

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.02.2021

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

C.M.A.Nos.748 & 749 of 2010
and
M.P.Nos.1, 1, 2 & 2 of 2010

Boopathy Ammal .. Appellant in both the appeal/Petitioner
Vs.

Ramachandran ... Respondent in both the appeal/Respondent

PRAYER : Civil Miscellaneous Appeal is filed under Order 43 rule 1(t) of Civil Procedure Code, against the order and decree dated 10.09.2009 passed in I.A.524 of 2006 in A.S.61 of 2005 and I.A.526 of 2006 in A.S.62 of 2005 respectively on the file of the Principal Subordinate Judge, Villupuram.

For Appellant : Mr.N.Suresh

For Respondent : No appearance

C O M M O N J U D G M E N T

The appellant herein is the petitioner in I.A.524 of 2006 in A.S.61 of 2005 and I.A.526 of 2006 in A.S.62 of 2005, which were filed under Order 41 Rule(22), praying to set aside the ex-parte order passed by the Principal Subordinate Judge, Villupuram, dated 10.09.2009.

2. The respondent herein also contested the said petition, by filing his counter objections.

3. On hearing both sides, the first Appellate Court dismissed the applications. Aggrieved by the order, the appellant preferred these Appeals.

4. Point to be decided.

The Substantial Question of Law involved in these appeals are "whether the trial Judge erroneously dismissing the I.A.Nos.526 & 524 of 2006, without giving opportunity to the appellant as stated under Order 41 Rule 21CPC?"

5. The learned counsel for the appellant submitted that the appellant filed a suit in O.S.No.371 of 2000 against the respondent for the relief of declaration and injunction with regard to the suit property in Mettupalayam Village, Villupuram Taluk, to the extent of 1.00 acre. The respondent also filed a suit against the appellant in O.S.No.194 of 2004 for the relief of specific performance and directing the appellant to execute the sale deed as per the sale agreement dated 20.07.1996. Both the suits were tried together and common judgment was passed by the learned Additional District Munsif Court. Accordingly, the suit filed by this appellant in O.S.No.371 of 2000 was decreed in her favour and the suit filed by the respondent in O.S.No.197 of 2004 was dismissed having no merits.

6. Against the above orders, the appellant preferred an appeal in A.S.No.62 & 61 of 2005. In those appeals the appellant also made appearance. Thereafter, the said appeals were posted for final hearing on 29.03.2006. On that day, due to illness, the appellant was un able to give instruction to her counsel and therefore, she was set ex-parte and ex-parte judgment was passed by the First Appellate Judge on 31.03.2006. Accordingly, the appeal was allowed by setting aside the lower Court decree. Immediately, within a period of two weeks, after her recovery from illness, she filed in I.A.524 of 2006 in A.S.61 of 2005 and I.A.526 of 2006 in A.S.62 of 2005 under 41 Rule 21 CPC to set aside the ex-parte order passed in the appeal and prayed for re-hearing. In that application, this respondent also submitted his objection stating that the case was posted on 07.03.2006 thereafter, adjourned to 29.03.2006. On that day, the appellant's counsel reported no instruction about her, so the ex-parte decree was passed in the appeal. Based upon that objections made by the counsel and also in the absence of medical proof attached to prove the illness, the First Appellate Court dismissed the petition and allowed the appeal.

7. At the time of arguments, the learned counsel for the appellant submitted that, the appellant entered appearance in this appeal through her counsel, but due to her illness, she was not able to give instruction on 29.03.2006. Immediately, she was set ex-parte and appeal was decreed in favour of the respondent without going into merits of the case. Further he submits that under 41 Rule 21 CPC the appellate Court itself can re-hear the appeals. But without considering this statutory provision, the First Appellate Court erroneously dismissed the application.

8. As per Order 41 Rule 17(2)CPC when the appellant appears and the respondent may appear to the appellate Court to hear the appeal under Order 41 Rule 21 CPC.

"ORDER XLI :

21. Re-hearing on application of respondent against whom ex-parte decree made.-Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him".

9. Therefore, even if the respondent remained ex-parte, the provision under Order 41 Rule 21 CPC permits the respondent to file an application praying to re-hear the appeals, if he satisfies that he was prevented by sufficient cause from appearing.

