



C.M.A.No.16 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2023

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.No.16 of 2021

Jeyadev

... Appellant

Vs.

1.Kannan
2.Savithiri
3.Bakthavatsalam
4.Lakshmi
5.Selvi
6.Seenu

Respondents 2 to 6 are given up
as they remained exparte

... Respondents

Prayer:

Civil Miscellaneous Appeal filed under Order 43 Rule (1) (U) of C.P.C., to set aside the judgment and decree dated 26.08.2019 passed in A.S.No.3 of 2017 preferred against the judgment decree dated 30.11.2016 in O.S.No.197 of 2011 on the file of the I Additional Sub Court, Villupuram.

For Appellant : Ms.R.Meenal
For Respondents : Mr.D.Rajasekar for R1 and R2
R3 to R6 – Given up



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J U D G M E N T

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This appeal has been filed against the judgment and decree dated 26.08.2019 passed in A.S.No.3 of 2017 preferred against the judgment decree dated 30.11.2016 in O.S.No.197 of 2011 on the file of the I Additional Sub Court, Villupuram.

2.The learned counsel appearing for the appellant submitted that the appellant/ plaintiff filed a suit for partition in O.S.No.197 of 2011 before the I Additional Sub Court, Villupuram on 15.09.2011. After adjudication, the Trial Court decreed the suit filed by the appellant vide judgment decree dated 30.11.2016. Aggrieved by the same, the first respondent/ first defendant filed appeal before the Lower Appellate Court and the Lower Appellate Court without disposing the appeal, inadvertently, remanded the matter back to the Trial Court by exercising the power under Order 41 Rule 23 of C.P.C. without deciding the preliminary point and without framing any issues. Challenging the same, the present appeal has been filed.

3.The learned counsel appearing for the appellant further submitted that even though two additional issues arose for consideration before the Lower Appellate Court and the Lower



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Appellate Court have power to decide the additional issues if it is necessary and put on notice to the parties by way of oral evidence and marking evidence, without exercising the power in terms of Section 96 of C.P.C., remanding the matter back to the Trial Court is not sustainable one. Hence, this Court may issue direction to the Lower Appellate Court to allow the parties to adduce evidence and mark the documents if it is necessary and dispose of the appeal within a reasonable time frame.

4.The learned counsel appearing for the respondents 1 and 2 submitted that though power of remand is available to the Lower Appellate Court in terms of Order 41 Rule 23, 23A of C.P.C., in the present case, the appellant filed suit for partition and the defendants contested the suit based on the evidence and already the brothers partitioned the property in respect of B Schedule and without considering the same the Trial Court decreed the suit. Further, the respondents intended to mark some documents before the Trial Court, however, they are xerox copies. Thereby, the Trial Court was not able to mark the documents produced by the respondents. Accordingly, prayed for dismissal of the appeal.



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5.The facts in the present case is not in dispute. As per Order 41 Rule 23, 23A of C.P.C., 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 the judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, however, in the present case, the respondents defendants not marked original documents and marked only xerox copies and for the purpose of marking the original copies, the present remand is made, which is not sustainable one.

6.Whatever power is available with the Trial Court, the same is also available with the Lower Appellate Court in terms of Section 96 of C.P.C. Hence, this Court is inclined to set aside the impugned order and remand the matter back to the Lower Appellate Court and to direct the Lower Appellate Court to give opportunity to the appellant as well as the respondents if it is necessary to mark any additional documents and allow the parties to adduce oral evidence and dispose of the appeal.



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7. In view of the above, the judgment and decree dated 26.08.2019 passed in A.S.No.3 of 2017, is set aside and the matter is remanded back to the learned Additional District Judge (FTC), Villupuram. The learned Additional District Judge (FTC), Villupuram shall give opportunity to the appellant as well as the respondents if it is necessary to mark any additional documents and to adduce oral evidence and shall decide the issue inbetween the parties and dispose of the appeal suit within a period of six months from the date of receipt of a copy of this judgment.

8. The civil miscellaneous appeal is allowed on the above terms.

No costs.

18.12.2023

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Index: Yes/ No

Speaking Order: Yes/ No

NCC: Yes/ No

To

1. The I Additional Sub Court,
Villupuram.

5/6



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M.DHANDAPANI,J.
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