

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2016

(Judgment Reserved on : 08.11.2016)

CORAM

THE HON'BLE MR.JUSTICE G.CHOCKALINGAM

C.M.A.No.1537 of 2009

and

M.P.No.1 of 2009

Kaliyaperumal Appellant/Defendant

.. Vs ..

1.Gopalakrishnan

2.Rajendran

3.Jothilakshmi ... Respondents 1 to 3/
Plaintiffs 2 to 3

4.Balamurugan 4th Respondent/1st Plaintiff

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (a) read with Section 104 of CPC, against the Order of remand made in A.S.No.5 of 2007, dated 19.02.2009 on the file of the Additional District Judge (Fast Tack Court No.3), at Vridhachalam, reversing the judgment and decree in O.S.No.555 of 1996, dated 29.07.2005 on the file of the Principal District Munsif Court at Vridhachalam.

For Appellant : Mr.S.Mukunth for
M/s.Sarvabhauman Associates

For RR-1 to 3 : Mr.V.Anand

JUDGMENT

This civil miscellaneous appeal is directed against the Order of remand made in A.S.No.5 of 2007, dated 19.02.2009 on the file of the learned Additional District Judge (Fast Tack Court No.3), at Vridhachalam, reversing the judgment and decree in O.S.No.555 of 1996, dated 29.07.2005 on the file of the Principal District Munsif Court at Vridhachalam.

2. It is admitted by both parties that the plaintiffs/respondents herein have filed a suit in O.S.No.555 of 1996 for partition of the plaintiffs' 4/5th shares over the

suit properties and for other reliefs before the Principal District Munsif Court, Vridhachalam, and the trial Court/Principal District Munsif Court, Vridhachalam, after hearing both the parties, dismissed the said suit on 29.07.2005. Aggrieved by the said order of the dismissal, the plaintiffs 2 to 4 have preferred an appeal before the learned Additional District Judge, (Fast Track Court No.3), Vridhachalam, and the said appeal was numbered as A.S.No.5 of 2007. After hearing the arguments of both parties, the First Appellate Court allowed the said appeal and remanded the matter to the trial Court by order dated 19.02.2009 for fresh disposal. As against the order of remand, the present civil miscellaneous appeal is preferred by the appellant/defendant.

3. The learned counsel for the appellant/defendant would vehemently contend that the suit filed by the plaintiffs was dismissed by the trial Court on the ground of partial partition and on the other ground that the property was not described properly and also on the other grounds. But, the First Appellate Court, without considering the evidence and the documents adduced on either side before the trial Court, erroneously allowed the appeal filed by the plaintiffs 2 to 4 and remanded the matter to the trial Court. It is further contended that even though there were materials available to decide the appeal, the First Appellate Court allowed the appeal and remanded the matter to the trial Court which is not maintainable in law. Hence, the learned counsel for the appellant/defendant prayed that the order passed by the First Appellate Court has to be set aside and the civil miscellaneous appeal has to be allowed.

4. In support of his contentions, the learned counsel for the appellant relied on a decision of the Hon'ble Supreme Court reported in (2015) 13 Supreme Court Cases 673 [Zarif Ahmad (Dead) through legal representatives and another Vs. Mohd, Farooq], wherein, at paragraph No.13, the Hon'ble Supreme Court has held as follows.

"13. No doubt, Section 107 CPC empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 CPC provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is not a healthy practice to remand a case to the trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case."

5. The learned counsel for the respondents 1 to 3/plaintiffs 2 to 4 would contend that the First Appellate Court, after considering the entire evidence adduced on either side, correctly passed an order allowing the appeal and remanding the matter to the trial Court and therefore, there is no illegality or infirmity in the order passed by the First Appellate Court and hence, the order passed by the first Appellate Court has to be confirmed and the appeal has to be dismissed.

6. This Court has considered the submissions made by the learned counsel appearing for the appellant and the learned counsel appearing for the respondents 1 to 3 and perused the entire records.

7. On reading of the plaint, it is seen that the plaintiffs have filed the suit claiming partition in the ABC Schedule properties and also for passing a preliminary decree for partition of the 4/5th shares over the suit properties. Even according to the plaint, it reveals that 'A' Schedule property is the joint family property consisting of plaintiffs 1 to 4 and also the defendant and 'B' schedule property was purchased by the defendant out of the compensation amount given by the Neyveli Lignite Corporation for acquiring the land belonging to the plaintiffs and defendant. Further, 'C' Schedule property was purchased by the defendant out of the income and earnings from 'A' and 'B' Schedule properties.

8. For the above pleadings, the defendant has filed written statement and specifically denied that 'A' Schedule property is not a joint family property as stated in the plaint and 'B' Schedule property was purchased by the defendant out of his personal earnings and the items mentioned in the 'B' Schedule property belongs to the defendant alone and 'C' Schedule property was not purchased from the income and earnings derived from 'A' and 'B' Schedule properties and 'C' schedule property is also separate property of the defendant.

