



C.M.A.(MD)Nos.416 and 417 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 16.02.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.DHANABAL

C.M.A.(MD)Nos.416 and 417 of 2014

and

M.P(MD) Nos.1 and 1 of 2014

C.M.A(MD) No.416 of 2014:

1. Malaiyappan
2. Murugesan
3. Baskaran

... Appellants/Appellants/Plaintiffs

-VS-

1. Pappa
2. Ravi

... Respondents/ Respondents/Defendants

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of C.P.C, against the judgment and decree dated 21.01.2014 passed in A.S.No.34 of 2012 on the file of the Principal Sub Court, Karur remanding the judgment and Decree dated 14.10.2011 passed in O.S.No.228 of 2008 on the file of Additional District Munsif Court, Karur.

For Appellants : Mr.M.P.Senthil
For Respondents : Mr.M.Bindran



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C.M.A(MD) No.417 of 2014:

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1. Malaiyappan
2. Murugesan
3. Baskaran
4. Kaliyammal

... Appellants/Respondents/Defendants

-vs-

Pappa

... Respondent/Appellant/Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of C.P.C, against the judgment and decree dated 21.01.2014 passed in A.S.No.95 of 2012 on the file of the Principal Sub-Court, Karur remanding the judgment and decree dated 14.10.2011 passed in O.S.No.774 of 2007 on the file of Additional District Munsif Court, Karur.

For Appellants : Mr.M.P.Senthil
For Respondent : Mr.M.Bindran

COMMON JUDGMENT

These Civil Miscellaneous Appeals have been filed by the appellants as against the common judgment and decree passed in A.S.Nos.34 and 95 of 2012 on the file of the Principal Sub-Court, Karur, dated 21.01.2014, wherein, the appellants have preferred the first appeal before the Sub Court,



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Karur, as against the judgment and decree passed in O.S.No.228 of 2008 and O.S.No.774 of 2007 on the file of Additional District Munsif Court, Karur, dated 14.10.2011, wherein, the appellants in C.M.A.(MD) No.416 of 2014 have filed the suit in O.S.No.228 of 2008 on the file of the Additional District Munsif Court, Karur and the respondent in C.M.A(MD) No.417 of 2014 have filed the suit in O.S.No.774 of 2007 on the file of the Additional District Munsif Court Karur. The Additional District Munsif Court, Karur passed a common judgment and dismissed both the suits. As against the decrees passed thereon both the plaintiffs have preferred the first appeals. The first appellate Court allowed the appeals by setting aside the common judgment and decrees and remanded the case for adducing additional evidences. As against the remand order passed by the first appellate Court, the present appeals have been filed.

2. The brief facts of the averments made in O.S.No.228 of 2008 are as follows:

The first plaintiff is the father of the plaintiffs 2 and 3. The first defendant is the sister of the 1st plaintiff and the 2nd defendant is the son of the



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1st defendant. The suit properties originally belonged to one Marudhai Gounder and he purchased an extent of Ac.5.44 in S.F.No.289/1 and 289/2 by way of registered sale deed dated 02.05.1936. Even though in the sale deed an extent of Ac.5.44 is mentioned only an extent of Ac.4.10 has been delivered to the above said Marudhai Gounder. After the sale deed, he was in possession and enjoyment of the suit properties. Marudhai Gounder had two sons namely Palaniyappa Gounder and Malaiyappa Gounder. The said properties were in the joint possession and enjoyment of Marudhai Gounder and his two sons. While so, Malaiyappa Gounder had executed a registered release deed in favour of his father and brother on 18.05.1953. Thereafter, the first plaintiff and his brother Palaniyappa Gounder have been in enjoyment of the suit properties and each are entitled to equal share. Marudhai Gounder died around 1975. After his demise, the first plaintiff and his father Palaniyappa Gounder were in possession and enjoyment of the suit properties. While so, the first defendant has filed a suit in O.S.No.845 of 1996 on the file of the District Munsif Court, Karur against the plaintiffs 1 and 2, the first plaintiff's wife Kaliyammal and father Palaniyappa Gounder for permanent injunction in respect of Ac.2.05 on the basis of the gift deed dated 15.03.1996 alleged to have been executed by the Palaniyappa Gounder and the same was



