



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.08.2020

DELIVERED ON : 30.09.2020

CORAM

THE HON'BLE MR.JUSTICE **S.S.SUNDAR**

C.M.A.(MD)No.631 of 2019

and

C.M.P.(MD)No.7795 of 2019

Anbu : Appellant/1st Respondent/1st Defendant

.. Vs ..

1.Murugan
2.Chandrababu
3.Vijayan ... 1 to 3 Respondents/Appellants/Plaintiffs

4.Thiruvaduthurai Aatheenam,
represented by its Inspector,
Kanyakumari District. :4th Respondent/2nd Respondent/
2nd Defendant

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rue 1 (u) of CPC, to set aside the fair and decreetal order, dated 05.02.2019 passed in A.S.No.16 of 2017 on the file of the Principal Subordinate Court, Nagercoil, reversing the judgment and decree, dated 05.01.2017 passed in O.S.No.337 of 2007 on the file of the II Additional District Munsif Court, Nagercoil.

For Appellant : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

For R1 to R3 : Mr.G.Aravinthan

For R4 : Mr.M.Ramu

JUDGMENT

This Civil Miscellaneous Appeal is directed against the order of learned Principal Subordinate Judge, Nagercoil, in A.S.No.16 of 2017, dated 05.02.2019 remanding the case to trial Court and directing *de-nova* trial.

2.Heard the learned Counsel appearing for the appellant and the learned Counsel appearing for the respondents 1 to 3 and the learned Counsel appearing for the fourth respondent.



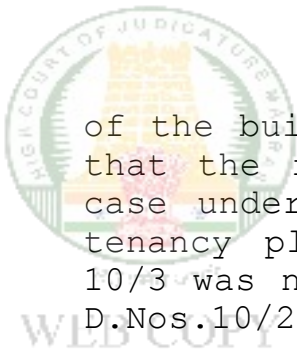
3. Brief facts that are necessary for the disposal of this Civil Miscellaneous Appeal are as follows:

4. The respondents 1 to 3 herein filed the suit in O.S.No.337 of 2007 on the file of the II Additional District Munsif Court, Nagercoil for permanent injunction restraining the defendants from encroaching into the suit property by putting up any construction or by doing anything interfering with the separate possession and enjoyment of the suit property by the plaintiffs. The suit is also for mandatory injunction to demolish the construction put up by the first defendant in an extent of 300 sq.ft., in the suit property. The suit property is a house plot measuring to an extent of 4 ½ cents along with building bearing D.No.10/1 and two temporary rooms in the said property comprised in Old S.No.1759 corresponding to New S.No.M/3-121/2 in Nagercoil Village, Agastheeswaram Taluk.

5. It is the case of the plaintiffs that the first defendant is a tenant. The second defendant is Thiruvaduthurai Aatheenam and no relief was claimed against the second defendant. It is the further case of the plaintiffs that the land originally belonged to the second defendant and that the site was taken on lease by the plaintiffs' predecessor-in-interest and that the leasehold right and the superstructure were purchased by the plaintiffs from their predecessor-in-interest by a sale deed, dated 11.08.1992. This Court need not elaborate the case of plaintiffs at the moment.

6. The appellant, who is the first defendant in the suit, filed the written statement denying the case of plaintiffs that the plaintiffs are in possession of D.Nos.10/2 and 10/3 in the very same survey numbers. Regarding leasehold right in respect of D.Nos.10/2 and 10/3 in the very same survey numbers, it is the case of the appellant that he is in possession of the building bearing D.Nos.10/2 and 10/3 in the very same survey numbers under the second defendant and that therefore, the suit in respect of D.Nos.10/2 and 10/3 is not maintainable.

