



C.M.A.(MD)No.1329 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 14.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.DHANABAL

C.M.A.(MD)No.1329 of 2011

and

M.P(MD) No.1 of 2011

1. Mariammal

2. Durairaj alias Durai

3. Marimuthu

4. Saravanan

... Appellants/Respondents 1 to 4
Defendants 1 to 4

-vs-

1. Kaliaperumal Chettiar (died)

... 1st respondent/Appellant/
Plaintiff

Manikandan (died)

2. Amirthalingam

... 2nd Respondent/ 6th Respondent/
6th Defendant

3. K.Paneerselvam

... 3rd Respondent

(3rd Respondent is brought on record
as Legal heir of the deceased 1st
respondent vide order of this Court
dated 26.02.2024 made in
C.M.P(MD) No.1747 of 2024 in
C.M.A(MD) No.1329 of 2011)



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PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (U) of C.P.C, against the judgment and decree in A.S.No.131 of 2008, dated 30.11.2010 on the file of the Principal Sub Court, Kumbakonam remanding the judgment and decree in O.S.No.310 of 2004, dated 17.09.2008 on the file of the Principal District Munsif Court, Kumbakonam.

For A4	: Mr.R.Murali
For A2 and A3	: No appearance
For R3	: Mr.Raghuvarangopalan for Mr.G.Mohan Kumar

J U D G M E N T

This Civil Miscellaneous Appeal is filed as against the decree and judgment passed in A.S.No.131 of 2008 on the file of Principal Sub Court, Kumbakonam. In fact the appellants herein have preferred the main appeal as against the order passed in final decree proceedings in I.A.No.246 of 2005 in O.S.No.310 of 2004 on the file of the Principal District Munsif Court, Kumbakonam.



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2. The first appellate Court, viz, the Principal Sub Judge, Kumbakonam, set aside the final decree passed by the Principal District Munsif Court, Kumbakonam, and remanded the case to the trial Court. Against which the present Civil Miscellaneous Appeal is filed.

3. The 1st respondent herein has filed the main suit for partition as against these appellants/defendants and others and the said suit was decreed. Thereafter, final decree proceedings were filed in I.A.No.246 of 2005 and Advocate Commissioner was appointed and he filed reports and plans and suggested the ways to allot the shares and the trial Court allotted as per the suggestion on the Advocate Commissioner.

4. Before the trial Court, on the side of the petitioner no witnesses were examined, on the side of the respondents RW.1 examined in chief and thereafter the petitioners have not come forward to cross examine the R.W.1 thereby, the trial Court closed the cross examination of R.W.1. Based on the evidence of R.W.1, the trial Court passed final decree. Aggrieved by the said order, the 1st respondent/plaintiff preferred an appeal before the Principal Sub



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Court, Kumbakonam and the 1st Appellate Court set aside the order of trial Court on the ground that the evidence of R.W.1 is not complete evidence, but the trial Court based on the evidence of R.W.1, only passed the order and directed to hear afresh by giving chance to both the parties. The said order is now under challenge.

5. This Court heard both sides and perused the records.

6. After elaborate arguments both side counsel agreed that before the trial Court on the side of petitioner no witnesses were examined and on the side of respondents R.W.1, was examined and he was not cross examined in spite of ample chances given for cross examination. Further, the Advocate Commissioner also filed 4 plans and suggested one plan and yet other three plans are also available and any one of the plans can be adopted by the parties. Therefore, the 1st appellate Court itself can decide the case based on the available evidence. Hence, it is appropriate to set aside the order of the first appellate Court and the first appellate Court itself can decide the case by giving opportunity to both the parties to examine the witnesses including the Advocate Commissioner.



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7. Further, the 1st appellate Court set aside the order of the trial Court on the ground that R.W.1, was not cross examined and his evidence is incomplete. But the 1st appellate Court failed to consider that the 1st respondent/plaintiff failed to cross examine the R.W.1 even after the opportunities given to him and thereby the evidence of R.W.1 is relevant and can be considered as evidence as per Section 33 of Evidence Act.

8. In view of the both side submissions made by the learned counsels and considering the fact that already the Commissioner has given suggestions through 4 plans and the first appellate Court itself can decide the matter without remanding the matter back to the trial Court. It is well settled that the order of remand cannot be in a routine manner and it has to be exercised sparingly in appropriate cases. In the case on hand, order of remand does not required. In view of the same, the order passed by the first appellate court is set aside and the first appellate Court is directed to dispose of the case within a period of three months from the date of receipt of a copy of this order after affording opportunity to both the parties.



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9. Accordingly, this Civil Miscellaneous Appeal stands allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.

14.03.2024

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

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



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P.DHANABAL,J.

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