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dismissed on 05.10.2001. The first defendant has filed suit in O.S.No.774 of 2007 on the file of the District Munsif Court, Karur and the said suit is barred by *resjudicata*. In fact, Palaniyappa Gounder when he was in a sound and disposing state of mind has executed his last will and testament dated 29.03.1993 in favour of the plaintiffs 2 and 3 and bequeathed his half share in the suit properties. The said Palaniyappa Gounder died on 10.12.1999. After his demise, the plaintiffs 2 and 3 are entitled to half share in the suit properties. As already stated the plaintiffs are entitled to ½ share ancestrally and the remaining shares were entitled through Will. While so, the defendants are interfering with the plaintiffs peaceful possession and enjoyment of the suit properties denying the title of the plaintiffs over the suit properties. Accordingly, on 17.03.2008, the defendants made attempts to interfere with the plaintiffs peaceful possession and enjoyment of the suit properties. Therefore, the plaintiffs have filed the suit for declaration and consequential relief of permanent injunction.

3. The averments made in the written statement filed by the first defendant and adopted by the 2nd defendant in brief are as follows:

All the averments made in the plaint are denied as false. The first



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defendant's father Palaniyappa Gounder owned properties in S.F.No.289/2 for an extent of 2.5 Acres and he has already executed a Gift settlement deed in favour of the first defendant out of love and affection. Thereafter, he has sold the remaining ½ share in the 3 H.P. Electric Motor Pumb set in the southern well to the first defendant under a registered sale deed, dated 15.07.1998. The first defendant has encroached the property in S.F.No.290 and has raised 9 coconut trees. 2 C patta has been granted in the name of the first defendant. The earlier suits are only for bare injunction and the findings in the Civil Miscellaneous Appeal will not operate as *resjudicata* and it will not take away the rights of the first defendant. Palaniyappa Gounder is entitled to execute gift settlement deed in favour of his only daughter. At the time of marriage, Palaniyappa Gounder presented only 5 sovereigns of jewels thereby to compensate this defendant the said Palaniyappa Gounder has executed settlement deed in favour of his daughter. Therefore, the suit is liable to be dismissed.

4. The averments made in the additional written statement filed by the first defendant and adopted by the 2nd defendant in brief are as follows:

The suit properties are the self acquired properties of one Marudhai



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Gounder, father of this defendant, purchased by him in the year 1936. After his death, Malayappa Gounder released his interest in favour of Palaniyappa Gounder. Hence the entire property in S.F.No.289 belonged to Palaniyappa Gounder. The alleged Will is a forged and concocted document. In any event it will not bind this defendant as already deceased Palaniyappa Gounder has executed gift settlement in favour of the first defendant. The suit is bad for non- joinder of necessary party. The description of property is not correct. The plaintiff has suppressed the suit filed by him for partition in O.S.No.363 of 1997. Therefore, the suit is liable to be dismissed.

5. The second defendant adopted the written statement filed by the first defendant.

6. Based on the above said pleadings and after hearing both sides and perusing the records, the trial Court has framed the following issues.

“1. Whether the plaintiffs are entitled to get the relief of declaration as prayed for?”

2. Whether the plaintiffs are entitled to get permanent injunction as prayed for?”



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3. To what relief the plaintiffs are entitled to?

