



C.M.A.No.2086 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.10.2023

CORAM

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

C.M.A.No.2086 of 2005

and

CMP.Nos.11005 of 2005 & 20937 of 2022

1. G.Kuppan (*Deceased*)
2. Dhanammal
3. K.Kumaravel
4. B.Pachaiammal
5. S.Poongodi
6. S.Seeniammal

...Appellants

(Petitioners P2 to 6 brought on record as LR's of the deceased 1st petitioner vide order of this Court dated 24.04.2017 made in CMP.No.4991 of 2017 in CMA.No.2086 of 2005.

Vs.

1. Kalaigarn Pothupani Manram,
Rep. by its President Srimathi R.Chinthamaniammal

2. Jalal

...Respondents

Civil Miscellaneous Appeal filed under Order 43 Rule I (u) of Civil Procedure Code, to set aside the Judgment and decree passed in A.S.No.344 of 2002 on the file of the First Additional Judge, Court of City Civil, Madras in O.S.No.2983 of 1994 on the file of the VIII Assistant Judge, City Civil Court, Chennai.



C.M.A.No.2086 of 2005

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For Appellant : Mr.R.Subramanian

For Respondents : R1 Dismissed vide order dated 25.04.2023
: No Appearance, for R2

JUDGEMENT

The appellant has come up with the present Appeal challenging the Judgment and decree dated 26.04.2004 made in A.S.No.344 of 2002 on the file of the First Additional Judge, Court of City Civil, Madras reversing the Judgment and Decree dated 12.08.1999 made in O.S.No.2983 of 1994 on the file of the VIII Assistant Judge, City Civil Court, Chennai.

2. The case of the appellant is that the suit in O.S.No.2983/1994 was filed against respondents herein in which the 1st respondent did not appear and no written statement was filed, and therefore, the 1st respondent was set *exparte* and the suit came to be decreed in favour of the appellant. Against the said decree, the respondents in the suit filed appeal in A.S.No.344/2002. In the said appeal, Chinthamaniammal, said to be representing the 1st respondent in the



C.M.A.No.2086 of 2005

suit, filed CMP No.2083/2003 praying to file certain documents. Taking up the appeal as also the miscellaneous petition together, the appellate court passed an order remanding the matter to the trial court with a further direction to receive the evidence through Chinthamaniammal, thereby, the name of the said Chinthamaniammal has been shown in the cause list, though in the original suit, her name has not been shown. Aggrieved by the said order, the present appeal has been preferred by the plaintiff.

3. The main grievance canvassed by the learned counsel for the appellant is that though Section 107 of the C.P.C provides power to the lower appellate court to receive additional documents, yet, without appreciating the same, the lower appellate court has passed the said order, which is grossly irregular and unsustainable. Further, when the said Chinthamaniammal was not representing the 1st respondent in the original suit, by way of miscellaneous petition, permitting the said individual to file additional documents and directing the trial court to receive it is wholly irregular.



C.M.A.No.2086 of 2005

4. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing for the appellant and perused the materials available on record.

5. Section 107 of the Code of Civil Procedure pertains to the power of the appellate court, which are as under :-

"107. Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

6. Remand of cases by the lower appellate court on appeal is provided for under Order 41 Rule 23 and 23-A of the Code of Civil Procedure and the same



C.M.A.No.2086 of 2005

is quoted hereunder :-

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"23. Remand of case by Appellate Court.—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case

so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases.—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

7. From the above provisions of law, more particularly Section 107 CPC, the appellate court is clothed with power to take additional evidence or require such evidence to be taken, literally meaning thereby that the lower appellate court can record evidence. Therefore, only in cases, which are covered under 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



C.M.A.No.2086 of 2005

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.

8. In the case on hand, the decree passed by the trial court is not on a preliminary point and no further issues have been framed by the appellate court, which requires adjudication by the trial court. Only to the limited extent of receiving certain documents, the order of remand has been passed, which is grossly erroneous, as Section 107 of the Code of Civil Procedure clothes the lower appellate court with powers to receive additional evidence. Therefore, the order under challenge is wholly unsustainable and, therefore, deserves to be interfered with.

9. For the reasons aforesaid, this Civil Miscellaneous Appeal stands allowed, by setting aside the Judgment and decree dated 26.04.2004 made in A.S.No.344 of 2002 and the First Additional Judge, Court of City Civil, Madras is directed to take oral evidence in terms of Section 107 of C.P.C and Order 41



C.M.A.No.2086 of 2005

Rule 23 and 23A of C.P.C., after providing opportunity to the appellant as well as the respondents and conclude the entire appeal proceedings within a period of six months from the date of receipt of a copy of this order. No costs. Consequently, the connected Miscellaneous petitions are closed.

16.10.2023

skt

Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No

To:

1. The First Additional Judge, Court of City Civil, Madras
2. The VIII Assistant Judge, City Civil Court, Chennai.
3. The Section Officer, V.R. Section, High Court, Madras.



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C.M.A.No.2086 of 2005

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C.M.A.No.2086 of 2005