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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:12.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.NO.1538 OF 2019
and
C.M.P.No.4302 OF 2019

D.M.Elangovan

...Appellant

Vs.

Raja

... Respondent

PRAYER: Civil Miscellaneous Appeal under Order XLIII Rule 1 of the Code of Civil Procedure praying to set aside the fair and decreetal order dated 27.11.2018 made in I.A.No.6 of 2018 in A.S.No.8 of 2016, on the file of the Additional District Court, Dharmapuri.

For appellant :Mr.D.Ramesh Kumar

For respondent :Mr.P.Valliappan

J U D G M E N T

This appeal is filed by the appellant seeking to set aside the fair and decreetal order dated 27.11.2018 in I.A.No.6 of 2018 in A.S.No.8 of 2016, on the file of the Additional District Court, Dharmapuri.

2. The respondent in the present civil miscellaneous appeal filed a suit for recovery of money and the same was dismissed, against which he preferred an appeal in A.S.No.8 of 2016 before the Principal District Judge, Dharmapuri.

3. In the appeal, an exparte decree and judgment came to be passed. Thereafter, the respondent filed an execution petition E.P.No.234 of 2017, to recover money in default of payment to commit appellant to Civil Prison. After receipt of notice, the appellant preferred the petition I.A.No.6 of 2018 under Order 41 Rule 21 of CPC on the ground that the notice in appeal proceeding was not duly served on him.



4. The Lower Appellate Court dismissed the petition on the ground that the judgment and decree was made after considering the merits of the case. Therefore, the petition to rehear the appeal was not sustainable.

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5. In other words, the lower Appellate Court failed to consider as to whether the notice was duly served on appellant or not and as to whether the appellant has proved that the notice was not served on him, which prevented him from appearing before the Court.

4. The Court below has passed the order without considering the merits of the petition filed by the appellant under Order 41 Rule 21 C.P.C. Therefore, the order is set aside and the matter is remitted back to the lower appellate Court to consider the petition afresh and to pass orders. The respondent is entitled to raise all objections with regard to service of notice and delay in filing the petition. The lower appellate Court shall dispose of the petition in I.A.No.6 of 2018 within a period of 30 days from the date of the receipt of a copy of this order.

5. With the above observations, the Civil Miscellaneous Appeal is ordered. No Costs. Consequently, connected Civil Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

bkn

To

1.The Additional District Court
Dharmapuri

+1 CC to Mr.D.Ramesh Kumar, Advocate sr 37314.

+1 CC to Mr.P.Valliappan, Advocate sr 36723.

C.M.A.NO.1538 OF 2019
and
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TM(CO)
SP(22/08/2019)