

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

CMA.NO.2169 OF 2019 AND  
CMP.No.8913/2019

1. Ramasamy Gounder

2. Jayammal

3. Kavitha

... Appellants

-vs-

1. Tamilselvi

2. Chinnapaiyan

... Respondents

Prayer: Civil Miscellaneous Appeal filed against the judgment and decree of the Principal District Judge, Namakkal, dated 11.01.2019 made in A.S.No.29/2016 reversing remanding the judgment and decree of the Subordinate Judge, Rasipuram, dated 09.03.2016 and made in I.A.No.38 of 2015 in O.S.No.22 of 2014 and to set aside the same.

For Appellants : Mr.Tranquebar Dorai Vasu

For 1<sup>st</sup> Respondent: Mr.V.Raghavachari

R2 : Set exparte

J U D G M E N T  
सत्यमेव जयते

This Civil Miscellaneous Appeal has been directed against the judgment and decree of the learned Principal District Judge, Namakkal, dated 11.01.2019 made in A.S.No.29/2016, reversing the judgment and decree of the learned Subordinate Judge, Rasipuram, dated 09.03.2016 made in I.A.No.38 of 2015 in O.S.No.22 of 2014 and to set aside the same.

2. At the outset, Mr.V.Ragavachari, learned Counsel for the 1<sup>st</sup> respondent raising preliminary objection against the maintainability of the Civil Miscellaneous Appeal filed by the defendants 1 to 3/appellants herein argued that instead of filing second appeal against that when the suit was filed by the plaintiff/1<sup>st</sup> respondent herein, on the file of the learned Subordinate Judge, Rasipuram, seeking a decree for partition of

the suit property, that was challenged by filing an application under Order 7 Rule 11 read with Section 151 of CPC to reject the plaint. The trial court allowing the I.A.No.38/2018 filed under Order 7 Rule 11 CPC and rejecting the plaint on the ground that no cause of action has been disclosed held that no cause of action has been made out by the plaintiff/1<sup>st</sup> respondent. Aggrieved thereby, an appeal has been filed by the plaintiff in A.S.No.29/2016 under Section 96 of CPC read with Order 41 Rule 1 of CPC on the file of the learned Principal District Judge, Namakkal. The learned Appellate Court after perusing the entire records, without going into the question whether the statements of the defendants were true or the statement of the plaintiff was true, holding that the veracity of all the statements of both parties shall be determined only during the trial, allowed the appeal, thereby setting aside the decree and judgment of the learned Subordinate Judge, Rasipuram, passed in I.A.No.38/2015 in O.S.No.22/2014 dated 09.03.2016. Aggrieved thereby, the present Civil Miscellaneous Appeal has been filed, instead of filing Second Appeal under Section 100 of CPC.

3. Mr.V.Ragavachari, learned Counsel for the 1<sup>st</sup> respondent further argued against the maintainability of the Civil Miscellaneous Appeal referring to Order 41 Rules 23 and 23A of CPC., that when the order rejecting of the plaint under Order 7 Rule 11 of CPC. is a decree under Section 2(2) of CPC., and the plaint was rejected, aggrieved thereby, the plaintiff/respondent has rightly filed the First Appeal under Section 96 of CPC read with Order 41 Rule 1 of CPC. The learned First Appellate Court while entertaining the A.S. No.29/2016 has allowed the same holding clearly that there is no merit in the I.A.No.38/2015 warranting rejection of the plaint and accordingly, the same was dismissed and the trial court was bound to consider the entire issue allowing both the parties to face the trial. Now aggrieved thereby, the appellants ought to have filed Second Appeal for the simple reason that once the A.S.No.29/2016 was allowed by judgment dated 11.01.2019 by the learned Principal District Judge, Namakkal, which is a decree as per Section 2(2) of the CPC, the question of filing Civil Miscellaneous Appeal will not arise.

4. In support of his contention, the learned Counsel for the 1<sup>st</sup> respondent has also heavily relied on a decision of the Hon'ble Apex Court in Shamsher Singh vs. Rajinder Prashad and others reported in (1973) 2 Supreme Court Cases 524 for a proposition that once the plaint is rejected under Order 7 Rule 11 of CPC, such an order amounts to decree under Section 2(2) of CPC, therefore, there is a right of appeal always open to the plaintiff, as such, this appeal has been filed and the same was also allowed without using the word, 'remand', therefore, the defendants 1 to 3 shall file only the Second Appeal under Section 100 of C.P.C. He has also referred to a judgment of our High Court in T.H.Anees Ahamed vs. Union Bank of India rep. By

its Manager, Bangalore Road, Krishnagiri, Krishnagiri District reported in 2012 (3) MWN (Civil) 46 wherein the above said ratio has been followed. Therefore, it is the contention of the learned Counsel for the 1<sup>st</sup> respondent that once the judgment and decree have been passed by the appellate court as against which if the appellants/defendants 1 to 3 are aggrieved, the remedy lies only by way of filing the Second Appeal, hence, the Civil Miscellaneous Appeal filed by the defendants 1 to 3/appellants is not legally maintainable in law.