10. In the instant case, the appellant is aged about more than 68 years and all the way, she had contested the suit from the year 2000 and the suit also got decreed in her favour before the Trial Court. In the appeal also, she appeared through her counsel, but on one hearing (i.e) on 29.03.2005 due to the illness she was absent and remained ex-parte and the appeal was allowed without any discussion. Furthermore, within a period of two weeks from the date of ex-parte, this appellant preferred an application under Order 41 Rule 21 CPC praying to re-hear the appeal by setting aside the ex-parte order. There was no negligence on the part of the appellant, as she was unable to give instruction to her counsel and she was set ex-parte.

11. Considering all the facts and circumstances, the First Appellate Court ought to have given opportunity by allowing the applications and should re-hear the appeal instead of dismissing the applications which is unwarranted one. Therefore, the order passed by the First Appellate Judge in I.A.524 of 2006 in A.S.61 of 2005 and I.A.526 of 2006 in A.S.62 of 2005 are hereby set aside as there is no merits and answered the question of law accordingly.

12. Accordingly, the application filed by this appellant in I.A.524 of 2006 in A.S.61 of 2005 and I.A.526 of 2006 in A.S.62 of 2005 are allowed.

13. Accordingly, the Civil Miscellaneous Appeals are allowed, and the order passed in I.A.524 of 2006 in A.S.61 of 2005 and I.A.526 of 2006 in A.S.62 of 2005 respectively, dated 10.09.2009 by the Principal Subordinate Judge, Villupuram are set aside. Consequently the First Appellate Court / the Principal Subordinate Judge, Villupuram is directed to re-hear

the appeals by giving an opportunity to both sides and dispose of the appeals on merits, within a period of three months from the date of receipt of a copy of the order. No Costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

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To

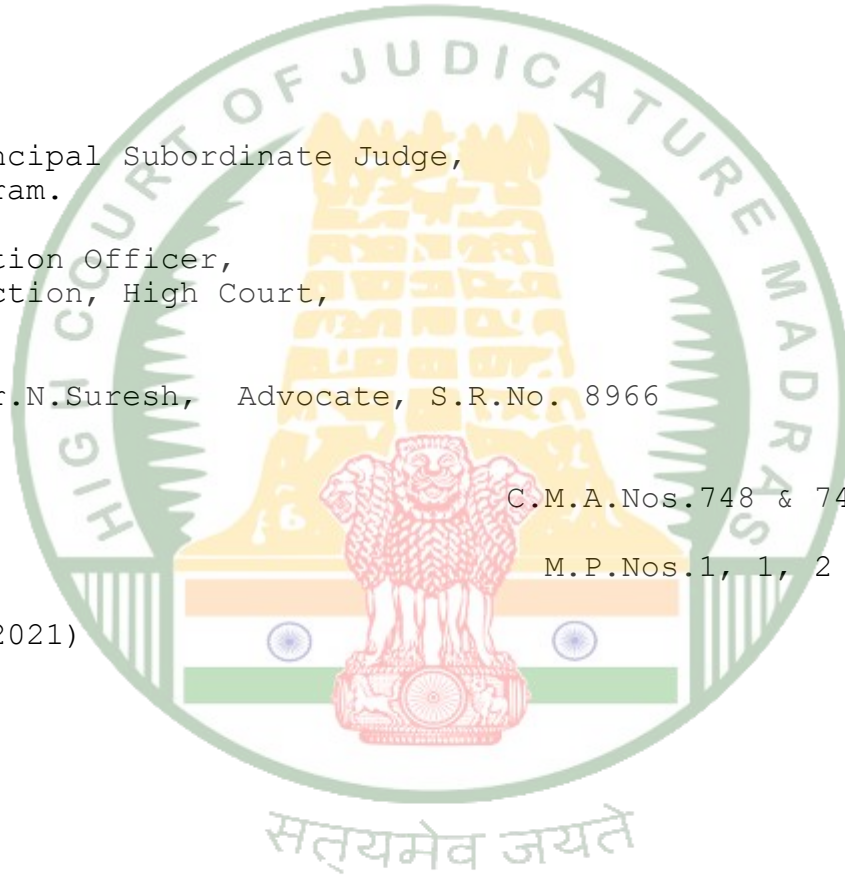
1.The Principal Subordinate Judge,
Villupuram.

2.The Section Officer,
V.R. Section, High Court,
Madras.

+lcc to Mr.N.Suresh, Advocate, S.R.No. 8966

C.M.A.Nos.748 & 749 of 2010
and
M.P.Nos.1, 1, 2 & 2 of 2010

KK (CO)
GN (23/03/2021)



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