



C.M.A(MD)No.631 of 2023

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.03.2024

PRONOUNCED ON : 26.04.2024

CORAM

THE HON'BLE MRS.JUSTICE S.SRIMATHY

C.M.A(MD)No.631 of 2023

and

C.M.P.(MD)Nos.8190 of 2023 and 5067 of 2024

N.Sangili

... Appellant

Vs.

1.A.Venkatachalam Chettiar (Died)

2.M.Dhanapal

3.Usha

... Respondents

PRAYER: Civil Miscellaneous Appeal is filed under Section 104 read with Order 43 Rule 1(u) of CPC to set aside the judgment and decree passed by the Sub Court, Lalgudi in A.S.No.70 of 2018, dated 28.02.2019, whereby the Court set aside the judgment and decree in O.S.No.414 of 2010, dated 16.12.2014 passed by the Additional District Munsif Court, Lalgudi and remanded the suit to the Trial Court for letting in additional evidence.

For Appellant	: Mr.R.S.Sivaraman
R1	: Died
For R2	: Mr.J.Maria Roselin
For R3	: No appearance



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JUDGMENT

The present Civil Miscellaneous Appeal is filed against the order of remand passed in A.S.No.70 of 2018, dated 28.02.2019.

2. The plaintiff is the appellant herein and the defendants in the suit are the respondents herein. For the sake of convenience, the parties shall be referred as Plaintiff and Defendant as per the ranking in the suit.

3. The suit in O.S.No.414 of 2010 was filed inter alia praying for passing preliminary decree for redemption of usufructuary mortgage dated 24.03.1973 of the suit property by directing the second defendant to hand over the vacant position of suit property, in case of failure to vacate him through the process of court, preliminary decree for mense profits for wrongful possession from 1978, then final decree of redemption along with mense profits. The suit was allowed, aggrieved over the same, the defendants in the suit preferred first appeal. In the first appeal, the Appellate Court has remitted the matter back to the Trial Court for fresh consideration. Aggrieved by the remand order, the present civil miscellaneous appeal is filed by the plaintiff.



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4.The contention of the plaintiff is that the Court ought not to have remitted the case for fresh consideration for letting in additional evidence from the defendants. Further the Appellate Court has straightaway accepted the application filed by the defendants and received the additional documents which were filed without getting any leave from the Court to file additional evidence and has not allowed the plaintiff to raise objections for marking the additional document as evidence. Also, the Appellate Court has not properly and meticulously appreciated the document and oral evidence produced by the plaintiff. The remand order would amount to travelling beyond the findings of the Trial Court. The defendants have not produced any new evidence or any new grounds. The act of the Appellate Court is against the provisions under order 41 rule 27 of Civil Procedure Code to receive additional evidence. The defendants did not file the said document dated 12.06.1974 during the trial, even after a “notice to produce” under Order 12 Rule 8 of Civil Procedure Code was given by the plaintiff. They also made endorsement that they have no such document or copy of the document. In such circumstances, the defendants are estopped from producing the copy of the document in appeal. The defendants did not state any reason for non-production of this document before the Trial Court and also failed to note that neither the defendants let evidence about what happened to the document nor they stated that



they were prevented from filing such document. In the absence of the same, the said document cannot be received in appeal. Further, the defendants filed only the certified copy which is only a secondary evidence. As per Section 65 of Evidence Act, in the absence of any pleading about the status of the original document, the secondary evidence cannot be accepted. In such circumstances, the Appellate Court ought not to have remitted the case back. The Appellate Court cannot allow the defendants to patch up or fill up the blanks or lacuna of their side by filing an appeal and by filing additional evidence. The Appellate Court has not rendered any finding that the judgment and decree is improper or perverse and in the absence of the same, the Appellate Court cannot remand the case to Trial Court to let in additional evidence. Furthermore, the Appellate Court itself can permit the parties to give additional evidence provided the same is within the parameters under Order 41 Rule 27. For taking additional evidence, the Appellate Court need not remand the case to the Trial Court as such the order of remand is not in consonance with order 41 rule 23 of CPC. Hence, the judgment of the Appellate Court ought to be set aside.