5. At this stage, Mr. Tranquebar Dorai Vasu, learned Counsel for the appellants by drawing the notice of this Court to Order 43 Rule 1(u) of CPC argued that when the First Appellate court has allowed the appeal, no doubt, the said decree is appealable by filing Second Appeal. But in the present case, as pointed out by the learned Counsel for the 1<sup>st</sup> respondent, the learned I Appellate Court has remanded the matter back without mentioning the word 'remand', however, there has been a specific direction given by the learned Principal District Judge, Namakkal, directing both the parties to face trial before the trial court for the purpose of considering the materials placed by both the parties. Therefore, when the matter has been sent back to the trial court with a direction to the trial court to peruse all the evidences both oral and documentary to be placed by both parties, the impugned decretal order dated 11.01.2019 passed in A.S.No.29/2016 has to be understood by a joint reading of Order 41 R 23 and 23(A) of CPC. as an order of remand only, and as such, an appeal under Order 43 Rule 1(u) of CPC will lie, therefore, this present Miscellaneous Appeal alone is legally maintainable, he pleaded.

6. There is a direct judgment of the Hon'ble Apex Court in the case of Jegannathan Vs. Raju Sigamani and others [(2012) 5 SCC 540] holding that Civil Miscellaneous Appeal from the order of remand is maintainable. It is useful to refer to the relevant portion of the judgment, which is extracted below:-

"15. Order 43 of the Code provides for appeals from orders. Clause (u) of Rule 1 Order 43 was amended consequent upon insertion of Rule 23A in Order 41 w.e.f. February 1, 1977. It reads as under:

An appeal shall lie from the following orders under the provisions of Section 104, namely:-

x x x x

(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

16. It is clear from the above provision that an order of remand passed under Order 41 Rule 23A is amenable to appeal under Order 43 Rule 1 (u) of the Code.

17. The High Court relied upon a decision of this

Court in the case Narayanan Vs. Kumaran & Ors. (2004) 4 SCC 26 in holding that Civil Miscellaneous Appeal from the order of remand was not maintainable. The High Court was clearly in error."

7. Further, it is also relevant to extract Order 41 Rules 23, 23 A and also Order 43(1)(u) here under:

"Order 41 Rule 23: Remand of case by appellate court : Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

(23A. Remand in other cases—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.); and

Order 43 Rule 1 (u) : Appeal from orders: An appeal shall lie from the following orders under the provisions of Section 104, namely:-

....  
...

(u) an order under Rule 23 (for Rule 23A) of Order XLI remanding a case, where an appeal would lie from the decree of the appellate court.

8.A joint reading of the above, in my considered opinion, shows that when the plaintiff/1<sup>st</sup> respondent filed an appeal against the rejection of the plaint under Section 96 of the CPC read with Order 41 Rule (1) of CPC, the learned First Appellate Court has rightly allowed in its order dated 11.01.2019 giving a detailed finding that the trial court ought not to have given a finding that there was no cause of action for the simple reason that the plaintiff has disclosed the cause of action. Of course, the learned I Appellate Court came to the conclusion that the suit ought not to have been rejected on the ground that it does not contain the cause of action. However, without going

into the merits of the case rightly for the reason that the trial court has gone into the merits of the matter holding that the veracity of the statements of all the parties can be decided by the trial court, considering all the issues, learned First Appellate Court has sent the matter back to the trial court without using the word, 'remand', but the meaning of he impugned order is order of remand, therefore, the impugned decreetal order passed by the learned Principal District Judge in A.S.No.29/2016 dated 11.01.2009 is covered by Order 41 Rules 23 and 23A of CPC., hence it is an order of remand, therefore, this CMA is legally maintainable under Order 43 Rule 1(u) of CPC.

9. Accordingly, answering the maintainability of the Civil Miscellaneous Appeal, this Court hereby directs both the parties to co-operate with the trial court for early disposal of the suit since the matter has been pending for quite a long time and the trial court is also directed to take up the matter and dispose of the same expeditiously, more preferably, within a period of six months.

10. With the above observation and direction, the Civil Miscellaneous Appeal is disposed of. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge, Namakkal.
2. The Subordinate Judge, Rasipuram.

Copy to: The Section Officer,  
VR Section, High Court,  
Madras-104.

+1cc to M/s.V.Raghavachari, Advocate SR.36630

CMA.No.2169 of 2020

SSV(CO)  
CB(12/03/2021)