7. Before the trial Court, the second plaintiff was examined as PW-1 and documents Ex-A1 to Ex-19 were marked and first defendant examined himself as DW-1 and marked Ex-B1 to Ex-B27. The learned II Additional District Munsif, Nagercoil, partly decreed the suit by judgment and decree, dated 05.01.2017 in respect of D.No.10/1. However, the suit was dismissed insofar D.Nos.10/2 and 10/3 are concerned. Though the plaintiffs and first defendant claim tenancy under the 2nd defendant, it is unfortunate to notice that the second defendant remained *ex parte*. Though the trial Court



of the building bearing D.Nos.10/2 and 10/3, it was further found that the first defendant has not come forward with the definite case under whom the first defendant took possession. Since the tenancy pleaded by the plaintiffs in respect of D.Nos.10/2 and 10/3 was not proved by them, the suit was dismissed in respect of D.Nos.10/2 and 10/3.

8.One of the documents relied upon by the plaintiffs in the suit was Ex-A1, which is nothing, but a sale deed, that was obtained by the plaintiffs from their predecessor-in-interest, by name, Kozhunthuvel. Though the plaintiffs sought for expert opinion during the pendency of the suit to prove that the plaintiffs purchased the property under Ex-A1, the trial Court rendered a specific finding that the document Ex-A1 might have been created for the purpose of the case.

9.As against the judgment and decree in O.S.No.337 of 2007, dated 05.01.2017, the plaintiffs preferred an appeal in A.S.No.16 of 2017 before the Principal Subordinate Court, Nagercoil. During the pendency of the appeal suit, the plaintiffs/respondents 1 to 3 filed an application in I.A.No.42 of 2018 in A.S.No.16 of 2017 before the lower appellate Court under Order 41 Rule 27 r/w Section 151 of CPC permitting the plaintiffs to adduce additional evidence by way of oral examination of forensic expert, who has compared the signature of the plaintiffs' vendor. The plaintiffs filed another application in I.A.No.129 of 2018 in A.S.No.16 of 2017 requesting the lower Appellate Court to pass an order to remand the case before the trial Court for adducing the evidence of forensic expert and to call for the documents from the second defendant in the suit.

10.The learned Principal Subordinate Judge, Nagercoil disposed of the appeal in A.S.No.16 of 2017 along with I.A.Nos.42 and 129 of 2018. After finding that the plaintiffs should be given an opportunity to examine the expert to prove the leasehold right claimed by the plaintiffs, the lower appellate Court decided to remand the matter to the trial Court for fresh disposal. The following portion of the judgment of lower appellate Court is necessary for the present case, having regard to the specific arguments advanced by the learned Counsel for the appellant, which reads as follows:

"In this case, regarding the Expert Opinion it was marked without examining the expert and its evidentiary value is of no use. Moreover, the signature of Kozhunthuvel contained in the Exh.A1 was compared with the xerox copy of signature contained in Exh-B1 and B26. In this regard the learned counsel for the plaintiffs also argued that for comparison the plaintiffs have filed



from O.S.No.562/92 and the same was allowed and documents were received from the central record section. But unfortunately the original documents were not taken by the Commissioner and the xerox copy alone were compared with the Exh-A1 document. The learned counsel for the appellant also argued that in the trial court, during the stage of arguments alone the Expert opinion petition was filed and allowed and the report was marked and no opportunity was given to file additional witness. On careful perusal of the notes paper of the lower court shows that at the stage of defendant side argument alone, the Expert opinion was marked as Exh-C1 and the same was not marked through the Expert. The learned counsel for the 1st defendant argued that even though the Expert Opinion was marked during the time of cross examination it was not relied and the lower court has come to the conclusion by its own comparison. Even though the comparison of signature is permitted by the Section 73 of the Evidence Act by the court, but when there is a dispute arise regarding the comparison of signature then the court must refrain from its own comparison and must seek the help of expert. Moreover, at the time of arguments, the learned counsel appearing for the 2nd defendant argued that the 2nd defendant is ready to produce the documents regarding the tenancy, if this court directs to do so. In this case, the 1st defendant has recorded his lease hold right only in the year 2002. But in the written statement he claims right from the year 1992. At the same time till the year 1996 the entire schedule property was stood in the name of one Velan who is the brother of Kozhunthuvel from whom the plaintiffs claiming right. It is also admitted fact that after the demise of Velan his brother Kozhunthuvelu acquired the schedule property. When the facts are so, then it is necessary to decide when the Kozhunthuvel or the persons claiming right under him were evicted by the 2nd defendant gets importance. In this regard the available evidence is not sufficient. There is also disputes regarding the execution of the documents by the Kozhunthuvelu in favour of the plaintiff. In such circumstances, this court comes to the conclusion that the examination of the Expert regarding Exh-C1 Expert Opinion and production of documents available with the 2nd defendant regarding the lease hold right will be useful to adjudicate the matter in clear manner. In such circumstances, this Court is inclined to allow I.A.No.42 of 208 and I.A.No.129 of 2018.

