



C.M.A.(MD)No.512 of 2009

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.09.2022

CORAM:

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

C.M.A(MD)No.512 of 2009

and

M.P(MD).No.1 of 2009 & 1 of 2010

1.Muruganantham

2.Vedavalli

... Appellants / Respondents 1 & 3

/ Defendants 1 & 3

/Vs./

1.Sri Kalikondayar and Selvi Pattatharasi

Ammal Temple,

Rep., by the President of the Panchayat,

Paripalanasaba,

Thiru.A.Rajendran

... Respondent/ Appellant
/Plaintiff

2.Swamynathan

...Respondent/2ndRespondent
/2nd Defendant

(No relief is claimed against the second
respondent in the above appeal)

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of the Code of Civil Procedure, praying this Court to set aside the decree and judgment passed in A.S.No.38 of 2006 on the file of the Principal Sub Court, Kumbakonam dated 05.1.2009 reversing the decree and judgment passed in O.S.No.162/03 on the file of the II Additional District Munsif Court, Kumbakonam, dated 29.12.2005.



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For Appellants : Mr.V.K.Vijayaragavan
For Respondents : Mr.P.Thiagarajan (for R1)
(R2-given up)

JUDGMENT

This Civil Miscellaneous Petition is filed to set aside the decree and judgment passed in A.S.No.38 of 2006 on the file of the Principal Sub Court, Kumbakonam, dated 05.1.2009 reversing the decree and judgment passed in O.S.No.162 of 2003 on the file of the II Additional District Munsif Court, Kumbakonam, dated 29.12.2005.

2. For the sake of convenience, parties are referred to as per their ranking before the trial Court. The suit in O.S.No.162 of 2003 was filed for recovery of possession of the 'E' Schedule property from the defendants after removing the building and the past and future profits before the II Additional District Munsif Court, Kumbakonam and the trial Court dismissed the suit on the ground that the plaintiff had failed to establish the case in his favour. Thereafter, an appeal was filed by the



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plaintiff in A.S.No.38 of 2006 before the Principal Sub Court, Kumbakonam and the lower appellate Court set aside the order of the trial Court and remanded the matter back to the trial Court for further investigation. Challenging the same, the defendants 1 and 3 filed this appeal.

3. The learned counsel appearing for the appellants submitted that the lower appellate Court has wrongly remanded the matter and erroneously set aside the order without following the procedures contemplated under Order 41 Rules 25, 27 and 28 of CPC. He further submitted that the lower appellate Court, without framing preliminary issues, wrongly set aside the order and remanded the matter to the trial Court for fresh disposal.

4. The learned counsel appearing for the appellants relies upon the decision of the Hon'ble Supreme Court in the case of **Municipal Corporation, Hyderabad vs. Sunder Singh** reported in **2008 (8) SCC 485** and the relevant portion of the judgment reads as follows:

“18.It is now well settled that before invoking the said provision, the conditions precedent laid down



therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

.....

32.A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order XLI Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order XLI Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33.Order XLI rule 23A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order XLI Rule 23 of the Code.

34.An order of remand cannot be passed on ipse dixit of the court. The provisions of Order II Rule 2 of the Code of Civil Procedure as also Section 11 thereof could



be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas & anr. (Civil Appeal No. 3495 of 2008) disposed of on 12.5.2008.

35.We are, therefore, of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly and the matter is remanded back to the High Court for consideration of the appeal on merits. The appeal is allowed with the aforesaid directions.

36.In the facts and circumstances of the case, however, there shall be no order as to costs.”

and in the case of **K.Gopalan Nair vs. K.Balakrishnan Nair and Others** reported in **2005 (12) SCC 351** and the relevant portion of the judgment reads as follows:

“4.Once the trial had been concluded, there was no question of the defendants being given a second opportunity to prove their case before the trial Court. The High Court should have decided the matter on the basis of the material on record not only as regard the third conclusion but also with regard to the issue of limitation.

5.In view of the above, third and fourth conclusions of the impugned judgment are set aside and the matter is remitted back to the High Court to decide it afresh on the



basis of materials on record. We make it clear that this order should be read as an affirmation of conclusions 1 and 2.”