7. The averments made in the plaint in O.S.No.774 of 2007 in brief are as follows:

The first item of the suit properties was originally belonged to the father of the plaintiff Palaniyappa Gounder and he has executed a registered Gift settlement deed in favour of the plaintiff dated 15.03.1996 in respect of the first item of the suit property. The said settlement deed is acted upon. At the time of the execution of settlement deed Palaniyappa Gounder had also sold the $\frac{1}{2}$ share in the well in S.F.No.289/2 and the plaintiff has enjoyed the properties by paying the kist for the first item of the suit properties Patta pass book has been granted in favour of the plaintiff. The plaintiff has encroached the 2nd item of the suit property. While so the defendants on 03.12.2007 attempted to interfere with the plaintiffs peaceful possession and enjoyment of the suit properties. Hence. The plaintiff has filed the suit.

8. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 to 4 in brief are as follows:



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The averments made in the plaint are all false. In fact one Marudhai Gounder has purchased an extent of 5.44 Acres under the registered sale deed dated 02.05.1936. But only 4.10 Acres alone has been delivered to the above said Marudhai Gounder. The said Marudai Gounder had two sons namely Palaniyappa Gounder and Malayappa Gounder. The above said extent of 4.10 Acre was enjoyed by Marudhai Gounder and his two sons as joint family properties. Marudhai Gounder died in the year 1975 and subsequently the first defendant's father Palaniyappa Gounder and his brother Malaiyappa Gounder have jointly enjoyed the above said extent of Ac.4.10 in common. While Marudhai Gounder was alive, his son Malaiyappa Gounder has executed a release deed dated 18.05.1953 releasing all his right, title and interest and possession over the suit properties with regard to his share in favour of his father Marudha Gounder and his brother Palaniyappa Gounder. While so the plaintiff herein has filed a suit in O.S.No.845 of 1998 on the file of the District Munsif Court, for permanent injunction. On the basis of settlement deed executed by Palaniyappa Gounder on 15.03.1996 along with the suit the plaintiff has also filed in I.A.No.907 of 1996 and it was allowed and thereafter the defendants have preferred C.M.A No.13 of 1997 before the Sub Court, Karur and after enquiry C.M.A was allowed and the injunction



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petition in I.A.No.907/96 was dismissed. While dismissing the CMA it was held that the entire properties purchased under the sale deed dated 02.05.1936 are the joint family properties of the first defendant and there is no division between them. As such Palaniyappa Gounder is not entitled to execute the settlement deed in favour of the plaintiff. The plaintiff has not produced any document except the Xerox copy of the will dated 29.03.1993 and the defendants came to know that Palaniyappa Gounder out of love and affection had executed his last will and testament dated 29.03.1993 in favour of the defendants 2 and 3 bequeathing his share out of 4.10 Ac. Therefore after the death of Palaniyappa Gounder the defendants became entitled to the entire 4.10 Acres absolutely. Therefore, there is no cause of action for the suit and the suit may be dismissed.

9. Based on the above said pleadings and after hearing both sides and perusing the records, the Trial Court has framed the following issues:

- “1. Whether the plaintiffs are entitled to get permanent injunction as prayed for?
2. To what relief the plaintiff is entitled to?”



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10. Before the trial Court a joint memo was filed and both the suits were jointly tried and common judgment was passed. The Trial Court considered the evidence recorded in O.S.No.228 of 2008 as the evidence adduced in O.S.No.774 of 2007. In the trial Court on the side of the plaintiffs P.W.1 and P.W.2 were examined and the Exhibits A.1 to A.24 were marked. On the side of defendants, D.W.1 and D.W.2 were examined and marked Exhibits D.1 to D.9.

11. After evaluating the oral and documentary evidences adduced on either sides, the trial Court has dismissed both the suits. The suit in O.S.No. 228 of 2008 was dismissed on the ground that the plaintiffs have not proved the execution of Will and the suit in O.S.No.774 of 2007 was dismissed on the ground of principle of *resjudicata*. As against the decrees and Common Judgment, the plaintiffs in the respective suits filed separate appeals before the Sub Court, Karur.

12. During the pendency of the appeal in A.S.No.34 of 2012, the appellants have filed a petition under Order 41 Rule 27 of C.P.C to receive the documents as additional evidence. Similarly the respondents have also filed a



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petition in I.A.No.190 of 2013 under Order 41 Rule 27 of C.P.C to receive the additional documents as additional evidence. Again the respondents have filed petition in I.A.No.224 of 2013 under Order 41 Rule 27 of C.P.C to receive the documents as additional evidence on their side.