5. The contention of the defendants is that at the time of Trial, the said document was not traceable, in spite of due diligence. Hence, it was submitted



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before the Trial Court that the document was not available. Moreover, the document was an old one. Thereafter, the defendants were advised to apply for copy of the document from the Registrar Office and to submit the same, hence, the defendants submitted the certified copy before the First Appellate Court. After receiving the same, in order to grant an opportunity, the Appellate Court remitted the case back to the Trial Court. Hence, the defendants submitted that there is no illegality in the remand order and prayed to dismiss the present Civil Miscellaneous Appeal.

6. Heard Mr.R.S.Sivaram, the Learned Counsel appearing for the appellant and Ms.J.Maria Roselin, the Learned Counsel appearing for the 2nd respondent and perused the records.

7. After hearing the rival submissions of both sides, this Court has given its anxious consideration. It is an admitted fact that the plaintiff has referred to the document dated 12.06.1974 and has issued “Notice to Produce” under Order 12 Rule 8 of Civil Procedure Code and the relevant portion of the said notice is culled out hereunder:

“Take notice that you are hereby required to produce and show cause to



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the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit and particularly

- 1. Sale Deed Original said to have been executed by plaintiff's father, Nallyan to the 1st defendant's father Aachimuthu Chettiyar dated 12.6.1974*
- 2. Any other document of title in the name of 1st defendant's father Aachimuthu Chettiyar before the year 1973"*

8. It is seen that in spite of the said notice, the defendants remained silent. Hence, the Trial Court took adverse inference against the defendants and allowed the suit. Further, the defendants has produced a certified copy of the sale deed and has not produced the original sale deed which was said to have been executed by the plaintiff's father in favour of the 1st defendant's father. If original sale deed is produced, then the plaintiff will have an opportunity to compare the signature supposed to have been fixed by the plaintiff's father. Moreover, the defendants have not stated whether the original was lost or destroyed. In such situation, the certified copy of the sale deed cannot be marked on the side of the defendants.

9. After hearing the arguments, this Court reserved the case for judgment.



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At this point of time, the Learned Counsel appearing for the 2nd respondent herein / 2nd defendant submitted that the 2nd defendant had taken sincere efforts to lay his hands to the said document and sought time to produce the said document by filing proper application to accept the document. Thereafter, the 2nd defendant has filed a petition in C.M.P.(MD)No.5067 of 2024 before this Court. On perusing the said document, it is seen that the document is original and therefore, the plea of the plaintiff that through certified copy of the document he will not be in a position to adjudicate on the signature of his father is no longer available.

10. Admittedly, the defendants had not produced the original document at the time of Trial and also failed to respond to the “notice to produce” issued under Order 12 Rule 8 of CPC. Now the plaintiff is prejudiced by such non-response by the defendants. Hence, the 2nd respondent herein / 2nd defendant is liable to pay the cost of the litigation to the tune of Rs.10,000/- to the plaintiff. On such condition, the 2nd respondent herein / 2nd defendant’s petition filed in C.M.P.(MD)No.5067 of 2024 before this Court is allowed. However, it is made clear that the plaintiff’s right to object to accepting the said document and for marking the said document is not disturbed by this order. Further, the plaintiff shall amend the plaint accordingly and also shall produce any evidence. Likewise, the defendants shall



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amend the written statement and also shall produce the evidence. In short, the plaintiff's rights and defendants' rights are not disturbed by this order.

11. With the above observations, the case is remitted back to the Trial Court for reconsideration. The Civil Miscellaneous Appeal is disposed of. No costs. C.M.P.(MD)No.5067 of 2024 is allowed on cost of Rs.10,000/- payable by M.Dhanapal to N.Sangili as stated supra. The other connected civil miscellaneous petition is closed. Registry is directed to send the documents mentioned in C.M.P. (MD)No.5067 of 2024 to the Trial Court to mark the same as additional evidence.

26.04.2024

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

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1. Sub Court, Lalgudi.
2. Additional District Munsif Court, Lalgudi.
3. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

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