

(2011) 01 MAD CK 0392

In the Madras High Court

Case No : C.M.A. No. 1525 of 2009 and M.P. No. 1 of 2009

Periyanayagasamy

APPELLANT

Vs

Jesudoss and Others

RESPONDENT

Date of Decision : 01-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105(1), 105(2), 97

Citation : (2012) 2 MLJ 81

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : S. Subbiah, for the Appellant; R. Baiauhramanian, for the Respondent

Final Decision : Dismissed

Judgement

R. Subbiah, J.—This appeal arises out of the order of remand dated 15.2.2008 passed by the learned Additional District Judge (Fast Track Court), Ariyalur, in A.S. No. 101 of 2003, whereby the judgment and decree dated 22.10.1997 passed by the learned District Munsif, Jayankondam, were set aside and the matter was remanded to the trial Court for fresh disposal. The appellant herein is the defendant and the respondents are the plaintiffs before the trial Court. The circumstances, which led the appellant/defendant to file the present appeal, are as follows:

(a) Respondents 1 to 4 herein/plaintiffs are the sons of one Chinnappan, the 5th respondent. Originally respondents 1 to 4 filed a suit as against the appellant/defendant for injunction restraining the appellant from interfering with their peaceful possession and enjoyment of the suit property consisting four items. It is the case of the plaintiffs inter alia that the entire suit property situated in new S. No. 115/5A at Pattanangkurichi Village comprised within the sub-registration district of Andimadam owned by their father Chinnappan, the 5th respondent and a partition took place on 18.6.1991 between the plaintiffs and their father in respect of the suit schedule property, in which the suit 1st, 2nd, 3rd and 4th

items of the properties were allotted to the share of 1st, 2nd, 3rd and 4th plaintiffs respectively. Joint patta in respect of said 1st to 4th items of the properties was also issued in favour of the plaintiffs. The entire extent of 0.26.5 Ares is in possession and enjoyment of the plaintiffs. The appellant has no right whatsoever in the suit property. The appellant had purchased the property situated on the northern side of the suit property from their father i.e. the 5th respondent. The appellant in order to defeat the right of the plaintiffs in the suit property, started to give trouble by cutting the trees, available in the suit property. On 28.5.1996, the appellant made an attempt to trespass into the suit property. Hence, the plaintiffs filed the suit for the relief stated supra.

(b) The said suit was resisted by the appellant by filing a written statement, admitting that the entire extent of the suit property situated in S. No. 115/5, namely, 0.66 cents belonged to Chinnappan; in which, he had purchased the northern portion of the suit property, namely, 0.33 cents, from the said Chinnappan under a sale deed dated 25.2.1988 for a consideration of Rs. 33,000/-. Pursuant to which, possession was also handed over to the appellant by the father of the plaintiffs. The 5th respondent is none other than the maternal uncle of the appellant. Though the appellant paid the entire sale consideration, the sale deed was not registered since there was a deficiency of stamp papers and the 5th respondent left the sale deed unregistered and the execution of the sale deed was over in the stamp paper of Rs. 150/- alone. When the appellant requested the 5th respondent to come to the Registrar's office and to complete the sale deed, the 5th respondent refused to do so and asked the appellant to purchase the rest of the land on the south in the same survey number, for which the defendant was not agreeable since he had no money for the same. The defendant is a teacher working in an Elementary School. The 5th respondent is a necessary party to the suit. Thus, he prayed for the dismissal of the suit.

(c) The trial Court framed necessary issues and on the side of the plaintiffs, P.Ws.1 to 6 were examined and Exhibits A-1 to A-10 were marked and on the side of the defendant, D.Ws. 1 to 3 were examined and Exhibits B-1 to B-9 were marked. The trial Court, on consideration of the entire evidence both oral and documentary, dismissed the suit. Being aggrieved, the plaintiffs and their father filed an appeal before the Additional District Judge, Fast Track Court, Ariyalur, in A.S. No. 101 of 2003. Pending appeal, the respondents filed two applications, one in I.A. No. 18 of 2004 to implead Chinnappan as a party to the proceedings and to add one more prayer in the plaint, namely, for a declaration declaring the right of the 5th respondent in the entire suit property. Both the applications were allowed by the lower appellate Court. In view of the same, the lower appellate Court set aside the judgment and decree of the trial Court and remanded the matter to the trial Court to give liberty to the 5th plaintiff, viz., Chinnappan to put forth his contentions in the suit and decide the suit afresh. Challenging the order of remand, the defendant has filed the present appeal.

