

(1927) 11 MAD CK 0045
In the Madras High Court

Srinivasa Raghava Patrachariar and Another

APPELLANT

Vs

T.K. Srinivasa Raghava Iyengar

RESPONDENT

Date of Decision : 24-11-1927

Acts Referred:

Citation : AIR 1928 Mad 1200 : 110 Ind. Cas. 692

Judgement

1. The District Munsif disposed of the suit on three preliminary points, the decision of any one of which against the plaintiff ends in the dismissal of the suit. On appeal the Subordinate Judge considering that all three points involve mixed questions of fact and of law, remanded the suit. He has not reversed the findings of the District Munsif on these three points. His judgment amounts to saying that, on the materials before him, he was not able to agree with the findings of the District Munsif. He reversed the decree of the District Munsif. We think that this is an order of the Subordinate Judge under Order 41, Rule 23. The case of *Habibullah Khan v. Lalta Prasad* [1912] 34 All. 612 relied on by the learned vakil for the respondent is really against him. That case shows that while the order of the Subordinate Judge is an order under Order 41, Rule 23, the grounds of the order are not. good grounds. We overrule the preliminary objection.

2. On the merits, it is difficult to see what further facts the Subordinate Judge requires before deciding the preliminary points. On the first point, it is possible that one would like to see the pleadings and the issues in the former suit to see how far it was a contentious proceeding between the plaintiff and defendants 10 to 12. One would think that even if there is no other point in dispute at least the facts that they are not agreed as to the shares to be allotted to each sharer and they seek the assistance of the Court for this purpose makes the suit a contentious proceeding. If, however, the appellate Court wants to be quite clear on the matter, it can admit the pleadings and issues by calling for them from the party who wishes to question the District Munsif's finding and then proceed to dispose of the point. No oral evidence seems to be necessary and even if it is necessary, the appellate Court may proceed under Order 41, Rule 27 to direct the District Munsif to take such evidence and send it with or without a fresh

finding. On any view of the matter a reversal of the Munsif's decree and a remand are totally uncalled for. The same observations apply to the second and third points.

3. We allow the appeal and set aside the order under appeal and remand it to the Subordinate Judge to be disposed of according to law. The respondent will pay the costs of the appellants herein. The costs in the Courts below will abide the result.