



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 16.02.2021

CORAM

THE HONOURABLE MRS. JUSTICE **T.KRISHNAVALLI**

WEB COPY

CMA(MD) No.277 of 2018

and

CMP(MD) No.3938 of 2018

Mandiram Pillai

: Appellant/1st Respondent/
Plaintiff

Vs.

1.Ananda Ganapathi

: R1/Appellant/1st Defendant

2.Sethuramalingam Pillai @
Ramasamy Pillai

: R2/2nd Respondent/
2nd Defendant

Prayer: Civil Miscellaneous Appeal filed under Order XLIII Rule 1(u) of the Code of Civil Procedure, against the order of remand, dated 20.11.2017 rendered in A.S No.219 of 2017 on the file of the Subordinate Judge, Tiruchendur, by setting aside the decree and judgment, dated 19.11.2014 rendered in O.S No.148 of 2011 on the file of the District Munsif, Srivaikundam.

For Appellant

: Mrs.P.Jessi Jeeva Priya

For Respondents

: Mr.G.Venugopal

O R D E R

This Civil Miscellaneous Appeal has been filed against the order of remand, dated 20.11.2017 rendered in A.S No.219 of 2017 on the file of the Subordinate Judge, Tiruchendur.

2.The appellant herein filed O.S No.148 of 2011 on the file of the District Munsif, Srivaikundam against the respondents for declaration and consequential permanent injunction in respect of the 3rd schedule property. Whereas the respondents herein filed O.S.No.169 of 2011 on the file of the District Munsif, Srivaikundam against the appellant for partition, declaration and permanent injunction. The subject matter of both the suits are one and the same, both were tried jointly and disposed of by a common judgment, dated 19.11.2014, by decreeing the suit O.S.No.148 of 2011 in favour of the plaintiff and it is declared that the 3rd schedule property is a common pathway belonging to the plaintiff and the defendants and dismissed the suit in O.S No.169 of 2011 filed by the defendants. The 1st respondent herein preferred appeal in A.S No.219 of 2017 before the Sub Court, Tuticorin and subsequently, due to establishment of the Sub Court, Tiruchendur, the same was transferred to the file of the Sub Court, Tiruchendur and renumbered as A.S Nos.219 of 2017 and clubbed with A.S No.220 of 2017 for simultaneous disposal. The first appellate court remanded the matter



back to the trial court, by a common judgment, dated 20.11.2017. Aggrieved over the same, the appellant/plaintiff is before this court.

3. Heard the learned counsel appearing for the parties and perused the materials available on record.

WEB COPY

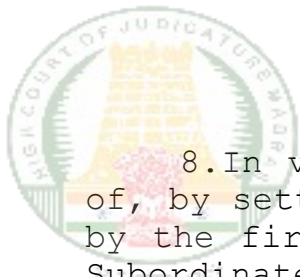
4. It is mainly contended by the learned counsel for the appellant that the order of remand passed by the first appellate court is illegal and if there was anything left, that has to be let in by way of further evidence or otherwise, the first appellate court itself ought to have taken up the matter and decide the matter on merits and in this case, there is absolutely no scope for making any order of remand and prays for setting the impugned order of the first appellate court.

5. It is seen that both the plaintiff and the defendants filed suits against each other. The suit filed by the plaintiff in O.S No.148 of 2011 on the file of the District Munsif, Srivaikundam was decreed on 19.11.2014, while the suit filed by the defendants in O.S.No.148 of 2011 was dismissed. The 1st respondent/1st defendant preferred separate appeal in A.S No.20 of 2015 and along with the 2nd respondent/2nd defendant, he also filed appeal in A.S No.21 of 2015 before the Sub Court, Tuticorin. Due to establishment of the Sub Court, Tiruchendur, both the appeals were transferred to the file of the Sub Court, Tiruchendur and renumbered as A.S Nos.219 and 220 of 2017. The first appellate court remanded the matter back to the trial court, by a common judgment, dated 20.11.2017.

6. In this case, it is necessary to refer Order XLI Rule 25 of the Code of Civil Procedure, which would run thus:-

"25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from,-Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence if required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor."

7. On coming to the instant case on hand, the first appellate court, without referring to the above section, had mechanically remanded the matter to the trial court, which according to this court, is not correct.



8. In view of that, this Civil Miscellaneous Appeal is disposed of, by setting the aside the impugned order, dated 20.11.2017 passed by the first appellate Court. The first appellate court namely the Subordinate Judge, Tiruchendur is directed to take up the appeal, frame additional issues and adduce additional evidence on both sides, if necessary, and after hearing arguments on both sides, pass a detailed order, purely on merits and in accordance with law, within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

er

To,

1.The Subordinate Judge,
Tiruchendur.

2.The District Munsif,
Srivaikundam.

Copy to:

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1 CC to M/s.P.JESSI JEEVA PRIYA, Advocate (SR-5406[F] dated 16/02/2021)

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-5499[F] dated 17/02/2021)

CMA (MD) No.277 of 2018
16.02.2021

KK(20.05.2021) 3P 7C