



C.M.A.No.3259 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **04.10.2023**

CORAM:

THE HONOURABLE MR.JUSTICE **M.DHANDAPANI**

C.M.A.No.3259 of 2004

and

C.R.P.(NPD).No.764 of 2004

and

C.M.P.No.18131 of 2004

C.M.A.No.3259 of 2004

R.Viswanathan

... Appellant/Respondent/Plaintiff

C.R.P.(NPD).No.764 of 2004

1. C.Muthusamy

2. Saraswathy

3. M.Chandrasekar

4. M.Vijayakumar

...Petitioners 1 to 4/ Defendants 1 to 4

*Petitioners 2 to 4 are brought on record
as legal representatives of the deceased
1st petitioner (C.Muthusamy)vide order
made in C.M.P.No.817 & 818 of 2007.*

Vs.

C.M.A.No.3259 of 2004

1. C.Muthusami (Deceased)

...1st Respondent/Appellant /1st Defendant

2. Rajamani

3. Indrani

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4. Devaraj

5. The Commissioner, Tirupur
Municipality, Tirupur.

... Respondents 2 to 5/Respondents 2 to
5/Defendants 2 to 5

6. Saraswathi

7. Sekar

8. Senthilkumar

*(R6 to R8 were impleaded as legal heirs of
the deceased first respondent vide
order of court dated 03.10.2023 in CMP.No.
1201 of 2007 in C.M.A.No.3259 of 2004)*

C.R.P.(NPD).No.764 of 2004

1. R.Viswanathan

...1st Respondent/ Plaintiff

2. The Commissioner,
Tiruppur Municipality,
Tiruppur.

...2nd Respondent/2nd Defendant

Prayer in C.M.A.No.3259 of 2004: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988, against the decree and judgment dated 28.11.2003 made in A.S.No.28 of 2003 on the file of Subordinate Judge of Tirupur remanding and setting aside the judgment and decree dated 28.02.2003 passed in O.S.No.227 of 1996 on the file of District Munsif, Tirupur.

Prayer in C.R.P.(NPD).No.764 of 2004: Civil Revision Petition filed under Article 227 of the Constitution of India against the plaint in O.S.No.82 of 2003 on the file of the District Munsif Court, Tiruppur.



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For Appellants : Mr.S.Sabarish for
M/s.S.K.Rakhunathan

For Respondents : Died (R1)

No Appearance (R2 &
R3)

Not Ready in Notice (R4)

Mr.Nedunchezhiyan for
R5

C.R.P.(NPD).No.764 of 2004

For petitioner : No Appearance

For Respondents : Mr.S.Sabarish for
M/s.S.K.Rakhunathan for
R1

Mr.Nedunchezhiyan for
R2

COMMON JUDGMENT

The issue involved in C.M.A.No.3259 of 2004 and
C.R.P.(NPD).No.764 of 2004 arises out of O.S.No.227 of 1996 and



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O.S.No.82 of 2003 filed by the appellant in C.M.A.No.3259 of 2004 and as the same is inter-related, they are disposed of by way of this common judgement.

2. The appellant in C.M.A.No.3259 of 2004 namely R.Viswanathan claims that he is the owner of the land to an extent of 0.80, 0.58 and 1.00 Acre along with a common space and a well in S.No.730/3 situated in Nallore Village. By a registered partition deed dated 23.08.1972, the 1st respondent in C.M.A.No.3259 of 2004 / 1st petitioner in C.R.P.No.764 of 2004 namely Muthusami is the owner of the land situated in S.No.730/2 which is towards the northern side of the appellant's property in C.M.A.No.3259 of 2004. However, it is alleged that the said Muthusami frequently interfered with the peaceful possession and enjoyment of the property of the said Viswanathan. Thereby, the said Viswanathan filed two different suits before the District Munsif Court, Tiruppur against the said Muthusami and the said suits were clubbed together and dismissed vide common judgment dated 28.02.2003 with a direction to the said



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Viswanathan to file fresh suits based on the existing cause of action.