As per the law down by the Hon'ble Supreme Court in



versus M.Parthasarathy & Others), the 1st Appellate Court had two options after receiving additional evidence. First it could have either set aside the entire judgment and decree of the trial court by taking recourse to the provisions of Order 41 Rule 23A of the Code and remanded the case to the trial court for retrial so as to enable the parties to adduce oral evidence or secondly it had an option to invoke the powers under Order 41 Rule 25 of the Code. In this case the marking of Expert opinion is not proper and it is also necessary to adduce oral evidence regarding the lease hold right. In such circumstances, this court is inclined to invoke the provisions of Order 41 Rule 23A of the Code and both parties to adduce additional oral and documentary evidence. These points are answered accordingly."

11.As against the judgment and decree passed by learned Principal Subordinate Judge, Nagercoil, in A.S.No.16 of 2017, dated 05.02.2019, the above Civil Miscellaneous Appeal has been filed by the 1st defendant.

12. The learned Counsel for the appellant raised the following issues apart from certain factual aspects touching upon the case:

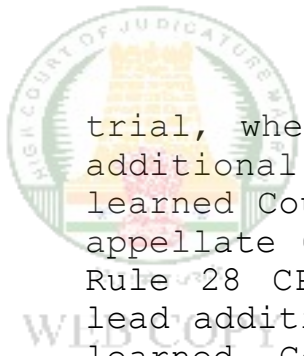
"A. Whether the order of remand passed by the First Appellate Court by exercise of power under Order 41 Rule 23(A) of CPC without following a finding that re-trial is necessary is sustainable in law?

B. When the First Appellate court is having ample power to record additional evidence and to mark additional documents whether the order of remand passed by the First Appellate court in A.S.No.16 of 2017 on for leading further evidence is correct?

C. When the First Appellate court decided to allow I.A.No.42 of 2018 to lead additional oral evidence under Order 41 Rule 27 CPC whether the order of remand is sustainable without following the procedure under Order 41 Rule 28 of CPC?

D. When the First Appellate Court decided to take additional evidence as prayed for in I.A.No.42 of 2018, whether the approach of the First Appellate Court setting aside the judgment and decree of the trial Court without recording the reasons for denova trial is correct in law?

13. The learned Counsel for the appellant submitted that the scope of appellate Court to remit the matter in a case falls under Order 41 Rule 23(A) CPC will be only when findings are recorded to the effect that re-trial is necessary. The learned Counsel for the appellant further submitted that the lower Appellate Court is not empowered to remit the case before the trial Court for de-nova



trial, when the appellate Court itself has ample power to record additional evidence and mark the additional documents. The learned Counsel for the appellant further canvassed that the lower appellate Court has failed to follow the procedure under Order 41 Rule 28 CPC, when it had decided to allow I.A.No.42 of 2018 to lead additional evidence under Order 41 Rule 27 CPC. Finally, the learned Counsel for the appellant submitted that the lower appellate Court has committed wrong to set aside the judgment and decree of the trial Court, even though it has only decided to take additional evidence by allowing I.A.No.42 of 2018.

14.The learned Counsel for the appellant relied upon the judgment of Honourable Supreme Court in the case of **Jegannathan vs Raju Sigamani and another**, reported in **2012-3-L.W. 197**, wherein, the Honourable Supreme Court after discussing the scope of Order 41 Rule 23(A) CPC, Order 41 Rule 25 and Order 43 Rule 1 (u) CPC, has held as follows:

"12.Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court.

13.Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue/s.

