



CRP (MD) No.488 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	11.07.2023
Pronounced on	18.08.2023

CORAM:

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

CRP (MD) No.488 of 2021
and
CMP(MD)No.2591 of 2021

1.Saroja

2.Manikandan

3.Suyambu

4.Venkatesh

... Petitioners

Vs.

1.Radhakrishnan

2.Suyambulingam

3.Ananthi

4.Sunddaram

5.Krishnakumar

6.Ravikumari

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order dated 11.12.2020 made in I.A.No.1 of 2019 in A.S.No.4 of 2019 on the file of the Sub Court, Eraniel.



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For Petitioners 1, 2 & 4 : Mr.G.Sridharan

For 3rd Petitioner : Mr.G.Mohankumar

For R1 : Mr.K.P.Narayanakumar

For R4 : Mr.G.Anto Prince
M/s. Peace Law Foundation

For R2, R3,
R5 & R6 : No appearance

ORDER

This civil revision petition is filed as against the fair and decretal order dated 11.12.2020 made in I.A.No.01 of 2019 in A.S.No.4 of 2019 on the file of the Sub Court, Eranial.

2. The defendants 2 to 5 in O.S.No.66 of 2003 are the revision petitioners. The first respondent/plaintiff filed a suit in O.S.No.66 of 2003 for permanent injunction restraining the defendants from trespassing or demolishing the house and cause damage, encumbering the suit property or dispossessing the plaintiff from the suit property in any other way and for declaration of title of the plaintiffs in the suit property and for partition



claiming 1/2 share in the suit schedule property. The said suit was decreed on 20.11.2013, against which, an appeal was preferred in A.S.No.3 of 2004 before the Sub Court, Padmanabhapuram. During the pendency of the appeal suit, the appeal suit was transferred to the Sub Court, Eraniel and renumbered as A.S.No.4 of 2019. However, the revision petitioners were not aware of the transfer of the appeal suit to the Sub Court, Eraniel, where it was renumbered as A.S.No.4 of 2019. The Sub Court, Eraniel, dismissed the appeal suit on 25.02.2019, without affording any opportunity to the revision petitioners. Hence, the revision petitioners filed an application in I.A.No.01 of 2019 for restoration of the appeal suit. The same was resisted on the side of the respondents. The Sub Court, Eraniel, considering the averments made in the petition and in the counter affidavit, dismissed the application filed by the revision petitioners, against which, the present revision is preferred.

3. The learned counsel appearing for the revision petitioners would submit that as per Order 41, Rule 17 of CPC, the Court is not empowered to dismiss the appeal, when the appellant is absent. Therefore, the appellate Court, in deciding the first appeal on merits in the absence of the



petitioners/appellants is violation of the Order 41, Rule 17 of CPC. The learned counsel would further submit that the transferee Court failed to give notice to the petitioners/appellants and therefore, the Judgment pronounced by the transferrer Court without hearing the arguments of the petitioners is liable to be set aside and therefore, the order passed in I.A.No.01 of 2019, is unsustainable and liable to be set aside. Sufficient opportunity to be given to the petitioners to put forth their arguments. To support his contention, he has relied upon the decision reported in **2018 (3) CTC 303**, in which, the matter was remanded to the High Court to decide the appeal afresh on merits.

4. On the other hand, the learned counsel appearing for the first respondent would contend that the dismissal of the appeal on merits is proper. Since the learned counsel failed to argue the matter on the day fixed for arguments on the side of the petitioners, the Court below has rightly dismissed the appeal on merits, which calls for no interference. To support his contention, he has relied upon the decision reported in **(1996) 5 SCC 625**.

5. Heard on both sides and records perused.



6. Admittedly, the appeal suit was transferred from Sub Court, Padmanabhapuram, to the Sub Court, Eraniel and renumbered as A.S.No.4 of 2019. There is nothing on record to show that notice was given to the petitioners/appellants about the transfer by the Transferee or the Transferror Court. From the records, it is seen that when the appeal was called on for hearing, neither the counsel nor the petitioners/appellants were present. In such situation, provisions of Order 41, Rule 17 of CPC got attracted and therefore, the appellate Court should have taken recourse to the power under Order 41, Rule 17 of CPC for passing appropriate orders as contemplated in Rule 17. Indeed, the explanation appended to Rule 17 in clear terms, provides that nothing in this Sub Rule shall be construed as empowering the Court to dismiss the appeal on merits. The Hon'ble Supreme Court in the case reported in **2018 (3) CTC 303**, in the case of **Navnirman Development Consultants (I) Pvt., Ltd., Pune Vs Divisional Commissioner & President, District Sports Complex, Executive Committee, Pune**, has held as hereunder:

"15) This enables the superior Court to examine the legality of the decision in its proper perspective in its appellate jurisdiction.



16) We find from the record that the High Court decided the appeal in the absence of both parties. In other words, when the appeal was called on for hearing, neither the counsel for the appellant nor the counsel for the respondent was present.

17) In such situation, provisions of Order 41 Rule 17 of the Civil Procedure Code, 1908 got attracted and, therefore, the High Court should have taken recourse to the powers under Order 41 Rule 17 for passing appropriate orders as contemplated in Rule 17. Indeed the explanation appended to Rule 17 in clear terms provides that nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on merits."

Therefore, the judgment pronounced by the transferror Court without hearing the arguments of the petitioners/appellants is unsustainable. The Court below ought to have allowed the application filed by the revision petitioners by affording sufficient opportunity to them. Since the petitioners have satisfactorily explained the reason for non-appearance before the transferror Court, this Court thinks fit that the petitioners shall have the opportunity to contest the suit on merits. Further, in the case referred by the first respondent's counsel reported in **(1996) 5 SCC 625**, the appeal was dismissed



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on merits for non-appearance of one of the appellant's advocate. Since the advocate for other three appellants argued the matter, the appeal was dismissed on merits. Therefore, the observation made in the above case, is not applicable to the present case.

7. In these circumstances, the order passed in I.A.No.01 of 2019 by the learned Subordinate Judge, Eraniel, is set aside and the appeal suit in A.S.No. 4 of 2019 is restored to its file. Since the matter is old, the learned Subordinate Judge, Eraniel, is directed to decide the appeal on merits and in accordance with law, as expeditiously as possible, preferably, within a period of three months from the date of receipt of a copy of this order, after serving notice of hearing of the appeal to the parties. Accordingly, this Civil Revision Petition is allowed. No Costs. consequently, connected miscellaneous petition is closed.

18.08.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
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K.GOVINDARAJAN THILAKAVADI

cp

To

The Subordinate Judge,
Eraniel.

order made in
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