13. The first appellate Court after hearing both sides and perusing the records allowed the application in I.A.No.190 of 2013 and received the additional documents and marked as Ex.B.10. The I.A.No.224 of 2013 was also allowed and the additional document was received and marked Exhibits B.11 and B.12 respectively. I.A.No.208 of 2013 was also allowed and the additional document was received and marked as Ex.A.25 to Ex.A.28 respectively. Thereafter, the judgment and decree passed by the trial Court in both the suits were set aside and the cases were remanded back for framing specific issues as to the nature of property and to record the evidence, in view of the additional documents received in the appeal and to decide the case in according with law. As against the order passed by the first appellate Court, the present Civil Miscellaneous appeals have been preferred by the respective parties.



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14. As against the order passed in the appeal in A.S.No.34 of 2012 the C.M.A(MD) N.416 of 2014 is filed and as against the order passed in the appeal in A.S.No.95 of 2012, the C.M.A.(MD) No.417 of 2014 is filed.

15. The grounds raised in C.M.A(MD) No.416 of 2014 are as follows:

“a) The judgment and decree of the First Appellate Court are against law, weight of evidence, facts and circumstances of the case.

b) The First Appellate Court ought not to have remanded the case simply because the trial Court had not framed proper issues.

c) The remand order passed by the First Appellate Court after receiving additional evidence on both sides is not within the parameters set out in Order 41 Rule 23 of Civil Procedure Code.

d) When the Appellate Court thought it fit to receive additional evidence from both the parties to the liz and there is a sufficient evidence on record, it ought not to have remanded the matter and the court below ought to have decided the issues as per Order 41 Rule 24 of C.P.C.



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e) The First Appellate Court ought not to have passed the remand order only for the reason to decide the nature of the property in dispute, since the Appellate Court is having wide power to decide that point with available materials on record.

f) The Appellate Court has power to re-appreciate the evidence, frame issues, resettle issues, delete issues, record evidence summon witness etc and when such powers are vested with the Appellate Court, the present order of remand is not support by sound principles of law

g) After receiving additional evidence produced by both parties and also decided the point of Res-judiciata, the First Appellate Court ought to have pronounced complete decision regarding the rights of the parties and the approach of remand to the trial Court is not supported by sound reasoning within the purview of power of remand.

h) In the present case, the parties to the litigation had let in evidence before the trial Court and presented their case after fully aware of the issue involved in the case and the same was accepted by the First Appellate Court. Hence, the order of remand by the Appellate Court is unnecessary and it ought to have decided the right of the parties.



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i) In any event the judgment and decree (remand order) of the First Appellate Court are liable to be set aside.”

16. The grounds raised in C.M.A(MD) No.417 of 2014 are as follows:

“a) The judgment and decree of the First Appellate Court are against law, weight of evidence, facts and circumstances of the case.

b) The First Appellate Court ought not to have remanded the case simply because the trial Court had not framed proper issues.

c) The remand order passed by the First Appellate Court after receiving additional evidence on both sides is not within the parameters set out in Order 41 Rule 23 of Civil Procedure Code.

d) When the Appellate Court thought it fit to receive additional evidence from both the parties to the liz and there is a sufficient evidence on record, it ought not to have remanded the matter and the court below ought to have decided the issues as per Order 41 Rule 24 of C.P.C.

e) The First Appellate Court ought not to have passed the remand order only for the reason to decide



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the nature of the property in dispute, since the Appellate Court is having wide power to decide that point with available materials on record.

f) The Appellate Court has power to re-appreciate the evidence, frame issues, resettle issues, delete issues, record evidence summon witness etc and when such powers are vested with the Appellate Court, the present order of remand is not support by sound principles of law

g) After receiving additional evidence produced by both parties and also decided the point of Res-judiciata, the First Appellate Court ought to have pronounced complete decision regarding the rights of the parties and the approach of remand to the trial Court is not supported by sound reasoning within the purview of power of remand.

h) In the present case, the parties to the litigation had let in evidence before the trial Court and presented their case after fully aware of the issue involved in the case and the same was accepted by the First Appellate Court. Hence, the order of remand by the Appellate Court is unnecessary and it ought to have decided the right of the parties.

i) In any event the judgment and decree (remand order) of the First Appellate Court are liable to be set



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aside.”

