



C.M.A.No.2648 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.10.2023

CORAM :

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

C.M.A.No.2648 of 2013

and

M.P.No.1 of 2013

V.Singaram

... Appellant

Vs.

1. S.Govindaraj

2. T.Annadurai

3. A.Ponnusamy

4. S.Arumugam

5. D.Rajangam

6. C.Kandasamy

7. R.Pachamuthu

8. The Assistant Commissioner,
H.R. & C.E.,
Villupuram.

... Respondents

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) r/w.



C.M.A.No.2648 of 2013

Order 41 Rule 23-A C.P.C to set aside the judgment and decree in A.S.No.109 of 2011 dated 28.11.2012 on the file of the learned Subordinate Judge, Kallakurichi, allowing and remanding the judgment and Decree in O.S.No.62 of 2007 dated 19.07.2011 on the file of the learned Principal District Munsif, Kallakurichi, and thereby allow the civil miscellaneous appeal.

For Appellant : Mr.N.Suresh

For Respondents : No appearance for
R1,2,4 to 6

Respondents 3 and 7
died (Steps not taken)
Hence Dismissed vide
order dated 14.06.2023

Dr.S.Suriya, AGP for
R8

JUDGEMENT

This appeal has been filed to set aside the judgment and decree in A.S.No.109 of 2011 dated 28.11.2012 on the file of the learned Subordinate Judge, Kallakurichi, allowing and remanding the judgment and Decree in O.S.No.62 of 2007 dated 19.07.2011 on the file of the learned Principal District Munsif, Kallakurichi.



C.M.A.No.2648 of 2013

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2. Though notice was sent to the respondents 1, 2, 4 to 6 none appeared on their behalf nor any representative of them was present before this Court. Considering the pendency of this appeal, this Court is inclined to dispose of the same based on available records.

3. It is the case of the appellant that the appellant / plaintiff along with 60 families of Thagamtheerthapuram filed a suit in O.S.No.62 of 2007 seeking declaration and permanent injunction to restrain the defendants therein from interfering with the performance of annual festival conducted in Karuppaiya Temple. After contest the trial court dismissed the said suit and granted a decree for permanent injunction against the defendants. Aggrieved over the same, the appellant / plaintiff filed an appeal in A.S.No.109 of 2011, wherein the appellate Court allowed the appeal vide order dated 28.11.2012 and remanded the matter to the trial court for fresh disposal. Challenging the same, the present appeal has been filed.

4. 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



C.M.A.No.2648 of 2013

lower appellate court to receive additional documents and to adduce evidence, yet, without appreciating the same, the lower appellate court though allowed the appeal filed by the appellant to adduce additional documents, however has passed the said order of remand, which is grossly irregular and unsustainable and, therefore, the said order needs to be interfered with.

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

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.



C.M.A.No.2648 of 2013

(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, 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



C.M.A.No.2648 of 2013

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. 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, remand of the matter needs to be made.

9. In the case on hand, the lower appellate Court set aside the decree passed by the trial court not on a preliminary point and without



C.M.A.No.2648 of 2013

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framing any further issues, the lower appellate Court has simply remanded back the matter to the trial Court for taking additional evidence, which is impermissible. The lower appellate Court can dispose of the appeal upon a preliminary point and the decree is reversed in appeal, may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case. The lower appellate Court clothes its power in terms of 107 of the Code to determine the case finally and to frame additional issues, to take additional evidence or to require such evidence to be taken, 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.

10. Only to the limited extent of fresh adjudication on the basis of additional documents filed by the appellant, the order of remand has been passed, which is grossly erroneous. Therefore, the order under challenge is wholly unsustainable and, therefore, deserves to be interfered with.



C.M.A.No.2648 of 2013

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11. For the reasons aforesaid, this Civil Miscellaneous Appeal stands allowed, by setting aside the Judgment and decree dated 28.11.2012 made in A.S.No.109 of 2011 and the Subordinate Court, Kallakurichi is directed to adduce evidence in terms of Section 107 of C.P.C and Order 41 Rule 23 and 23A of C.P.C., in respect of the additional documents filed by the appellant, after providing opportunity to the appellant as well as the respondents and conclude the entire appeal proceedings within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, the connected Miscellaneous petition is closed.

11.10.2023

rap/RR

Index : Yes / No

Speaking order / Non speaking order

Neutral Citation Case : Yes / No

To

1. The Subordinate Judge, Kallakurichi,
2. The Principal District Munsif, Kallakurichi,



C.M.A.No.2648 of 2013

3.The Section Officer, V.R.Section, High Court, Madras.

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M.DHANDAPANI, J.

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C.M.A.No.2648 of 2013

C.M.A.No.2648 of 2013

11.10.2023