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Civil Miscellaneous Appeal No.1581 and 1582 of 2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED : 05.12.2024**

**CORAM**

**THE HONOURABLE MR.JUSTICE M.DHANDAPANI**

**Civil Miscellaneous Appeal No.1581 and 1582 of 2021**

1.Prakasam

2.Namasivayam

3.Dhanabakkiyammal

... Appellants in both appeals

*Vs.*

Kathirvelan  
appeals

... Respondent in both

Civil Miscellaneous Appeals filed under Order XLIII Rule 1(u) of the Civil Procedure Code, against the common judgment and decree dated 19.01.2021 passed in A.S.Nos.4 and 18 of 2018 on the file of the II Additional District Court, Thindivanam, remanded back to in O.S.Nos.7 of 2012 and 48 of 2012 dated 24.07.2017 on the file of the Subordinate Court, Gingee.

For Appellants : Ms.R.Anvitha

in both cases for M/s.V.Srimathi

For Respondent : Ms.R.Poornima

in both cases

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Civil Miscellaneous Appeal No.1581 and 1582 of 2021

### **COMMON JUDGMENT**

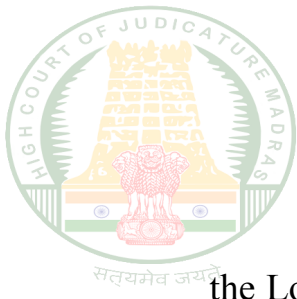
**WEB COPY** These Civil Miscellaneous Appeals arise out of the common judgment and decree passed in A.S.Nos.4 and 18 of 2018 dated 19.01.2021 by the II Additional District Court, Tindivanam and hence, they are disposed of by way of this common judgment.

2. While the appellants herein are the plaintiffs in O.S.No.48 of 2012 who filed the suit for recovery of possession, the respondent herein filed a suit in O.S.No.7 of 2012 for specific performance. The suit filed by the respondent herein in O.S.No.7 of 2012 was dismissed by the Trial Court and the suit filed by the appellants in O.S.No.48 of 2012 was decreed. Aggrieved by the same, the respondent herein preferred A.S.Nos.4 and 18 of 2018 before the Lower Appellate Court. During the pendency of the appeals, the respondent filed a petition in I.A.No.14 of 2020 for marking additional evidence under Order 41 Rule 27 CPC and the Lower Appellate Court allowed the petition filed by the respondent and remanded the matter back to the Trial Court contrary to the provisions of Order 41 Rule 23 CPC. Challenging the same, the present appeals have been filed before this Court.



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3. The learned counsel appearing for the appellants submits that the respondent has right to produce additional document before the Lower Appellate Court, if he satisfies the requirement under Order 41 Rule 27 CPC. If the trial Court refuses to admit the evidence, the party seeking to produce additional evidence has to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge and came to his knowledge anterior in point of time and in exercise of due diligence, produced by him during the appellate proceedings. In the present case, the additional evidence which was produced by the respondent before the Lower Appellate Court was very much available even at the time of trial in the suit and the respondent has also knowledge about the same. However, in order to drag the proceedings, the additional evidence was marked before the Lower Appellate Court. If the additional evidence produced by the respondent is admissible one, the Lower Appellate Court can very well appreciate the same and pass the judgment and decree on the basis of the evidence available before it. However, contrary to the provisions of Order 41 Rule 23 C.P.C, the matter was remanded back to the trial Court. The power of remand is available to the Lower Appellate Court, unless



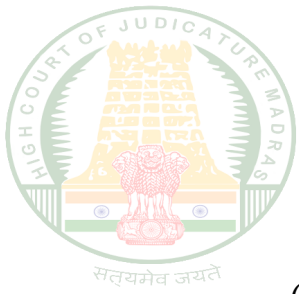
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the Lower Appellate Court satisfies that the order of remand is necessary on the preliminary point to be decided by the trial Court by framing the issues. In the present case, without framing any issues, the Lower Appellate Court remanded the matter back to the Trial Court. In support of her contention, she relied on the judgment of the Hon'ble Apex Court in C.A.No.2647 of 2024 dated 19.02.2024. Accordingly, she prays for allowing this appeal.

4. The learned counsel appearing for the respondent submits that this Court may issue a direction to the Lower Appellate Court to dispose of the appeals on merits and in accordance with law.

5. The issue raised in these appeals is no longer *res integra* and a similar issue came up for consideration before the Hon'ble Apex Court, wherein, it has been held as follows:-

*“The High Court, in our considered view, ought not to have remitted the matter after setting aside the judgment and decree of the trial Court. While doing so, the High Court found that the respondent did not adduce sufficient evidence in support of Exhibit B-3. Such an approach cannot be countenanced. The appellate Court is the final court of fact*



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*and law. An order of remand under Order 41 Rule 23, Code of Civil Procedure, cannot be made for a mere asking. If the High Court is of the view that the evidence is not sufficient enough to decide a particular issue from its point of view, it can very well call for a finding from the trial Court. As stated, it is the defendant who filed the appeal while relying upon Exhibit B-3.”*

6. From the above judgment, it is clear that an order of remand cannot be made for mere asking, unless the Lower Appellate Court satisfies on the preliminary issue to be necessarily tried by the trial Court. However, in the present case, without satisfying the requirement under Order 41 Rule 23 C.P.C, the Lower Appellate Court remanded the matter back to the Trial Court. Hence, the common judgment and decree dated 19.01.2021 passed in A.S.Nos.4 and 18 of 2018 by the II Additional District Court, Tindivanam, is hereby set aside and the Lower Appellate Court is directed to dispose of the appeals by providing opportunity to the appellants and the respondent to put forth their case in respect of I.A. No.14/2020, viz., with regard to the additional evidence and dispose of the appeals within a period of three months from the date of receipt of this judgment. It is made clear that mere receiving the additional



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evidence will not deprive the rights of the appellants to prove their case.

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7. Accordingly, these Civil Miscellaneous Appeals are allowed.

There shall be no order as to costs.

**05.12.2024**

Speaking Judgment/Non-speaking Judgment

Index : Yes/No

Neutral citation: Yes/No

ssb

To

1. The II Additional District Judge,  
Thindivanam.
2. The Subordinate Judge,  
Gingee.



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**M.DHANDAPANI, J.**

ssb

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**05.12.2024**