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17. The learned counsel appearing for the appellants in both the appeals would contend that the appellants have filed the suit in O.S.No.228 of 2008 on the file of the District Munsif Court, Karur for the relief of declaration and injunction and the respondent herein have filed the suit in O.S.No.774 of 2007 on the file of the District Munsif Court, Karur for the relief of permanent injunction. Both the suits were dismissed. The suit in O.S.No.228 of 2008 was dismissed by the trial Court on the ground that the Will executed by the father of the plaintiff ie., Palaniyappa Gounder dated 29.03.1993 was not proved. The suit filed by the respondent herein in O.S.No.774 of 2007 was dismissed on the ground that it is on barred by principle of *resjudicata*. Both the parties respectively preferred the appeals. A.S.No. 34 of 2012, is arising out of decree and judgment passed in O.S.No.228 of 2008 and A.S.No.95 of 2012, is arising out of decree and judgment passed in O.S.No. 774 of 2007. During the pendency of the appeal, in A.S. No.34 of 2012 both the parties have filed petitions under Order 41 Rule 27 of C.P.C for receiving additional evidence and the same were allowed and the documents were marked. However, the first appellate Court came to a conclusion that there is



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no specific issue as to the nature of properties, that whether they are ancestral joint family properties as alleged by the plaintiffs or the separate property of Planiyappa Gounder as alleged by the defendants and without determining the nature of properties, the issue involved in both the suits cannot be *adjudicated* completely. However, there is no dispute in respect of the nature of property and both the parties are admitted that the property only purchased by the Marudai Gounder and his two sons namely., Palaniyappa Gounder and Malaiyappa Gounder. Therefore, with regard to the nature of property, there is no dispute. Further, even it is essential the appellate Court itself can decide the case. The appellate Court itself can frame the issues and decide the matter. Further after receipt of documents, the first appellate Court itself can send back the case records to the trial Court for recording evidence and to render findings and thereafter, the appeals have to be disposed of by the first appellate Court. But without following the procedure, the first appellate Court simply remanded back the case to the trial Court. Therefore, the order passed by the first appellate Court is not in accordance with law and the same are liable to be set aside and the appeals are to be allowed.

18. To support of his contention, he relied upon the judgments of the



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Hon'ble Supreme Court are as follows:

1. (2018) 9 SCC 445 (*Corporation of Madras*

***and another Vs. M.Parthasarathy and others*)**

2. 2023 (5) CTC 223 (*Arvind Kumar Jaiswal (D)*

***thr LRS Vs. Devendra Prasad Jaiswal Varun*)**

19. The learned counsel appearing for the respondents would contend that the respondents have filed a suit in O.S.No.774 of 2007 and the appellants have filed suit in O.S.No.228 of 2008. Both the suits were tried jointly by the trial Court and the trial Court correctly dismissed the suit in O.S.No.228 of 2007, but erroneously dismissed the suit in O.S.No.774 of 2007 by holding that the suit is barred by *res-judicata* and the findings rendered in I.A proceedings will not operate as *res-judicata*, since the issues were not framed in the I.A. However, the trial Court erroneously dismissed the suit on the ground of *res-judicata*. As against the same the respondents herein have preferred the appeal before the first appellate Court. The plaintiffs in O.S.No.228 of 2008 have preferred a separate appeal in A.S.No. 34 of 2012 and as against the decree and judgement passed in O.S.No.774 of 2007 in A.S.No.95 of 2012 was filed before the Sub Court, Karur and both



