties to make good their lapse.

14. In (Sujatha v. Vijay Anand and Anr.) (2007) 4 MLJ 447, a learned single Judge of this Court in Para No. 15 and 16, held as follows:

15. In the case on hand, the learned District Judge has not reversed or set aside the finding of the trial court. It is only to give opportunity to the plaintiffs to prove the Will dated 12.08.1982, the lower Appellate Court has remanded that suit to the trial court. The procedure adopted by the learned District Judge is not correct. The District Judge himself got jurisdiction and powers under Order 41 and Section 151 of Code of Civil Procedure

16. I am of the opinion that the order of remand of the suit cannot be sustained and therefore, the judgment and decree of the learned District Judge remanding the suit to the trial court are set aside. The learned District Judge is directed to take the first appeal and I.A. No. 53 of 2001 on its file and give opportunity to both parties with regard to the proof of the said document dated 12.08.1982 and dispose of the first appeal on merits.

15. In the aforesaid decisions, it was categorically held that order of remand should not be passed as a matter of course and without giving a finding as to how the decree and judgment of the trial court is perverse, illegal, especially, after amendment to Order 41 Rule 23A of Code of Civil Procedure.

16. The learned Counsel for the appellants fairly submitted that the appellants have no objection for impleading all the daughters of Jothi Gounder in the first appellate Court itself. In fact, the learned Counsel for the respondent brought to the notice of this Court that subsequent to the order of remand, they have also filed necessary application before the trial court to implead the necessary parties namely daughters of Jothi Gounder for which the appellant has no objection but the legal heirs have to be impleaded only before the first appellate Court. Inasmuch as the first appellate Court has remanded the matter back to the trial court for the purpose of impleading the necessary parties to the suit and now the learned Counsel for the appellants have no objection to implead the necessary parties, but before the first appellate Court and the first appellate Court also has not given any finding to set aside the well considered decree and judgment passed by the trial court, the decree and judgment passed by the first appellate Court is set aside. The matter is remanded back to the first appellate Court for disposing of the first appeal suit on merits and in accordance with law. The first appellate Court shall dispose of the first appeal on merits and in accordance with law after giving sufficient opportunity to both sides.

17. In the result, the civil miscellaneous petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.