

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 14TH DAY OF DECEMBER 2015/23RD AGRAHAYANA, 1937

FAO (RO).No. 1 of 2015 ()

**-----
AGAINST THE JUDGMENT IN AS. NO.5/2011 OF SUB COURT, KOTTARAKKARA
DATED 28-08-2014**

**AGAINST THE JUDGMENT IN OS. NO.104/2006 OF MUNSIF COURT,
KOTTARAKKARA DATED 30/09/2010.**

.....

APPELLANT/RESPONDENT/DEFENDANT:

**JOHN, AGED 59 YEARS,
S/O. YOHANNAN, PLAVILA VEEDU,
POOVATTOOR KIZHAKKUM MURI,
KALAYAPURAM VILLAGE,
KOTTARAKKARA TALUK.**

**BY ADVS.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL),
SRI.A.R.DILEEP,
SRI.MANU SEBASTIAN,
SMT.PARVATHY NAIR.**

RESPONDENT/APPELLANT/PLAINTIFF:

**DASAMMA, AGED 52 YEARS,
D/O. ALEYA, BINU BHAVAN, ATTUVASSERY MURI,
KULAKKADA VILLAGE, KOTTARAKKARA TALUK, PIN-691 506.**

BY ADV. SRI.BIJU BALAKRISHNAN.

**THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN
FINALLY HEARD ON 14-12-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:**

rs.

P.B.SURESH KUMAR, J.

= = = = =

F.A.O.(RO).No.1 of 2015.

= = = = =

Dated this the 14th day of December, 2015.

J U D G M E N T

The decision in A.S.No.5 of 2011 on the file of the Sub Court, Kottarakkara by which O.S.No.104 of 2006 on the file of the Munsiff's Court, Kottarakkara was remitted for fresh disposal, is under challenge in this appeal. The defendant in the suit is the appellant.

2. O.S.No.104 of 2006 is a suit for declaration of title, possession and injunction. The plaintiff is the sister of the defendant. The case of the plaintiff is that the suit property was obtained by her by virtue of Ext.A1 settlement deed executed by her mother. It is also the case of the plaintiff that her mother got the suit property by virtue of Ext.A2 will executed by her father. According to the plaintiff, the defendant who was residing in the building in the suit property with her permission is not vacating the

building when demanded by her. The defendant resisted the suit. According to the defendant, Ext.A2 is not a document executed by the father of the parties and that since the suit property belonged to the father of the parties, on his death, the defendant also acquired a right in the property. Despite the aforesaid contention of the defendant, the plaintiff did not attempt to prove Ext.A2 will. Consequently, the trial court dismissed the suit holding that the plaintiff has not proved the execution of Ext.A2 will. The plaintiff took up the matter in appeal. In so far as the plaintiff did not prove the execution of Ext.A2 will, the appellate court thought it fit to afford to the plaintiff an opportunity to prove Ext.A2 will and consequently remitted the suit for fresh disposal as per the judgment impugned in this appeal.

3. Heard the learned counsel for the appellant as also the learned counsel for the respondent.

4. The learned counsel for the appellant, relying

on the decision of this Court in **Sundaram Hammond v. K.Padmanabhan and others** (2015(2) KHC 802) contended that the present suit being a suit disposed of otherwise than on a preliminary point, the matter cannot be remitted to the trial court for fresh disposal unless the appellate court finds that the decree is liable to be reversed and that a re-trial is necessary. It was also contended, relying on the decision of the Apex Court in **Union of India v. Ibrahim Uddin** [(2012)8 SCC 148], that inadvertence of the party or his inability to understand the legal issues involved or the wrong legal advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a substantial cause for remitting a suit for fresh disposal.

5. True, in the light of the specific contention raised by the defendant that Ext.A2 is a false document, it was obligatory for the plaintiff to prove the same. The plaintiff has not proved Ext.A2 by examining the attesting

witnesses. A perusal of the appellate judgment indicates that the matter is remitted by the appellate court to enable the plaintiff to prove Ext.A2 will. The question is as to whether the appellate court is justified in doing so. Rule 23 of Order 41 of the Code of Civil Procedure as applicable in the State of Kerala reads thus:

23. Remand of case by Appellate Court-Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case the Appellate Court may 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, with 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."

Rule 23 empowers the appellate court to remit a suit for fresh disposal if the appellate court considers it necessary in the interest of justice to do so. In the light of Rule 23, it

cannot be said that the appellate court has no authority to remit a suit for fresh disposal as done in the instant case. The decision in **Sundaram Hammond v. K.Padmanabhan and others** (*supra*) is a judgment dealing with the scope of Rule 23A of Order 41 of the Code of Civil Procedure. The decision of the Apex Court in **Union of India v. Ibrahim Uddin** (*supra*) relied on by the learned counsel is a decision rendered on the scope of the power of the appellate court to admit additional evidence at the appellate stage. The said decisions, in the circumstances, cannot have any application to the facts of the present case.

In the circumstances stated above, there is no merit in the appeal and the same is, accordingly, dismissed.

**Sd/-
P.B.SURESH KUMAR,
JUDGE.**

Kvs/-

// true copy //

PA TO JUDGE.