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the appeals were heard together. While pending these appeals, these respondents have filed two applications to receive the additional documents and in A.S.No. 34 of 2012 the appellants herein have also filed the applications to receive the documents and the first appellate Court allowed all the petitions and marked the documents respectively. Further, the first appellate Court held that there is no clarity in respect of the nature of the property whether it was ancestral property or separate property of the Palaniyappa Gounder as well as the defendants. The first appellate Court remanded the case for framing additional issues and to decide the matter after adducing evidences in respect of the documents received by the first appellate Court. Therefore, the order passed by the first appellate Court is in order and the present appeals are liable to be dismissed.

20. This Court, after hearing the learned counsel appearing on either side and perusing the records, frames the following points for determination in the appeal in C.M.A.(MD) No.416 of 2014 is:

“i. Whether the order passed by the first appellate Court by remanding back to the case to the trial Court is sustainable either in law or on facts?
and



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ii. Whether the appeal in C.M.A(MD) No.416 of 2014 is liable to be allowed or not?.

iii. Whether the appeal in C.M.A(MD) No.417 of 2014 is liable to be allowed or not?.”.

21. The points for determination in the appeal in C.M.A.(MD) No.416 of 2014 is:

“i. Whether the order passed by the first appellate Court by remanding back to the case to the trial Court is sustainable either in law or on facts? and

ii. Whether the appeal in C.M.A(MD) No.417 of 2014 is liable to be allowed or not?.

Points:

22. In these cases, the appellants in C.M.A.(MD) No.416 of 2014 have filed the suit in O.S.No.228 of 2008 on the file of the Additional District Munsif Court, Karur for the relief of declaration and permanent injunction and the same was dismissed by the District Munsif by holding that the plaintiffs have failed to prove the Will dated 29.03.1993. The appellants in



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C.M.A(MD)No.417 of 2014 have filed the suit in O.S.No.774 of 2007 on the file of the Additional District Munsif Court, Karur and the same was dismissed on the ground that it is barred by *res judicata*. Both the suits were tried together and a common judgment was passed by the trial Court. As against the decrees and common judgment, both the parties have preferred appeals, before the first appellate Court in A.S.No.34 of 2012, which arises out of judgment passed in O.S.No.228 of 2008 and the appeal in A.S.No.95 of 2012, arising out of judgment passed in O.S.No.774 of 2007. During the pendency of the appeals, before the first appellate Court in A.S.No.34 of 2012 both the parties have filed applications to receive the documents. I.A.No.190 of 2013 and I.A.No.224 of 2013 were filed by the respondents and I.A.No. 208 of 2013 was filed by the appellants in that appeal to receive the documents as additional evidence and all the petitions were allowed and the documents were received. Before the first appellate Court on the side of the defendants, documents were marked as Ex.B.10 to B.12. On the side of the plaintiffs, documents were marked as Ex.A.25 to Ex.A.28 respectively.

23. Further, the first appellate Court after analyzing the evidences adduced on both sides held that there is no specific issue as to the properties,



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whether they are ancestral and joint family property as alleged by the plaintiffs or Whether the separate properties of the Palaniyappa Gounder as alleged by the defendants. After perusing the evidences, the first appellate Court held that without determining the nature of properties this issue involved in both the suits cannot be adjudicated completely. If it is the separate properties of Palaniyappa Gounder he was having every right to execute the settlement deed and if it is the joint family property he had no right to execute the settlement deed. Similarly, Palaniyappa Gounder had executed a Will in respect of specific extent of 2.0 Acres. However, there is no evidence as to how the Palaniyappa Gounder had the property with specific extent, with the above observations remanded the matter back to the trial Court for framing fresh issues and for adducing evidences, based on the marked documents.

24. As per Order 41 Rule 28 of C.P.C deals with the procedure to be followed after receiving additional evidence. Which is as follows:

*“Rule 28 Order XLI of Code of Civil Procedure 1908
deals with "Mode of taking additional evidence":*



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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.”