9. The trial Court, after perusal of the pleadings and the written statement filed by the defendant, framed issues on 08.09.1995 which read as follows:-

"1) Whether the suit filed by the plaintiffs includes all the family properties and the suit is non joinder of partial partition.?

2) Whether 'A' Schedule property is separate property of the defendant or joint family property.?

3) Whether the property was correctly described in the plaint?

4) Whether the plaintiffs are entitled for partition in 'A' and 'B' Schedule properties.

5) Whether the plaintiffs are entitled for partition and if so, what is the share of the plaintiffs."

10. In this case, evidence was adduced by either side to prove the above issues and judgment was pronounced by the trial Court. On reading of the entire pleadings and the judgment of the trial Court, it is seen that regarding 'C' Schedule property, there were no issues framed. Even though there are pleadings to that effect, the trial Court has not properly framed the issues and tried the suit.

11. Since the trial Court has not properly framed the issues according to the pleadings, this Court is of the considered view that the judgment passed by the trial Court is liable to be set aside and the matter has to be remitted back to the trial Court for fresh disposal after framing necessary issues. The First Appellate Court, after considering the entire facts and circumstances of the case, correctly passed an order setting aside the order passed by the trial Court and remitting the matter back to the trial Court for fresh disposal. This Court is also of the considered view that since there were no proper issues framed regarding 'B' and 'C' Schedule properties, the judgment passed by the trial Court has to be set aside and the matter has to be remitted back to the trial Court for fresh disposal according to law, after giving opportunity to both parties to adduce oral and documentary evidence.

12. In the result, this Civil Miscellaneous Appeal is dismissed and the judgment passed by the First Appellate Court is confirmed and the matter is remitted back to the trial Court for fresh disposal. The trial Court is directed to frame necessary issues according to the pleadings after giving opportunity to both parties to adduce oral and documentary evidence on the newly framed additional issues and dispose the case according to law, within a period of eight weeks from the date of receipt of a copy of this judgment. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

Jr1

To

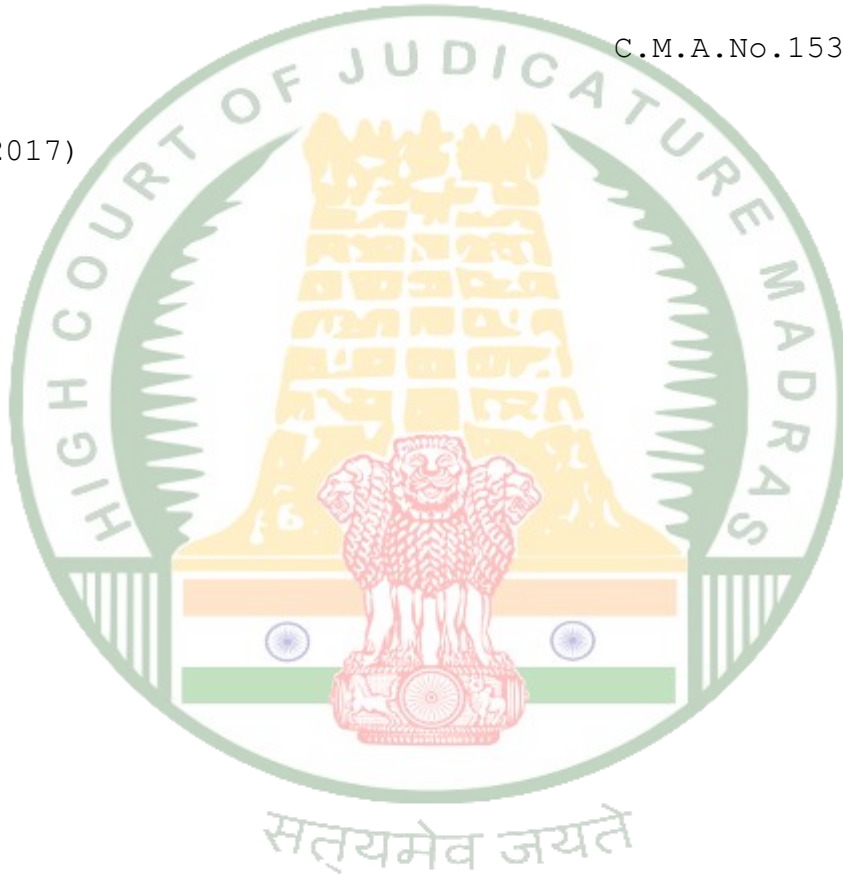
1.The Additional District Judge,
(Fast Tack Court No.3),
Vridhachalam.

2.The Principal District Munsif,
Vridhachalam.

+lcc to M/s.Sarvabhauman Associates, Advocate, S.R.No.74758

C.M.A.No.1537 of 2009

SVI (CO)
CA(28/02/2017)



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