



CMA(MD)No.877 of 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.02.2024

CORAM :

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CMA(MD)No.877 of 2008

and

M.P(MD)No.1 of 2008

Raja (alias) Ramakrishnan

... Appellant

vs.

1. R.Subramanian
2. Smt.Visalam
3. T.M.Subramanian (Died)
4. Kalyanaraman
5. S.Visalakshi
6. P.Vanavi
7. V.Padma
8. S.Vidhya

... Respondents

(R5 to R8 are brought on record as LR's of the deceased R3 vide order dated 07.06.2012 made in M.P(MD)Nos.1 to 3 of 2012 in CMA(MD)No. 877 of 2008)

Appeal filed under Order XLIII Rule 1 of the Civil Procedure Code, against the judgment and decree dated 12.02.2008 in A.S.No.23 of 2006 on the file of Principal Subordinate Judge, Kumbakonam, remanding the suit to the trial Court in O.S.No.337 of 2004 on the file of the Principal District Munsif, Valangaiman, for marking the additional documents and to take further evidence and to decide on the title to the suit property.



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For Appellant : Mr.B.Jameel Arasu
For R1, R2 & R4 : Mr.S.Prabhu

J U D G M E N T

The plaintiffs in the suit O.S.No.337 of 2004 on the file of the Principal District Munsif, Valangaiman, at Kumbakonam, who lost the suit for declaration and possession, preferred appeal in A.S.No.23 of 2006 before the Principal Subordinate Judge, Kumbakonam. Pending appeal, they have filed interlocutory application in I.A.No.218 of 2006 to receive certain additional documents which are predominantly revenue records subsequent to the suit. The said application was opposed by the defendant/respondent stating that the additional documents are not relevant and are subsequent to the filing of the suit, therefore the interlocutory application should not be entertained. However, the lower appellate Court had held that these documents are to be considered for complete adjudication of the dispute and to avoid multiplicity of proceedings, remanded the matter back to the trial Court to take additional evidence, mark the additional documents and to decide title to the suit property. This order is impugned in the present appeal by the respondent/defendant.



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2. The point canvassed by the counsel for the appellant is that the lower appellate Court contrary to the provisions and the procedure laid under the Civil Procedure Code, has remanded the matter back to the trial Court for fresh adjudication under the guise of entertaining the application filed under Order 41 Rule 27 CPC to receive additional documents. This amounts to filling up the lacuna without considering the oral as well as the documentary evidence already adduced by the parties.

3. The learned counsel appearing for the respondents 1, 2 and 4 referring to Order 41 Rules 27 and 28 of CPC as well as Order 41 Rules 23 and 23A of CPC, would submit that the lower appellate Court on considering the reasonings given by the plaintiffs in their application to receive additional documents, nature of the additional documents and the *lis* between the parties had thought fit that the additional documents which are sought to be introduced at the appellate stage are necessarily to be taken into consideration for better appreciation and therefore to take additional evidence, it has remanded the matter back to the trial Court to record evidence and to proceed.



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4. The law on receiving additional documents in a pending appeal is well spelt out under Order 41 Rule 27 CPC as below:

*"27. Production of additional evidence in Appellate Court— (1)
The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if —*

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

*(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
the Appellate Court may allow such evidence or document to be produced, or witness to be examined.*

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

5. If the appellate court is of the view that the additional documents which have been produced are necessary for the adjudication and they were not available with the party who seeks for reception of additional documents at the time of trial, can record the reasons and



permit the party to introduce additional documents. The Code also provides the mode of taking the additional evidence under Order 41 Rule 28 CPC which reads as below:

"28. Mode of taking additional evidence— Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

6. In this case, the lower appellate Court having thought fit that the additional documents which the aggrieved plaintiffs want to introduce in the appellate stage are necessary for proper adjudication and to avoid multiplicity of proceedings, ought to have followed the mode which has been contemplated under Rule 41 Order 28 CPC which has been extracted above. However, the lower appellate Court has virtually set aside the order of the trial Court and remanded the matter back to the trial Court for fresh adjudication which could be done only if the conditions provided under Order 41 Rule 23 CPC or Rule 23A is satisfied. For the sake of better appreciation, the above provisions are extracted below:

"Order 41 Rule 23: Remand of case by Appellate Court—

Where the Court from whose decree an appeal is preferred has



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disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Order 41 Rule 23A: Remand in other cases— *Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.'*

7. A combined reading of Order 41 Rules 23, 23A, 27 and 28 of CPC would clearly show that the power of the lower appellate Court to receive additional documents should be in accordance with Order 41 Rules 27 and 28 of CPC and not remand of the entire matter back to the trial Court setting at naught the judgment and decree passed by the trial Court unless and until such order is warranted and also satisfies the mandate contemplated under Order 41 Rules 23 or 23A. In this case, this Court finds no such necessity to remand the matter back either under Order 41 Rule 23 or under Order 41 Rule 23A of CPC. As pointed out by the learned counsel for the appellant, the order of the lower appellate



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Court has virtually led to reopening of the litigation afresh enabling the plaintiffs to fill up the lacuna.

8. Therefore, the Civil Miscellaneous Appeal is allowed and the judgment and decree dated 12.02.2008 made in A.S.No.23 of 2006 on the file of Principal Subordinate Judge, Kumbakonam, remanding the suit to the trial Court in O.S.No.337 of 2004 on the file of the Principal District Munsif, Valangaiman, at Kumbakonam, is set aside.

9. The lower appellate Court shall consider I.A.No.218 of 2006 afresh and pass orders in consonance with Order 41 Rules 27 and 28 CPC and proceed. Registry is directed to send the original records if any, to the lower appellate Court forthwith. The lower appellate Court shall take up the matter on priority basis and dispose it of preferably within a period of nine months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

16.02.2024

Index : Yes / No
Neutral Citation : Yes / No
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To

1. The Principal Subordinate Judge,
Kumbakonam.
2. The Principal District Munsif,
Valangaiman,
Kumbakonam.



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DR.G.JAYACHANDRAN, J.

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JUDGMENT MADE IN
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