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Aggrieved by the same the said Muthusami preferred an appeal in A.S.No.28 of 2003 on the file of Subordinate Court, Tiruppur wherein the lower appellate Court has set aside the judgement dated 28.02.2003 passed by the Lower Court and remanded the same to the trial Court. Challenging the same, the present appeal in C.M.A.No.3259 of 2004 has been filed by the said Viswanathan.

3. The learned counsel for the appellant in C.M.A.No.3259 of 2004 submits that as per the provisions of Order 41 Rule 23 of the Code of Civil Procedure, where a decree of the trial court, passed on a preliminary point, is reversed in appeal, the lower appellate court, if it thinks fit, may remand the case for adjudication of issue or issues that are to be tried. Under Rule 23-A, where the decree is passed otherwise than on a preliminary point, and where retrial is considered necessary, only in such cases, remand of the matter needs to be made. However, in the case on hand the appellate Court without framing any issues has remanded the matter to the lower Court



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which is *per se* unsustainable.

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4. Though notice was sent to the respondents 2 and 3 none appeared for the respondents 2 and 3 nor any representative of the respondents 2 and 3 was present before this Court. Considering the pendency of this appeal as well as the Civil Revision Petition, this Court is inclined to dispose of the same based on available records.

5. Admittedly the said Viswanathan filed two different suits before the trial Court as against said Muthuswami and the said suits were dismissed on 28.02.2003 with a direction to file fresh suits based on the existing cause of action as against which the said Viswanathan preferred an appeal before the appellate Court as against the order dated 28.02.2003 which was set aside by the appellate Court and remanded the said matter to the trial Court.

6. Order 41 Rule 23 of the Code of Civil Procedure deals with the



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power of the appellate court to remand the suit to the trial court on an appeal. It specifically provides that an appeal arising out of a decree of a trial court in a suit, which has been disposed upon a preliminary point, which is reversed in appeal by the lower appellate court, only such of the cases, be remanded to the trial court with along the issues that shall be tried in the case along with a copy of the order to the trial court with direction to readmit the suit and proceed to determine the suit.

7. Rule 23A relates to remand in other cases by the lower appellate court, against a decree, which is otherwise than on a preliminary point and in such cases, if the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

8. Therefore, from the above, it is clear that for the purpose of remand, the requirements mandated in Rule 23 and 23A ought to be fulfilled and only in such cases, either invoking Rule 23 or 23A, the matter could be



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remanded to the trial court by the lower appellate court, that too by framing of issues if the matter was dealt with only on preliminary point by the trial court and if it is otherwise as well, the trial court has to frame the issues and remand it to the trial court for retrial. However, in the case on hand, a perusal of the order passed by the lower appellate court reveals that no issues have been framed, but the matter has been merely remanded back to the trial court. Neither there is any finding as to the points in issue, which were considered by the trial court, whether it is on a preliminary issue or a full fledged trial was conducted. Therefore, the order passed by the lower appellate court is against the tenor and mandate of Order 41 Rule 23 CPC and the same deserves to be set aside, by restoring the judgment and decree passed by the trial court.

9. Accordingly, for the reasons aforesaid, the judgment passed by the appellate Court in A.S.No.28 of 2003 is set aside and the order passed by the trial court is restored with liberty to the appellant in C.M.A.No.3259 of 2004 to file fresh suit as ordered by the Trial Court. The Civil



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Miscellaneous Appeal is allowed with the above terms. Insofar as CRP No.764 of 2004 is concerned, as there is no representation for the petitioner, C.R.P.No.764 of 2004 is dismissed for non prosecution. No costs. Consequently, connected miscellaneous petition is closed.

04.10.2023
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Index : Yes / No
speaking Order : Yes / No
Neutral Citation Case : Yes / No
rap

To

1. The Subordinate Court of Tirupur.
2. The District Munsif, Tirupur.
3. The Section Officer, V.R. Section, High Court, Madras.



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CMP.No.1201 of 2007 in
CMA.No.3259 of 2004

M.DHANDAPANI,J

This petition filed by the petitioner seeking to bring on record the legal heirs of the deceased first respondent as proposed respondents in the main appeal is ordered as prayed for.

04.10.2023

2/2

Office to Note :

carry out necessary amendment

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