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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.01.2022

CORAM:

THE HONOURABLE MR. JUSTICE M. GOVINDARAJ

S.A.No.638 of 2017

1.Selvi

2.V.G.Kalaivani

3.V.G.Indhumathi

4.Minor V.G.Dharaneeswaran

rep. By guardian/mother/next friend

Ms.Selvi

...Appellants/Respondents
Respondents/Plaintiffs

vs.

Kunjammal

...Respondent/Appellant
Petitioner/Defendant

Prayer: Appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 24.03.2017 in C.M.A.No.43 of 2011 on the file of the learned II Additional District Judge, Salem, reversing the Fair and Decreetal order dated 22.12.2009 in I.A.No.159 of 2007 in O.S.No19 of 2007 on the file of the learned Sub Judge, Sankari.

For Appellants : Mr.N.Manokaran

For Respondent : Mr. S. Saravanan

JUDGMENT

The above Second Appeal has been preferred against the order of the Appellate Court in rejecting the plaint under the plea of res judicata.

2.The plaintiffs are the appellants. Originally, the properties belonged to one V.M.Ganesan. The said Ganesan had two wives, namely, Kunjammal and Selvi. It appears that during the life time of the said Ganesan, the first wife Kunjammal has filed a suit for partition in O.S.No.111 of 1994 which was decreed ex parte on 10.07.2006.



3. On coming to know the same, immediately, the second wife has filed O.S.No.19 of 2007 on 27.03.2007. The said suit is still pending on the file of the learned Subordinate Judge, Sankari. In the said suit, the first wife filed an interim application in I.A.No.159 of 2007 under Order 7 Rule 11 of the Code of Civil Procedure that it is hit by res judicata. The trial Court dismissed the application by its order dated 22.11.2009. Aggrieved by the same, the respondents herein preferred a Civil Miscellaneous Appeal in C.M.A.No.43 of 2011. Even though the said order is not an appellable order, the Appellate Court entertained the appeal and allowed the same vide its order dated 24.03.2017. Aggrieved over the same, the appellants/plaintiffs are before this Court.

4. The learned counsel for the appellants would submit that the learned II Additional District Judge, Salem, ought not to have entertained the appeal as the order is not an appellable order. Secondly, as per the Judgment of the Hon'ble Supreme Court in (2021) 9 SCC 99 [Srihari Hanumandas Totala v. Hemant Vithal Kamat], the issue of res judicata is a matter for trial. Therefore, the order is also not sustainable.

5. Per contra, the learned Counsel for the respondent/defendant would contend that the defendants may be permitted to convert the Civil Miscellaneous Appeal into one of Civil Revision Petition to contest the case and to get an order on merits from this Court.

6. Head the learned counsel appearing on either side and perused the materials available on record.

7. In view of the latest dictum of the Hon'ble Supreme Court in (2021) 9 SCC 99 [Srihari Hanumandas Totala v. Hemant Vithal Kamat], the issue of res judicata is the matter for trial as it involves question of fact as well as the Law. Therefore, the conversion of Civil Miscellaneous Appeal into Civil Revision Petition may not fetch better prospects.

In view of the above, the order passed in C.M.A.No.43 of 2011 dated 24.03.2017 on the file of the learned II Additional District Judge, Salem and the order passed in I.A.No.159 of 2007 dated 22.11.2009 on the file of the Subordinate Court, Sankari, stand set aside and the matter is remitted back to the learned Subordinate Judge, Sankari, for expeditious disposal. The learned Subordinate Judge, shall frame an issue on the point of Res Judicata also and try the suit. Considering the fact that the suit is of the year 1994, the learned Subordinate Judge, Sankari, shall dispose of the suit within a period of three months not later than a period of six months from the date of receipt of a copy of this Judgment.



Accordingly, this Second Appeal is disposed of. There shall be no order as to costs.

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Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mps

To

1. The II Additional District Judge,
Salem.
2. The Sub Judge,
Sankari.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.1681

+1cc to Mr.S.Saravanan, Advocate, S.R.No.1728

S.A.No.638 of 2017

PM(CO)
RGA(16/06/2022)