



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.11.2017

CORAM :

WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CMA(MD)No.482 of 2017

Karuppaiah (died)

1.Selvi

2.Anand

(appellants 1&2 brought on
record as the Lrs of the deceased
sole appellant, vide Court order
dated 31.11.2017 made in
CMP(MD)No.1551 to 1553 of 2017)

... Appellants

Vs.

Lakshmi

(Rep by his Power Agent Saroja)

... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Order 43 Rule (1) (t) of CPC, to set aside the fair and decreetal order in I.A.No.200 of 2010 in A.S.No.120 of 2008 dated 19.08.2011 on the file of Sub Court, Pudukkottai.

For Appellants : Mr.N.Balakrishnan
For Respondent : Ms.K.Porkodi Karnan

JUDGMENT

The defendant in the suit is the appellant in the CMA. The respondent herein filed O.S.No.160 of 2000 on the file District Munsif Court, Aranthangi seeking the relief of declaration and injunction in respect of 44 cents of land in Survey No.199/3 in Arasarkulam, Aranthangi Taluk. The Trial Court partly decreed the suit in respect of 34 cents of land on the Eastern side. It was held that the defendant / appellant herein Karuppaiah (died) was entitled to 10 cents on the Western side.

2.The respondent herein filed A.S.No.120 of 2008 on the file of Sub Court, Pudukkottai. The appeal was taken up for hearing on 08.10.2009. On the said date, the counsel appearing for the appellant/defendant herein filed memo reporting no instructions. The copy of the memo filed by the counsel for the defendant in the first appeal is enclosed in the typed set of papers. The First Appellate Court chose to dispose of the First Appeal on merits. The



appeal filed by the plaintiff was allowed by judgment and decree dated 09.10.2009.

3.The defendant filed I.A.No.200 of 2010 under Order 41 Rule 21 of CPC praying for re-hearing of the appeal. Even though, the said I.A was filed in time, there was a delay in numbering the same. The First Appellate Court by the impugned order dated 19.08.2011 dismissed the I.A. The First Appellate Court was of the view that the application has been filed in order to protract the matters. However, a finding has been given that there was no record to show that the defendant was not heard in the said first appeal.

4.Heard the learned counsel on either side and perused the materials on record.

5.The materials on record clearly show that the appellant Karuppaiah(died) was not heard before the First Appellate Court. The first appeal filed by the plaintiff was disposed of on merits. The memo dated 08.10.2009 filed by the counsel for the defendant clearly states that he was reporting no instructions. The First Appeal was taken up and disposed of on the very next date ie., 09.10.2009. No doubt, the judgment of the First Appellate Court states that the First Appeal was disposed of by hearing the counsel on either side. But, this was subsequently disputed by the defendant. That is why I.A.No.200 of 2010 was filed for re-hearing.

6.The plaintiff filed her counter affidavit in the said I.A.No.200 of 2010. A reading of the said counter would show that the defendant did not really present his case when the first appeal was taken up for disposal. Though the judgment was on merits, it was really an ex-parte decision. The only issue is whether the defendant was heard before the disposal of the first appeal. The answer has to be in the negative. A reading of the affidavit and counter filed in I.A.No.200 of 2010 in A.S.No.120 of 2008 would clearly show that the defendant has given satisfactory reasons for re-hearing of the first appeal.

7.The First Appellate Court erred in dismissing I.A.No.200 of 2010 by order dated 19.08.2011. Therefore, the same is set aside. This appeal is allowed. The First Appellate Court shall hear and dispose of A.S.No.120 of 2008 on merits and in accordance with law on or before 31.01.2018. No costs.

Sd/-

Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar



To

1. The Subordinate Judge,
Pudukkottai.

2. The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO M/s.POLAX LEGAL SOLUTIONS, IN SR No. 90006
+ 1 CC TO Mr.N.BALAKRISHNAN, ADVOCATE IN SR No. 90286

SKM

TE/SV/SAR-4 : 29/12/2017 : 3P/5C

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