



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CMA No.2685 of 2021 and  
CMP.No.15430 of 2021

Sethupillai

...Appellant/Defendant

Vs

Chinnasamy Konar

...Respondent/Plaintiff

Prayer: This Civil Miscellaneous Appeal filed under Order XLIII Rule 1(u) of the Civil Procedure Code, against the Judgment and Decree dated 04.02.2020 passed by the Subordinate Judge, Kallakurichi in A.S.No.100 of 2015 reversing the Judgment and Decree dated 04.09.2015 made in O.S.No.509 of 2011 by the 1<sup>st</sup> Additional District Munsif, Kallakurichi.

For Appellant : Mr.J.Haiharan  
For Respondent : Mrs.R.Meenal

J U D G M E N T

The defendant in O.S.No.509 of 2011 is the appellant. This appeal is against the order of remand made by the appellate Court. The plaintiff filed a suit for declaration that he is the absolute owner of the suit property which is a well and for consequential injunction. The suit was resisted by the defendant contending that the suit well belonged to three brothers and the plaintiff as well as the defendant are descendants of one of the brothers namely, Narayanan. Claiming that there were some release deeds executed by the other sharers, the defendant contended that the plaintiff and the defendant are each entitled to half share in the suit well. The trial Court on consideration of the evidence on record concluded that the plaintiff has not made out a case for declaration of title and dismissed the suit. Aggrieved over the same, the plaintiff preferred an appeal in A.S.No.100 of 2015. Pending appeal, the plaintiff wanted to introduce a document which is an exchange deed dated 06.11.2002 as additional evidence.

2.It appears that during the course of the arguments, the learned counsel appearing for the appellant had contended that



since the defendant had admitted the plaintiff's half share, the whole sale dismissal of the suit is incorrect and the trial Court must have atleast granted the relief with reference to the half share. The lower appellate Court concluded that the relief of declaration cannot be granted solely based on the admission made by the defendant and the plaintiff will have to make out the case. It also felt that an opportunity should be given to the plaintiff to establish the said claim. The Court also dismissed the application in I.A.No.102 of 2019 filed for producing additional evidence in the appellate Court. The appellate Court remitted the matter to the trial Court for fresh consideration by framing appropriate issues.

3.Mr.J.Hariharan, learned counsel appearing for the appellant would contend that the conclusions of the lower Appellate Court and the remand made cannot be sustained. According to the learned counsel, the lower Appellate Court must have considered the evidence independently and should have come to the conclusion whether the plaintiff had established his claim of exclusive title or not.

4.The learned counsel would make an alternative submission that it was open to the appellate Court to declare the title of the plaintiff with reference to half share, which is admitted by the defendant, if the appellate Court finds that the plaintiff has made out such a case. A remand is wholly unnecessary.

5.Mrs.Meenal, learned counsel appearing for the respondent would submit that the lower appellate Court has rejected the application in I.A.No.102 of 2019 only because it was making an order of remand it has permitted the appellant in the appeal to produce the document before the trial Court. It has also permitted further evidence to be let in and therefore, if the order of remand is set aside, it will cause serious prejudice to the respondent herein.

6.I have considered the rival submission.

7.Considering the nature of controversy, I do not think that the remand order could be sustained. A remand can be made in certain circumstances under Order 41 Rule 23. The power of remand under Order 41 Rule 23 is confined to cases where the trial Court has disposed of the suit on a preliminary point. The appellate Court can also make an order of remand in other cases, if it falls under Order 23A. In order to invoke Order 41 Rule 23A, the appellate Court must reverse the judgment and decree of



the trial Court and must also come to the conclusion that a re-trial is necessary. The appellate Court has not reversed the judgment of the trial Court and it has not come to the conclusion that a re-trial is necessary. The appellate Court has merely said that the decree cannot be granted on the basis of the admission and in order to avoid future litigation between the parties, there should be a remand and the plaintiff should be allowed to amend the plaint. I do not think such an approach could be sustained. In the absence of compliance with Rule 23A, the remand order cannot be sustained. Therefore, the order of remand is set aside, the I.A.No.102 of 2019 is restored, the appellate Court is directed to dispose of the appeal and I.A.No.102 of 2019 on merits in accordance with law. This Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

s/d-  
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

vs

To

- 1.The Subordinate Judge,  
Kallakurichi.
- 2.The 1<sup>st</sup> Additional District Munsif,  
Kallakurichi
- 3.The Section Officer,  
VR Section,  
Madras High Court, Chennai.

+1 CC to M/s.R. Meenal, Advocate sr 68181(06/04/2022)

+1 CC to M/s.KV Law Firm, Advocate sr 67872(06/04/2022)

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CA(CO)  
SP(30/03/2022)