



C.M.A.(MD)No.252 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

DATED : 20.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.(MD)No.252 of 2021

and

C.M.P.(MD)No.2151 of 2021

Tamilarasan

...Appellant/21st Respondent/Plaintiff

Vs.

1.S.Annadurai

S.Karunanidhi (died)

2.S.Selvam

3.V.Thiripurasundari

4.Vasanthi

5.Kalaiyarasi @ Kalaivani

...Respondents/Respondents/Defendants 1-3

PRAYER: This Civil Miscellaneous Appeal is filed under Section 43 Rule 1 of the Civil Procedure Code, to call for the records pertaining to A.S.No.63 of 2014 and 20.01.2020 on the file of the Principal Sub Court, Kumbakonam by allowing the appeal by setting aside the decree and judgment passed in O.S.No.29 of 2011 dated 31.10.2014 on the file of the District Munsif Cum Judicial Magistrate Papanasam and remand back to the trial Court for fresh trial and set aside the same.

For Appellant	: Mr.G.Karnan
For R1	: Mr.R.Sreenivasan
For R2	: No Appearance



C.M.A.(MD)No.252 of 2021

JUDGMENT

WEB COPY

This Civil Miscellaneous Appeal is filed challenging the decree and judgment, by which the First Appellate Court set aside the judgment of the trial Court and remanded the same to the trial Court for fresh disposal.

2.For the sake of convenience, the parties herein are referred to as per their rank before the Tribunal.

3.The brief facts, leading to the filing of the civil miscellaneous appeal, are as follows:-

(i) The plaintiff and the defendants are the sons and daughters of one Subramania Pillai and Varnathammal. The plaintiff's father had an ancestral property and he had sold the same in the year 1985 to a third party. He purchased the suit property from the income derived from the ancestral property. The plaintiff is the elder son of Subramania Pillai and the defendants are the younger brothers and sister of the plaintiff. The father of the plaintiff died intestate. Hence, the suit has been filed claiming partition for a preliminary decree of 1/3 share.



WEB COPY

(ii) In the written statement, the fourth defendant had taken a stand that no income yielding properties were owned by the joint family of the plaintiff and the defendants. Only an extent of 2 acres and 32 cents of land was the ancestral property of the family. The defendants and the plaintiff jointly converted the said land into house plots and sold the same. The father had settled an extent of 5377 ½ sq.feet in Survey No.114/14 in favour of the fourth defendant by way of a settlement deed dated 11.08.2006. The fourth defendant is in possession and enjoyment of the said property. The same was also included in the suit for partition. Further, the suit properties are not properly described with proper boundaries. Hence, he opposed the suit.

(iii) The trial Court on appreciation of evidence available on record had granted decree in favour of the plaintiff. Challenging the same, appeal was filed by the fourth defendant. During the appeal stage, an application for reception additional documents as well as additional written statement were filed in I.A.Nos. 74 and 75 of 2015, wherein a new plea had been taken by the defendants to the effect that the ancestral property had already been partitioned in the year 1985. At that time the fourth defendant was a minor. The first defendant, pursuant to the above partition, sold his share. Besides he had also raised a plea in respect of the



partition. According to him, his interest has not been properly protected, since he was a minor at the time of partition.

(iv)The appellate Court, taking note of the above applications, had set aside the entire decree and judgment of the trial Court and remanded the matter back to the trial Court for fresh consideration and even relegated I.A.Nos.74 and 75 of 2015 to the trial Court. Challenging the same, the present appeal came to be filed.

4.The learned counsel for the appellant/plaintiff would submit that the Appellate Court committed an error in remanding the matter with an applications filed for reception of additional documents. The Appellate Court ought to have either allowed or rejected the applications filed for reception of additional documents, instead, the Appellate Court relegated the same to the trial Court and simply set aside the entire judgment and decree by remanding the matter to the trial Court for fresh disposal. Hence, the procedure adopted by the Appellate Court is not in accordance with law and the same is required to be set aside.