25. As per Order 41 Rule 28 of C.P.C, the first appellate Court itself can examine the witnesses or remand the case to the trial Court for recording evidence and to send it when taken to the appellate Court. Thereafter, the first appellate Court has to pass it's verdict.

26. But in this case, the first appellate Court has not followed the procedure under Order 47 Rule 28 of C.P.C. Further, even according to the first appellate Court if the issues are essential then the first appellate Court itself can frame appropriate issues and decide the same as per the Order 41 Rule 25 of C.P.C. Instead, the first appellate Court has erroneously remanded the matter back to the trial Court for fresh disposal after adducing evidences in respect of received documents. The first appellate Court itself could dispose the case based on the available evidence and the parties are also already have knowledge about the nature of property and they adduced



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sufficient evidences. Therefore, the order passed by the first appellate Court is not in accordance with law.

27. In this context the learned counsel appearing for the appellants has produced the following judgments:

(i) ***(2018) 9 SCC 445 (Corporation of Madras and another Vs. M.Parthasarathy and others)*** wherein the Hon'ble Supreme Court in paragraph No.15 as follows:

“Having allowed the CMP No.1559/1993 and, in our opinion rightly, the first Appellate Court had two options, first it could have either set aside the entire judgment/decreed of the Trial Court by taking recourse to the provisions of Order 41 Rule 23A of the Code and remanded the case to the Trial Court for re-trial in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the Trial Court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record



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and invite findings of the Trial Court on such limited issues to enable the first Appellate Court to decide the appeals on merits.”

2. 2023 (5) CTC 223 (Arvind Kumar Jaiswal (D) thr LRs Vs. Devendra Prasad Jaiswal Varun) wherein the Hon'ble Supreme Court in Paragraph No.3 held as follows:

*“3. An order of remand prolongs and delays the litigation and hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account. See **Shivakumar and others v. Sharanabasappa and others**, 2020 (4) CTC 321 (SC): 2020 (2) MWN (Civil) 572 (SC) : 2021 (11) SCC 277; and **Bachahan Devi and another v. Nagar Nigam, Gorakhpur and another**, 2008 (2) CTC 790 (SC) 2008 (12) SCC 372. Where evidence has already been*



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adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.

28. On a careful perusal of the above said judgment it is clear that Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.



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29. In the case on hand also, already both sides adduced evidences and there is no dispute with regard to the nature of the property and the first appellate Court after receipt of documents set aside the judgment and decree and remanded the matter back to the trial Court. Therefore, as discussed supra and in view of the said judgments the first appellate Court has not proceeded in accordance with law and therefore the remand order passed by the first appellate Court is liable to be set aside and this Court has decided the previous paras that the first appellate Court has not followed the procedure and erroneously remanded back to the trial Court for fresh trial and thereby the order passed by the first appellate Court is not sustainable and the same are liable to be set aside.

30. In the result, C.M.A(MD) No.416 of 2014 is allowed and the judgment and decree dated 21.01.2014 passed in A.S.No.34 of 2012 on the file of the Principal Sub Court, Karur, are set aside and the first appellate Court is directed to follow the procedure under Order 41 Rule 25 and Rule 28



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of C.P.C and dispose the case on merits and in accordance with law.

31. In the result, C.M.A(MD) No.417 of 2014 is allowed and the judgment and decree dated 21.01.2014 passed in A.S.No.95 of 2012 on the file of the Principal Sub Court, Karur, is set aside and the first appellate Court is directed to follow the procedure under Order 41 Rule 25 and Rule 28 of C.P.C and dispose the case on merits and in accordance with law. There shall be no orders as to costs. Consequently, connected Miscellaneous Petitions are closed.

16.02.2024

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

To

1. The Principal Sub Court,
Karur.
2. The Additional District Munsif Court,
Karur.
3. The Section Officer,

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Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

P.DHANABAL,J.

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