



C.M.A.No.749 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.10.2023

CORAM

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

C.M.A.No.749 of 2007

and

MP.No.1 of 2007

C.Rajendran

...Appellant

Vs.

1. Paramasivam (*Died*)
2. Santha
3. Kamaraj
4. Sivakami
5. Selvam

...Respondents

(R4 & R5 brought on record as LR's of the deceased R1, vide order of this Court dated 14.06.2023 made in CMP.No.10477/2022 in CMA.No.749/2007)

Civil Miscellaneous Appeal filed under Order 43 Rule I (u) of Civil Procedure Code as against the Judgment and decree dated 01.09.2006 in A.S.No.18 of 2006 on the file of the Principal District Court, Salem reversing the Judgment and Decree in O.S.No.224 of 1997 dated 08.11.2004 on the file of the Additional Subordinate Court, Salem.

For Appellant : Mr.V.Ravi

For Respondents : R1 Died (Steps taken)
: Mr.V.Sekar, for R2 & R3
: Not ready Notice, for R4 & R5



C.M.A.No.749 of 2007

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JUDGEMENT

The appellant, who is the respondent in A.S.No.18 of 2006 has come up with the present Appeal challenging the Judgment and decree dated 01.09.2006 made in A.S.No.18 of 2006, reversing the Judgment and Decree dated 08.11.2004 passed in O.S.No.224 of 1997.

2. The case of the appellant is that, the appellant is the plaintiff who filed a suit for specific performance and permanent injunction as against the respondents herein in O.S.No.224/1997 and the said suit came to be decreed in favour of the appellant. Against the said decree, the respondents herein filed an appeal in A.S.No.18/2006 and the Lower Appellate Court, instead of answering the appeal, had simply remanded the matter to the Trial Court for fresh disposal, by setting aside the Decree dated 08.11.2004 passed in O.S.No.224 of 1997 and for examining witness and to send Ex.A1 for expert opinion. Aggrieved by the said order, the present appeal has been preferred by the plaintiff.



C.M.A.No.749 of 2007

3. The main grievance canvassed by the learned counsel for the appellant is that though Section 107 of the Code of Civil Procedure provides power to the lower appellate court to receive additional documents and to examine witnesses, yet, without appreciating the same, the lower appellate court has passed the said order, which is grossly irregular and unsustainable and the same is contrary to order 41 Rule 23 and 23-A of C.P.C and, therefore, the said order needs to be interfered with.

4. On the above contention, this Court heard the learned counsel appearing for the 2nd and 3rd respondents, who fairly submits that the lower appellate court has powers to entertain reception of additional evidence and can examine witness. However, he submits that the lower appellate court having remanded the matter to the trial court, no prejudice would be caused to the appellant herein to contest the case before the trial court itself.

5. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.



C.M.A.No.749 of 2007

WEB COPY

6. 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."

7. 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 is quoted hereunder :-

"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,



C.M.A.No.749 of 2007

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."

8. 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 and it has the same powers as that of the trial court. 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 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,



C.M.A.No.749 of 2007

remand of the matter needs to be made.

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9. 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 examining witness to verify the genuineness of 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 and to examine witnesses. Therefore, the order under challenge is wholly unsustainable and, therefore, deserves to be interfered with.

10. For the reasons aforesaid, this Civil Miscellaneous Appeal stands allowed, by setting aside the Judgment and decree dated 01.09.2006 made in A.S.No.18 of 2006 and the Principal District Court, Salem is directed to send the Ex.A1 to expert opinion along with the admitted signature in terms of Section 107 of C.P.C and Order 41 Rule 23 and 23A of C.P.C., within a period of four weeks from the date of receipt of a copy of this order. Thereafter, the Lower Appellate Court shall conclude the entire appeal proceedings within a



C.M.A.No.749 of 2007

period of six months thereafter, after providing opportunity to the appellant as well as the respondents. No costs. Consequently, the connected Miscellaneous petition is closed.

12.10.2023

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

To

1. The Principal District Court, Salem.
2. The Additional Subordinate Court, Salem.
3. The Section Officer, V.R. Section, High Court, Madras.



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C.M.A.No.749 of 2007

M.DHANDAPANI, J.

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C.M.A.No.749 of 2007
and
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