2. Learned counsel appearing on behalf of the appellant/defendant would submit that the order of remand should not be made mechanically. In the instant case, there is no dispute with regard to the title of Chinnappan to the suit property. When there is no dispute with regard to the title of Chinnappan with regard to the suit property, there is no need for impleading Chinnappan and amending the prayer and the appellate Court itself can decide the suit on merits. In support of his contentions, the learned counsel has relied on the judgments in Somasundaram Chettiar and Others Vs. Balasubramanian, , Kannathal and Others Vs. Arulmighu Kanniammal Karuppasamy Thirukoil and State of Tamil Nadu, and Parimal Vs. Veena @ Bharti,

3. Per contra, the learned counsel for the 4th and 5th respondents submitted that it is the main defence of the appellant before the trial Court that the suit property belonged to Chinnappan, the 5th respondent and he purchased 0.33 cents situated on the northern side of the suit property from the same from Chinnappan, but Chinnappan was not impleaded as a party to the suit before the trial Court. But, before the lower appellate Court, the respondents have taken two applications, one to implead the Chinnappan as one of the parties to the suits and also to amend the plaint to add the prayer for declaration declaring the right of Chinnappan in the suit property. The said applications were allowed by the Court on 13.8.2004 and 22.7.1997 respectively. Since the declaration prayer is added, the nature of the suit has totally changed. Under such circumstances, the order of remand passed by the lower appellate Court to record the evidence of Chinnappan cannot be found fault with. The learned counsel further submitted that the appellant having failed to challenge the orders passed in I.A. Nos. 18 of 2004 and 35 of 1997, now cannot challenge the order of remand. In support of the said submissions, the learned counsel has relied on the decisions in Md. Najibuzzaman v. Sheo Shankar AIR (30) 1943 OUDH 288 and Purushottam Reddy v. Pratap Steels Limited (2002) 2 MLJ 99 (SC).

4. By way of reply, the learned counsel for the appellant submitted that there is no need for the appellant to challenge the interim order passed in I.A. No. 18 of 2004. When order of remand is made in setting aside the judgment and decree of the trial Court, the appellant can question the correctness of the interim orders by filing an appeal as against the order of remand as per Section 105(2) C.P.C. In this regard, the learned counsel further submitted that the application allowed by the Court below to implead the 5th respondent as one of the parties is not an appealable order. Therefore, the correctness of the same could be questioned in the present appeal filed against the order of remand. Furthermore, while questioning the order of remand, the appellant has to raise the grounds with regard to the correctness of the interim order. In the instant case, the appellant has raised the grounds with regard to the correctness of the orders passed by the lower appellate Court in I.A. No. 18 of 2004 to implead Chinnappan as one of the parties and I.A. No. 35 of 1997 to add the declaration prayer. Therefore, it cannot be said that when the appellant has failed to challenge the interim orders, he cannot now question the order of remand. In

support of this contention, the learned counsel has relied on the decision in Achal Misra Vs. Rama Shanker Singh and Others, .