14.Insofar as the present case is concerned, the trial Court had disposed of the suit on merits and not on a preliminary issue. The first appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh after giving parties an opportunity to lead evidence b oral as well as documentary. The nature of the order passed by the appellate Court leaves no manner of doubt that such order has been passed by the appellate Court in exercise of its power under Order 41 Rule 23A of the Code.

15.Order 43 of the Code provides for appeals from



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 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;

x x x x x

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. What has been held by this Court in *Narayanan* is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of *Narayanan* in holding that miscellaneous appeal preferred by the appellant was not maintainable."

15.The learned Counsel for the appellant also relied upon yet another judgment of learned Single of this Court in the case of ***Lakshmiammal and others vs Natchiar Ammal and others***, reported in **2015 (3) MWN (Civil) 680**, wherein, the learned Single of this Court has held that the lower appellate Court has power either to receive additional documents by itself and get certain issue decided by the trial Court or to send back the entire suit.

16.The learned Counsel for the appellant then relied upon a judgment of Honourable Supreme Court in the case of *Uttaradi Mutt vs Raghavendra Swamy Mutt*, reported in 2019 (3) CTC 799. In the said judgment, the Honourable Supreme Court has considered the power of appellate Court after reception of additional evidence. Paragraph 15 to 19 in the said judgment is relevant and hence, extracted for convenience:

15. In other words, there are two options available to the Appellate Court. First, it may record the evidence itself by permitting the parties to produce evidence



before it as per Rule 27 of Order XLI or direct the Court from whose decree the appeal under consideration has arisen, to do so.

16. The appellants have placed reliance on **H.P. Vedavyasachar Vs. Shivashankara and Anr.**², which has also considered the decision in **Shanti Devi Vs. Daropti Devi**³. In the case of **H.P. Vedavyasachar** (supra), it was specifically contended that no case was made out to adduce additional evidence and in that event, the entire case could not have been remanded to the trial Court for fresh disposal after recording fresh evidence as it was not a case envisaged under Order XLI Rule 23 of CPC. This contention has been considered in paragraphs 7 to 10 of the said decision, in the following words:

"7. However, so far as the second contention raised by the learned counsel for the appellant is concerned, in our opinion, the same has substance. **When an application for adducing additional evidence is allowed the appellate court has two options open to it. It may record the evidence itself or it may direct the trial court to do so.**

8. Order 41 Rule 28 CPC reads as under:

"28. Mode of taking additional evidence.—Wherever additional evidence is allowed to be produced, the appellate court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the appellate court."

For the aforementioned purpose, in our considered opinion, the High Court could not have directed the trial court to dispose of the suit after taking evidence. Such an order of remand could be only in terms of Order 41 Rule 23, Order 41 Rule 23-A or Order 41 Rule 25 of the Code. None of the said provisions have any application in the instant case.

9. This Court in *Shanti Devi v. Daropti Devi* has held as under: (SCC p. 778, para 13)

"13. **But the same by itself could not be a ground for remitting the entire suit to the learned trial Judge upon setting aside the decree of the learned trial court. The power of remand vests in the appellate court either in terms of Order 41 Rules 23 and 23-A or Order 41 Rule 25 of the Code of Civil Procedure.** Issue 4 was held to have been wrongly framed. Onus of proof was also wrongly placed and only in that view of the matter the High Court

10.

(emphasis supplied)

"28. **Mode of taking additional evidence.**— Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."



"29. Points to be defined and recorded.- Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified."

The High Court could have issued directions to the First Appellate Court to determine any question of fact including the existence and genuineness of the additional evidence or for that matter, whether the contents of the said documents had been duly proved by the party relying thereon. After recording the evidence in support of such relevant matters as the High Court may have directed, the First Appellate Court could proceed to try such issues and return the evidence to the High Court together with its findings thereon within the prescribed time. Such a course was permissible in terms of Rule 28 of Order XLI of CPC. And on receipt of the report, the High Court could then consider the substantial questions of law already framed while admitting the second appeal and finally decide the same on all issues."

