



C.M.A.(MD) Nos. 1112 and 1113 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 05.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD) Nos.1112 and 1113 of 2012

and

M.P(MD) Nos.1 and 1 of 2012

C.M.A(MD) No.1112 of 2012:

1.K.Kadher Meera (died)Appellant/Respondent/Defendant

2. K.Mohamed Kashim

3. K.Kathar

4. Jeenath Appellants

(Appellants 2 to 4 are brought on record as the
LRS., of the deceased sole appellant vide order
dated 27.02.2015 made in M.P(MD) Nos.
1 to 3 of 2015 in C.M.A.(MD) No.1112 of 2012)

-vs-

Sharfuddin Respondent/Appellant/Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 U of C.P.C., against the judgment and decree, dated 21.04.2012 in A.S.No.14 of 2010, on the file of the Principal Subordinate Judge, Tiruchirappalli reversing the judgment and decree, dated 30.09.2009 in O.S.No.723 of 2003 on the file of the II Additional District Munsif Court, Tiruchirappalli.

For Appellants : Mrs.J.Maria Roseline

For Respondent : No appearance



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C.M.A(MD) No.1113 of 2012:

1.K.Kadher Meera (died)Appellant/Respondent/Plaintiff
2. K. Mohamed Kashim
3. K.Kathar
4. Jeenath Appellants

(Appellants 2 to 4 are brought on record as the
LRS., of the deceased sole appellant vide order
dated 27.02.2015 made in M.P(MD) Nos.
1 to 3 of 2015 in C.M.A.(MD) No.1113 of 2012)

-VS-

Sharfuddin Respondent/Appellant/Defendant

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 U of C.P.C., against the judgment and decree dated 21.04.2012 in A.S.No.15 of 2010, on the file of the Principal Subordinate Judge, Tiruchirappalli, reversing the judgment and decree, dated 30.09.2009 in O.S.No.1159 of 2001 on the file of the II Additional District Munsif Court, Tiruchirappalli.

For Appellants : Mrs.J.Maria Roseline

For Respondent : No appearance



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COMMON JUDGMENT

C.M.A(MD) No.1112 of 2012 has been filed by the defendant in a suit for permanent injunction, challenging the order of remand passed by the first appellate Court. C.M.A(MD) No.1113 of 2012 has been filed by the plaintiff in a suit for declaration that the suit schedule property is a common lane and for mandatory injunction directing the defendants to remove the encroachment, challenging the order of remand passed by the first appellate Court.

2. The plaintiff in O.S.No.1159 of 2001 had filed a suit for declaration that the suit schedule property is a common lane and for mandatory injunction to remove the obstructions put up by the defendant. The defendant had filed O.S.No.723 of 2003 for a permanent injunction claiming exclusive right over the said common lane and for permanent injunction not to disturb the possession. Both the suits were tried together. The suit in O.S.No.1159 of 2001 was decreed and O.S.No.723 of 2003 was dismissed by the trial Court. The defendant in O.S.No.1159 of 2001 and the plaintiff in O.S.No.723 of 2003 had filed A.S.Nos.15 of 10 and 14 of 2010 before the Principal Sub Court, Tiruchirappalli.



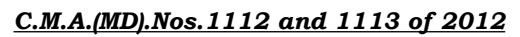
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3. The learned first appellate Judge heard both the appeals together and set aside the judgment and decree of the trial Court in both the suits and remanded back to the trial Court. Both the order of remand passed in both the appeals are under challenge in the present Civil Miscellaneous Appeals.

4. The learned counsel appearing for the appellants, who are the legal heirs of the plaintiff in O.S.No.1159 of 2001 had contended that the suit claim is a common lane between the plaintiff and the defendant. Even the documents of the respondent herein would clearly indicate the boundaries and the documents filed by the respondent herein would clearly establish that the dispute is only regarding a common lane. The Advocate Commissioner who was appointed before the trial Court has also categorically found that the suit claim does not form within the boundary of the defendants' documents. Therefore, the first appellate Court ought not to have remitted the matter back to the trial Court for fresh consideration.

5. The learned counsel appearing for the appellant had further contended that the defendant had filed I.A.No.62 of 2012 for receiving the additional evidence. The first appellate Court for the purpose of receiving



8. A perusal of the first appellate Court judgment clearly reveals that the appellant in the first appeal had filed I.A.No.62 of 2012 in order to mark



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certain additional documents before the first appellate Court. 11 documents were marked before the first appellate Court. Without considering the said application on merits, the first appellate Court had accepted the contention of the appellant in the first appeal by mistaken, the documents were not placed before the trial Court. On the said ground, the order of remand has been passed.

9. The first appellate Court has to exercise powers as contemplated under Order 41 Rules 24 to 27 C.P.C. Only if the first appellate Court finds that it cannot exercise power under Order 41 Rules 24 to 27 C.P.C, and the power under Order 41 Rule 23 C.P.C, can be invoked by the first appellate Court for remanding the matter back to the trial Court.

10. In the present case, admittedly, the appellant in the first appeal has filed I.A.No.62 of 2012 for receiving 11 documents as additional evidence. The first appellate Court ought to have exercised power under Order 41 Rule 27 C.P.C and Order 41 Rule 28 C.P.C to decide the said application on merits. In case, if the appellate Court had arrived at a conclusion that these documents could be received in evidence, proper procedure should be followed by examining the parties for marking the said



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documents. The respondent in the appeal should be given an opportunity to cross-examine the parties. The oral and documentary evidence on the side of the respondent in the appeal should only be restricted to the additional evidence that is permitted to be marked by the first appellate Court.

11. In view of the above said facts, the order of remand passed by the first appellate Court in order to enable the appellant in the first appellate Court to mark certain additional documents is not legally sustainable. The order of remand in both the appeals is hereby set aside. The first appellate Court is directed to consider I.A.No.62 of 2012 on merits and in accordance with law before considering the appeal on merits. The learned first appellate Judge is directed to follow the judgment of the Hon'ble Supreme Court reported in **2018 (9) SCC 445 (Corporation of Madras and another Vs. M.Parthasarathy and others)** and consider the application under Order 41 Rule 27 C.P.C. In case, if the appellate Court decides to receive the additional evidence on record, the respondent should be given an opportunity to dispute the said documents. Thereafter, the first appellate Court shall proceed to hear the appeal on merits.



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12. With the above said observations, both the Civil Miscellaneous Appeals stand allowed. In case, if the appellants in the appeals are permitted to mark the additional documents, the respondent in the appeal may also be permitted to mark additional documents and the said documents shall be restricted to the additional evidence which is sought to be marked by the appellants. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

05.04.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To

1. The Principal Subordinate Judge,
Tiruchirappalli.
2. The II Additional District Munsif Court,
Tiruchirappalli.
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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