5. Heard the learned counsel for the parties and perused the materials available on record.

6. It is the case of the respondents/plaintiffs that the suit property belonged to Chinnappan. By partition deed dated 18.6.1991, the items of the suit property were allotted to the share of respondents 1 to 4. The property purchased by the appellant on the northern side of the suit property, also belonged to them. Therefore, they have filed the suit for bare injunction alleging that the appellant was giving trouble by cutting the trees in the suit property. But, it is the defence of the appellant that he had purchased the northern portion of the suit property, namely, 0.33 cents from the father of plaintiffs 1 to 4 i.e. Chinnappan but the sale deed was not registered; however he was put in possession by the father of plaintiffs 1 to 4 long back. The said suit was dismissed. Hence, the respondents filed an appeal and during pendency of the appeal, two applications one in I.A. 18 of 2004 to implead Chinnappan as one of the parties and I.A. No. 35 of 1997 to add the prayer of declaration declaring the right and title of Chinnappan; both the applications were allowed, but the appellant has not filed any appeal against the interim orders. When the judgment and decree of the trial Court were set aside and the matter was remanded for the purpose of examining Chinnappan, now the present appeal is filed by the appellant not only questioning the order of remand but also the interim orders passed in I.A. No. 18 of 2004 and I.A. No. 35 of 1997.

7. Learned counsel appearing for the appellant relied on number of judgments in order to show that the order of remand cannot be made as a routine course. Since the appeal is a continuation of original proceedings, the appellate Court itself can decide the case. That apart, the appellant also questioning the correctness of the interim order in I.A. No. 18 of 2004, made his submission. It is the submission of the learned counsel for the appellant that whether interim order is appealable order or not, the same could be questioned when challenging the order of remand u/s 105(2) C.P.C. In this regard, it is useful to refer the judgment relied on by the appellant in Achal Misra v. Rama Shanker Singh (supra) and the relevant paragraphs are extracted hereunder:

12. In Sheonath v. Ramnath (1865) 10 MIA 413, the Privy Council reiterated that a party is not bound to appeal from every interlocutory order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory order.

13. This principle is recognized by Section 105(1) of the CPC and reaffirmed by Order 43 Rule (1A) of the code. The two exceptions to this Rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code

of Civil Procedure, 1908 which precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came to be considered by this Court in *Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105(2) of the CPC as regards orders of remand where the order of remand itself was made appealable. Since Section 105(2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court, the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in *Amar Chand Butail Vs. Union of India (UOI) and Others*, and in other subsequent decisions.

8. It is, no doubt, the interim order could be challenged in the appeal filed as against the order of remand. But at the same time, the appellant ought to have raised the grounds with regard to the correctness of the interim order in the grounds of appeal filed against the order of remand. In the instant case, the appellant has raised the grounds with regard to the order passed by the lower appellate Court in I.A. 18 of 2004 in impleading Chinnappan as one of the parties and the appellant has not chosen to raise the ground, with regard to the amendment of the prayer in the plaint. Moreover, as per Section 105(2) C.P.C., any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Therefore, only if an error, defect or irregularity is found in the interim order passed by the Court below, the correctness of the same could be challenged while challenging the order of remand. So far as in the instant case, it is the specific defence of the appellant himself that he had purchased the property from the father of plaintiffs 1 to 4 and from the date of purchase, he was put in possession in the suit property. But in spite of this defence, the plaintiffs have not chosen to implead the said Chinnappan before the trial Court; but, during pendency of the appeal, they filed the applications and the same were allowed by the lower appellate Court. It is to be noted that the appellant has also kept quiet without challenging the interim orders independently. Under such circumstances, I do not find any error or defect or irregularity in the order passed by the lower appellate Court in impleading Chinnappan as one of the parties and consequential amendment made in the prayer, which is necessary for effective adjudication of the issue involved in the suit. No doubt, the appellant has relied on a number of judgments in support of his contention that the order of remand could not be made as a routine course. Absolutely, there is no controversy in accepting the principle; but in the instant case, by adding a new party, the prayer of the plaint itself was amended. Considering the facts and circumstances,

I do not find any infirmity in the order passed by the lower appellate Court and hence, I am not inclined to interfere with the order of remand. I am also not inclined to set aside the orders passed in the interlocutory applications since I do not find any error, defect or irregularity in allowing the said applications. Under such circumstances, the appeal is liable to be dismissed.

Consequently, the civil miscellaneous appeal is dismissed. No costs. Connected M.P. is closed.