17.The learned Counsel for the appellant also relied upon a judgment of learned Single Judge of this Court in the case of **Duraisamy Pillai and others vs Mannammal and another**, reported in **1998 2 MLJ 338**, for the proposition that the mere reception of additional documents or additional documents cannot be ground for order of remand and try the suit once again by the trial Court.

18.The learned Counsel appearing for the respondents 1 to 3, after narrating the facts leading to order of remand, relied upon a judgment of Honourable Supreme Court in the case of **Corporation of Madras and another vs M.Parthasarathy and others**, reported in **(2018) 8 MLJ 208 (SC)**, wherein, the Honourable Supreme Court has held that in a fit case, where the parties are required to be given an opportunity to lead further evidence, the Court can invoke the power under Order 41 Rule 23(A) CPC to remand the case to the trial Court for re-trial.

19.The learned Counsel for the respondents 1 to 3 also relied upon the judgment of Honourable Supreme Court in the case of **J.Balaji Singh vs Diwakar Cole**, reported in **(2017) AIR (SC) 2402**, wherein, the Honourable Supreme Court has considered the scope of Order 41 Rule 23(A) CPC in the following lines :

"17) There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.

18) So far as Order 41 Rule 23 is concerned, it



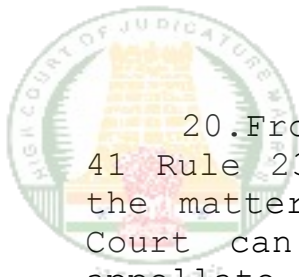
enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.

19) So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.

20) So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself.

21) Now coming to the facts of the case, we are of the considered opinion that once the first Appellate Court allowed the application under Order 41 Rule 27 of Code and took on record the additional evidence, it rightly set aside the judgment/decreed of the Trial Court giving liberty to the parties to lead additional evidence in support of their case which, in turn, enabled the Trial Court to decide the civil suit afresh on merits in the light of entire evidence. The first Appellate Court was, therefore, justified in taking recourse to powers conferred on the Appellate Court under Order 41 Rule 23-A for remanding the case to the Trial Court. We find no fault in exercise of such power by the first Appellate Court.

22) In our considered view, the only error which the first Appellate Court committed was that it went on to record the findings on merits. In our view, it was not necessary to do so while passing the order of remand. The reason is that once the first Appellate Court formed an opinion to remand the case, it was required to give reasons in support of the remand order as to why the remand is called for in the case. Indeed, the remand was made only to enable the Trial Court to decide the case on merits. Therefore, there was no need to discuss much less record findings on several issues on merits. It was totally uncalled for."



20.From the precedents relied upon by both sides, under Order 41 Rule 23(A) CPC, the appellate Court has ample power to remit the matter for *de-nova* trial. It is, of-course, true that the Court can remand the matter for *de-nova* trial only when the appellate Court found that the re-trial is necessary. In the present case, the appellate Court has recorded reasons as to why the re-trial is necessary. Having regard to the fact that the second defendant remained *ex parte*, the production of documents available with the second defendant regarding the leasehold right will have much assistance to the Court for an effective adjudication. The lower appellate Court is right in remitting the matter for re-trial, so as to enable the parties to adduce oral evidence. Therefore, the question of law raised by the appellant are answered against him in the light of specific facts and the reasons recorded by the lower appellate Court while remitting the matter for re-trial.

21.Accordingly, this Civil Miscellaneous Appeal is dismissed and the order passed by the learned Principal Subordinate Judge, Nagercoil, in A.S.No.16 of 2017, dated 05.02.2019 is confirmed. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

cmr

To

1.The Principal Subordinate Judge, Nagercoil.

2.The II Additional District Munsif, Nagercoil.

3.The Section Officer, V.R.Section,

Madurai Bench of Madras High Court, Madurai.(2 copies)

+1 CC to M/s.D. NALLATHAMBI, Advocate (SR-18582[F] dated 30/09/2020)

+2 CC to M/s.G. ARAVINTHAN, Advocate (SR-18639 & 18805[F] dated 01/10/2020)

Judgment made in
C.M.A. (MD)No.631 of 2019
30.09.2020

KMK (CO)

TR(19.10.2020) 12P 8C