5. The learned counsel appearing for the appellants also relied upon the decision of this Court in the case of **Bhuvaneswari vs. Saraswathi Ammal** reported in **2005 (3) MLJ 626** and the relevant portion of the judgment reads as follows:

“3. We went through the judgment of the lower appellate Court. As already noted, enough oral and documentary evidence had been let in on the side of the plaintiff as well as on the side of the defendant. An order of remand cannot be for the mere purpose of remanding a proceeding to the lower Court. It is governed by the provisions of the Code of Civil Procedure commencing from O. 41, R. 22 onwards. The appellate Judge's view that in order to enable the parties to have the suit properties identified, an Advocate Commissioner had to be appointed and for that purpose, the suit must be remanded back to the trial Court, in our considered opinion, is not warranted on the facts of the case. If it is possible for the appellate Court to evaluate the evidence made available on record and come to its own conclusion one way or the other, then it is not open to the lower appellate Court to come to the aid of the parties for filling up a lacuna which is found wanting in the records.”



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and in the case of **S.Shanmugham vs. S.Sundaram and Others**

reported in **2005 (2) MLJ 552** and the relevant portion of the judgment

reads as follows:

“12. On a perusal of the judgment of the lower appellate Court, it is revealed that on the basis of both oral and documentary evidence available on record, the lower appellate Court came to the conclusion that the third defendant is also entitled to a share in 'A' Schedule property and in the sketch of the Commissioner also when it is made clear that as to how 'A' Schedule property could be partitioned and especially when the provisions under Order 41 Rules 23 to 29 of C.P.C. are not a bar to take further evidence or to appoint a Commissioner, if so necessary, and to try the appeal, as rightly pointed out by the learned counsel for the appellant, we are of the view that there is no necessity to remand the matter back to the trial Court and that the lower appellate Court itself can try the matter after taking further evidence as to the point to be decided and it can dispose of the appeal on merits and in accordance with law.”

The learned counsel appearing for the appellants prayed this Court to allow this appeal in line with the judgments cited supra.



6. Per contra, the learned counsel appearing for the first respondent submitted that there is no error in the order of the lower appellate Court and the lower appellate Court has got the right and power to remand the matter to the trial Court for further investigation. He also relied upon the decision of the Hon'ble Supreme Court in the case of the **Corporation of Madras and Another vs. M.Parthasarathy and Others** reported in **2018 (9) SCC 445** and the relevant portion of the Judgment reads as follows:

“13) It is an admitted fact that the respondents (plaintiffs) had filed an application under Order 41 Rule 27 of the Code in their first appeals before the first Appellate Court (CMP No.1559/93) praying therein for production of additional evidence in appeals. It is also an admitted fact that this application was allowed and the additional evidence was not only taken on record but also relied on by the Appellate Court as Exs.P16 to P20 for allowing the appeals filed by the respondents which, in consequence, resulted in decreeing all the four civil suits.

.....

17) Having allowed the CMP No.1559/1993 and, in our opinion rightly, the first Appellate Court had two options, first it could have either set aside the



entire judgment/decreed 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 in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the Trial Court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record and invite findings of the Trial Court on such limited issues to enable the first Appellate Court to decide the appeals on merits.

.....

21) In the light of the foregoing discussion and having regard to the totality of the facts of the case and to enable the parties to have full and fair trial, we consider it proper to take recourse to the powers under Order 41 Rule 23A of the Code and accordingly set aside the judgment and decree of the first Appellate Court to the extent it allows the respondents' appeals on merit but at the same time uphold that part of the order which has allowed CMP No. 1559/1993 filed by the plaintiffs for adducing additional evidence and remand the cases to the Trial Court for retrial of all the four civil suits on merits afresh."



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7. This Court has carefully considered the submissions on either side and perused entire records.

8. In the considered view of this Court, as per Order 41 Rules 25 and 28 of CPC, this Court deems it fit to remand the matter back to the lower appellate Court, setting aside the order passed in A.S.No.38 of 2006 on the file of the Principal Sub Court, Kumbakonam, dated 05.01.2009 and accordingly, the same is set aside. The matter is remanded back to the lower appellate Court and the lower appellate Court/ Principal Sub Court, Kumbakonam, is directed to send it back to the trial Court/ II Additional District Munsif Court, Kumbakonam, for recording evidence. After recording evidence, the lower appellate Court/ Principal Sub Court, Kumbakonam, is directed to hear the matter and dispose it of within a period of three months from the date of receipt of recording evidence by the trial Court.



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9. With the above directions, this Civil Miscellaneous Appeal is disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

06.09.2022

Index :Yes/No
Internet :Yes/No
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To:

1. II Additional District Munsif Court, Kumbakonam.
- 2.The Principal Sub Court, Kumbakonam.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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A.A.NAKKIRAN, J.

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Judgment made in
C.M.A(MD)No.512 of 2009

Dated
06.09.2022