5.The learned counsel for the first respondent would submit that the appellate Court had remanded the matter to the trial Court after taking note of the



C.M.A.(MD)No.252 of 2021

fact that the interest of the minor had not been protected at the time of partition that had taken place in the year 1985, therefore, fresh trial is required. Hence, there is no infirmity in the judgment passed by the appellate Court.

6.In view of the above submissions, now the points arise for consideration in this appeal are:

1.Whether the First Appellate Court is right in setting aside the entire judgment of the trial Court?; and

2.Whether the remand order passed by the First Appellate Court even without receiving the additional documents in evidence is proper?

7.On perusal of the entire judgment, this Court is of the view that the approach of the First Appellate Court in setting aside the entire judgment of the trial Court is not in accordance with law. The applications have been filed for reception of some additional documents and additional written statement. The Appellate Court ought to have decided the said applications first. In the event, the appellate Court came to the conclusion that those documents are necessary for effective disposal of the appeal, then the Appellate Court ought to have allowed



C.M.A.(MD)No.252 of 2021

those applications and received the additional documents and the additional written statement on file. Once the additional documents are received under Order 41 Rule 27 of the Civil Procedure Code (hereinafter referred to as 'CPC' for the sake of brevity), the Appellate Court ought to have followed the procedures contemplated under Order 41 Rule 28 of CPC as to the mode of taking additional evidence either by the appellate Court or to direct the Court, from whose decree the appeal is preferred or any other subordinate Court to take such evidence and send it to the appellate Court.

8. Such course had not been followed by the appellate Court in this matter, whereas, the appellate Court set aside the entire judgment on the basis of the applications for reception of additional documents and directed the trial Court to decide that applications also. Such approach of the appellate Court indicates that the learned Judge has not even understood the fundamental law in dealing with the applications for reception of additional documents in appeal stage.

9. It is relevant to note that the Appellate Court can remand the matter only on certain circumstances as provided under Order 41 Rule 23 to Rule 25 of CPC. When the trial Court decided the suit on a preliminary issue, which had



C.M.A.(MD)No.252 of 2021

been appealed and the appellate Court set aside the said judgment, in that situation, the appellate Court can very well remand the matter under Order 41 Rule 23 of CPC.

10. Order 41 Rule 23-A of CPC reads that only when the appellate Court is of the firm opinion that re-trial is considered necessary, the remand is possible. Order 41 Rule 24 of CPC deals with disposal of the appeal by the appellate Court itself, when there are sufficient evidence on record. Order 41 Rule 25 of CPC deals with non framing of necessary issues and in such case, the appellate Court may remand the suit and refer the same for re-trial to the Court, whose decree is appealed with a direction to take additional evidence if necessary.

11. Only in the above circumstances, the remand is permissible in law. Whereas, in the present case, the appellate Court without embarking on such exercise had simply remanded the matter to the trial Court and set aside the entire judgment, which is *per se* not valid in the eye of law. The course adopted by the Appellate Court clearly indicate that the Appellate Court had not applied its mind and just shared its responsibility to the trial Court only to show disposal of the appeal. It is not proper in the eye of law.



C.M.A.(MD)No.252 of 2021

WEB COPY

12. Such view of the matter, the decree and judgment of the appellate Court remanding the matter to the trial Court is set aside and the First Appellate Court is directed to decide the applications in I.A.Nos.74 and 75 of 2015. Consequent upon its decision, the Appellate Court shall take evidence, if requires, by following the prescribed procedures and decide the appeal within a period of four months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

20.04.2023

NCC : Yes / No
Index : Yes/No
Internet : Yes/No
ta

To

1. The Principal Sub Court, Kumbakonam.
2. The District Munsif Cum Judicial Magistrate Court,
Papanasam.
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



C.M.A.(MD)No.252 of 2021

N.SATHISH KUMAR, J.

ta

C.M.A.(MD)No.252 of 2021

20.04.2023