

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 24.08.2016

CORAM

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

C.M.A.No.1725 of 2009
and
M.P.No.1 of 2009

K.R.Sundaram

... Appellant/Plaintiff

Vs.

Mahalakshmi

.... Respondent/Defendant

Prayer: Civil Miscellaneous Appeal is filed against the order of remand dated 23.12.2008 and made in the appeal in A.S.No.7 of 2008 on the file of the Principal District Court, Coimbatore, reversing the judgment and decree, dated 06.03.2007 and made in the suit in O.S.No.602 of 2004 on the file of the First Additional Sub-Court, Coimbatore.

For Appellant : Mr.M.V.Krishnan

For Respondent : Mr.V.Anandhamoorthy

JUDGMENT

Challenging the order of remand dated 23.12.2008 and made in the appeal in A.S.No.7 of 2008 on the file of the learned Principal District Judge, Coimbatore, this present Civil Miscellaneous Appeal is filed by the appellant/defendant.

2) For easy reference and for the sake of convenience, the appellant herein may hereinafter be referred to as the plaintiff whereas the respondent be referred to as the defendant wherever the context so require.

3) Heard Mr.M.V.Krishnan, learned counsel for the appellant.

4) The plaintiff who is the appellant herein had filed the suit in O.S.No.602 of 2004 on the file of the First Additional Sub-Court, Coimbatore, as against the defendant, seeking the relief of recovery of money, directing the defendant to pay a sum of Rs.3,40,000/- with subsequent interest at the rate of 9% per annum. This suit was resisted by the respondent by filing her written statement.

5) On appreciation of evidences both oral and documentary available on record, the learned First Additional Sub-Judge, Coimbatore had proceeded to decree the suit, directing the defendant to pay a sum of Rs.3,40,000/- to the plaintiff with interest at the rate of 9% per annum on the principal amount of Rs.2,50,000/- from the date of plaint till date of decree and thereafter at 6% per annum till the date of realization.

6) Having been aggrieved by the Judgment and Decree of the Trial Court, the respondent/defendant had preferred an appeal in A.S.No.7 of 2008 on the file of Principal District Judge, Coimbatore.

7) After hearing both sides, the learned Principal District Judge while allowing the appeal had set aside the Judgment and decree of the Trial Court dated 06.03.2007, and subsequent by remitted the suit in O.S.No.602 of 2004 back to the file of the trial Court with a direction to take the suit on its original file and formulate an issue as to whether, the suit is maintainable as it was filed without obtaining the leave of the Court under Order 3 Rule 2 of C.P.C to file the suit through P.W.2 who is said to be the power of attorney agent of the plaintiff and also to provide an opportunity to both sides to adduce additional evidences and dispose of the suit on merits.

8) Challenging the order of remand, the present appeal is filed by the plaintiff.

9) The learned Trial Judge had appreciated the evidences and granted a decree, directing the defendant to pay the suit claim to the plaintiff. It appears that the learned Trial Judge had appreciated the evidences extensively and allowed the suit granting the relief on merits.

10) The First Appellate Court on a feeble ground, had remanded the matter back to the Trial Court, directing the learned Trial Judge to frame an issue with reference to the maintainability of the suit as no permission was obtained or as no order was obtained to recognize P.W.2 as the power agent of the plaintiff under Order 3 Rule 2 of the Code of Civil Procedure to verify and sign the plaint on behalf of the principal viz., the plaintiff.

11) As suggested by the learned counsel for the appellant, this Court finds that the First Appellate Court is having ample power to decide this issue, even to formulate an issue, in this connection, and dispose the appeal, on merit, without being remanded the suit back to the Trial Court.

12) For reference, Rule 33 of Order 41 is extracted as under:-

33. Power of Court of Appeal - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities. AIR 1982 SC 98.

Order 41, Rule 33 does not confer an unrestricted right to reopen decrees which had become final merely because the appellate Court did not agree with the opinion of the Court appealed from. AIR 1982 SC 98.

13) As observed by the Apex Court in Ravikumar Vs. Julumi Devi 2010, 3 law weekly 10 (SC) in exercise of its power under Order 41 Rule 33, the First Appellate Court can come to a finding different from the one which has been arrived at by the Trial Court especially in a case where appreciation of evidences by the Trial Court was not proper. Even the First Appellate Court exercising its power can also frame an issue, which is absolutely necessary for the better disposal of the suit.

14) Keeping in view of the above fact, this Court finds that the appeal in A.S.No.7 of 2008 itself may be remitted back to the First Appellate Court to dispose the same on merits.

After formulating an issue as to whether the suit is maintainable as the plaintiff had failed to obtain an order from the Trial Court under Order 3 Rule 2 of CPC recognizing P.W.2 as its power of attorney agent.

15) In the result, this Civil Miscellaneous Appeal is allowed. The order of remand dated 23.12.2008 made by the First Appellate Court in the appeal in A.S.No.7 of 2008 is set aside and the appeal in A.S.No.7 of 2008 is remitted back to the First Appellate Court with the direction to dispose the same within a period of two months from the date of receipt of a copy of this order. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Coimbatore.
2. The First Additional Subordinate Judge,
Coimbatore.

Copy To

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.M.V.Krishnan, Advocate, S.R.No.48058
+1cc to Mr.V.Anandhamoorthy, Advocate, S.R.No.48303

C.M.A.No.1725 of 2009
and
M.P.No.1 of 2009

KS(CO)
CA(19/01/2017)