



C.M.A.(MD).No.284 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.04.2023

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISHKUMAR

C.M.A.(MD).No.284 of 2023

and

C.M.P.(MD).No.3476 of 2023

Arulraj

... Appellant

Vs.

A.Suseela Mary

... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Order 43(u) of the Code of Civil Procedure, against the order of remand in A.S.No.37 of 2019 on the file of the Principal District Judge, Thanjavur, dated 19.10.2022, remanded the judgment and decree passed in O.S.No.113 of 2014 on the file of Additional Sub Court, Thanjavur, dated 11.01.2019.

For Appellant : Mr.G.Karnan

For Respondent : Mr.A.Senthilkumar



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JUDGMENT

Challenging the order of remand passed by the First Appellate Court, the present appeal has been filed.

2. The brief facts leading to the filing of this appeal are as follows:

The suit has been originally filed for specific performance of the agreement dated 20.11.2006 and the trial Court has decreed the suit. The defence was taken in the suit that Ex.A1 is a forged one and not a genuine. However, the trial Court has rejected the defence and decreed the suit. Challenging the same, the first appeal has been filed before the Principal District Court, Thanjavur. During the pendency of the appeal, an application under Order 41 Rule 27 of C.P.C., has been filed for receiving additional documents as Document Nos.3 to 5. While allowing the application under Order 41 Rule 27 of C.P.C., the first appellate Court has set aside the entire decree and judgment of the trial Court and remanded the matter back to the trial Court for fresh disposal, including the application filed under Order 41 Rule 27 of C.P.C. Challenging the same, the present appeal came to be filed.



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3. Heard the learned counsel for the appellant and the learned counsel for the respondent.

4. Now, the point arise for consideration in this appeal is whether the appellate Court is right in remanding the matter merely on the basis of the application filed under Order 41 Rule 27 of C.P.C.

5. On perusal of the judgment of the appellate Court, this Court is of the view that the appellate Court has not decided the issue on merits and as against the well settled procedure contemplated under C.P.C. If any application is filed under Order 41 Rule 27 of C.P.C., the appellate Court has to either reject or to allow the same. Once the application filed under Order 41 Rule 27 of C.P.C., is allowed, then the procedure for taking further evidence has to be followed as contemplated under Order 41 Rule 28 of C.P.C., wherein it has been stipulated that either the appellate Court itself can take such evidence or the appellate Court can direct the trial Court to take such evidence and forward the evidence and then decide the appeal on its own merits. Whereas, in this case, the first



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appellate Court, merely on the basis of the application filed under Order 41 Rule 27 of C.P.C., has set aside the entire judgment passed by the trial Court which is *per se* not valid in the eye of law. The order of remand can be made under the circumstances narrated under Order 41 Rules 23, 23A and 25 of C.P.C., only when the suit is decided on preliminary point and the appellate Court come to the conclusion to set aside the judgment and decision under other aspect is required, the matter can be remanded. Similarly, the order of remand is permissible under Order 41 Rule 23-A of C.P.C., only when the judgment of the trial Court is reversed in appeal on merits and the appellate Court is of the view that retrial is necessary. The remand is possible similarly under Order 41 Rule 25 of C.P.C., when there is no issue has been framed, the appellate Court frame necessary issues, refer the same for trial to the Court from whose decree the appeal is preferred. Only under these circumstances, the remand is possible, whereas in this case, merely on the basis of the application filed under order Order 41 Rule 27 C.P.C., the first appellate Court has set aside the entire judgment and remand the matter. The very conduct of the appellate Court itself indicates



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that the appellate Court judge has abdicated his judicial duty in taking the evidence or following the procedure contemplated under Order 41 Rule 27 of C.P.C.

6. Such being the position, the order of remand passed by the first appellate Court is set aside and the learned Principal District Judge, Thanjavur is directed to hear the application filed under Order 41 Rule 27 of C.P.C., and decide the same on merits. If that application is allowed, then follow the procedure contemplated under Order 41 Rule 28 of C.P.C., and decide the main appeal on merits, within a period of four months from the date of receipt of a copy of this order.

7. In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

17.04.2023

NCC:Yes/No
Index:Yes/No
Speaking/Non-speaking order
akv



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To

- 1.The Principal District Judge,
Thanjavur.
- 2.The Additional Sub Court,
Thanjavur.



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N.SATHISHKUMAR, J.

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