
(1996) 04 MAD CK 0082
In the Madras High Court

Soosairaj

APPELLANT

Vs

The State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 10-04-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : (1996) 2 LW 184 : (1996) 2 MLJ 257

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—This appeal is against the judgment of the learned District Judge, Pudukottai remanding the suit O.S. No. 760 of 1984 to

the trial court for fresh disposal in the light of the directions given in the judgment.

2. The plaintiff's case is as follows: The plaintiff was the successful bidder of toddy shop No. 20, in Kottaikkadu village in Alangudi taluk for a

period of one year for 1983-84. The highest bid amount was Rs. 2100. Since it was less than the upset price fixed by the defendants, the auction

was not confirmed. No licence was issued to the plaintiff on that account. No agreement was entered into. There was a failure of monsoon in the

village and therefore the defendant is bound to refund Rs. 1,000 deposited by the plaintiff and also a sum of Rs. 1,050 paid by the plaintiff towards

kist for 15 days. The plaintiff sustained a loss of Rs. 5,000 which he has given as advance to the persons who tap the toddy from the tree. While

so, the plaintiff has received a notice under the Revenue Recovery Act, on account of the non-payment of monthly kist. The amount claimed is not

correct. The plaintiff is not responsible for the loss sustained by the defendant. When the amount due to the defendant is in dispute, initiation of

revenue recovery proceedings is not proper. Hence the suit.

3. The first defendant in his written statement has stated briefly as follows: The plaintiff was the successful bidder in respect of shop No. 20 for the period 1983-84. The bid amount was Rs. 2,100. Even though it was far less than the upset price fixed at Rs. 4,100 per mensem by the defendant, and there was no other bidders, the auction was confirmed in favour of the plaintiff. He has paid half a month's kist and also solvency certificate to the tune of Rs. 200 and advance of a sum of Rs. 1,000. As per the terms of the auction, the payment has to be made 2 1/2 months prior to the confirmation of the auction. But the plaintiff has failed to deposit the amount in spite of repeated requests. Even though the shop was again sold on public auction, there was no bidders. Therefore, steps have been taken for realising the loss sustained by the defendant under the revenue recovery proceedings. The plaintiff is not entitled to file the suit in court and it is liable to be dismissed.

4. The trial court, after trial, has held that since licence has not been issued to the plaintiff, the defendant is not entitled to demand any kist from the plaintiff and on those findings, has come to the conclusion that the plaintiff is entitled to a decree and granted a decree in favour of the plaintiff.

5. As against the said judgment, the defendant put forward an appeal to the District Court, Pudukottai. The learned District Judge, has held that evidence has to be let in by both sides and in order to provide sufficient opportunity to all, the matter has to be remitted to the trial court for fresh disposal according to law, after giving an opportunity to the defendant to produce the additional documents which would show the confirmation of the auction and also service of notice to the auction and other relevant materials.

6. Aggrieved over the same, the plaintiff has preferred this appeal.

7. The suit is for injunction, for restraining the defendant from taking any steps for realising the alleged loss sustained by the defendant under the revenue recovery proceedings. The plaintiff has alleged in the plaint that he was not issued with any licence and the bid for auction of toddy shop No. 20 made by him was not confirmed. The trial court has originally held that the licence was not issued to the plaintiff and the bid at the auction by the plaintiff was not confirmed by the defendant and therefore the defendant is not entitled to demand any kist from the plaintiff. Against the said

judgment, the defendant preferred an appeal to the District Court, Pudukottai. The appeal was allowed and the matter was remanded. It was again dismissed. An appeal was preferred for a second time. The learned District Judge who heard the appeal has given weight to the contention of the appellant before there that the appellant was having documents which would show the confirmation of the sale in favour of the plaintiff and the licence being issued to the plaintiff. The learned District Judge, has observed that in the previous order of remand made in A.S. No. 67 of 1989, since the defendant was not given an opportunity to let in any fresh evidence neither oral nor documentary, the defendant was unable to exhibit the licence and the order of confirmation and therefore in the interests of justice, an opportunity is given to the defendant to exhibit these documents and for that purpose, the matter is remanded. I am of opinion that the learned District Judge has not looked into the provisions of Order 41, Rules 23 to 27 of the CPC before passing the impugned order. The expression "interests of justice" does not widen the power of the appellate court to remand the suit in the sense that irrespective of the fact whether it comes to the conclusion that the judgment and decree of the trial court are liable to be set aside or not if the appellate court is of the opinion that the "interests of justice" require that there should be a fresh trial, it can remand the suit for fresh disposal. Such a contention is not a valid one if we consider Order 41, Rule 23 of the CPC which lays down that the appellate court should first come to the conclusion that the decision of the trial court is liable to be reversed. In this case by remanding the suit and by giving an opportunity to the defendant to let in further to evidence, the lower appellate court has only opened the gate to gate to enable the defendants to fill up the lacuna and it may even give room for fabrication of the documents. Therefore the order of remand cannot be sustained.

8. As per the decision reported in Mrs. Indira Bhalchandra Gokhale (deceased by LRs) Vs. Union of India and Another, , it is held as follows:

Under Order 41, Rule 27, C.P.C., production of additional evidence whether oral or documentary is permitted only in certain contingencies. The first contingency is that the evidence sought to be produced in the appeal court is that which the trial court has refused to admit though it ought to have been admitted. Next, is the contingency where the evidence sought to be produced was not available to the party seeking to produce it

notwithstanding the exercise of the due diligence by him. The third contingency is the requirement of the court of appeal for additional evidence so

as to enable it to pronounce judgment. Order 41, Rule 27, C.P.C. is not to be taken recourse to merely because a party at the stage of appeal

finds that some material could have tilted the decision in its favour has not been produced but should have been.

9. It is thus seen that the provisions of Order 41, Rule 27, C.P.C. are not meant to enable either party to fill up the gaps in the evidence or to

better their case in the Appellate Court when once they find that the evidence which they had chosen to let in the trial court is found by the

appellate court to be insufficient to justify their case. The lower appellate court has given an opportunity to the defendants to fill up the gaps in the

defendants case. It is not a case in which the trial court has refused to admit the documents produced by the appellant and it is not a case where

the evidence sought to be produced was not available to the defendant notwithstanding the exercise of due diligence by him at the time of the trial.

It is also not a case in which, the lower appellate court has expressed that it is unable to pronounce the judgment without these documents.

Therefore, the order of remand which is not in consonance with the provisions of Order 41, Rule 27, of the CPC cannot be upheld. In that view, I

am of opinion, that the appeal has got to be allowed.

10. In the result, the civil miscellaneous appeal is allowed setting aside the order of remand passed by the lower appellate court in A.S. No. 83 of

1991 and directing the lower appellate court to dispose the appeal A.S. No. 83 of 1991 by itself on the evidence available before it. Since the suit

is an old one, the lower appellate court is further directed to dispose the appeal within three months from the date of receipt of the copy of this

judgment by this Court. No costs.