

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 24TH DAY OF MARCH 2015/3RD CHAITHRA, 1937

FAO (RO).No. 181 of 2014 ()

AS 49/2012 of II ADDITIONAL DISTRICT COURT,THODUPUZHA

OS 76/2010 of SUB COURT,THODUPUZHA

APPELLANTS/APPELLANTS/PLAINTIFFS:

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1. JAMES,
S/O.AVIRAH, KALAMBUKATTU HOUSE
VELLIYAMATTOM VILLAGE AND KARA, THODUPUZHA TALUK
 2. ANNAKUTTY,
W/O.JAMES, KALAMBUKATTU HOUSE
VELLIYAMATTOM VILLAGE AND KARA , THODUPUZHA TALUK

BY ADV. SRI.K.S.HARIHARAPUTHRAN
ADV.M.D.SASIKUMAR
ADV.GEORGE MATHEW
ADV.A.G.SUNILKUMAR

RESPONDENTS/RESPONDENTS/DEFENDANTS:

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1. JOSE MATHEW
S/O.MATHEW, THOTTATHIL, EZHOLIL HOUSE
EDAPADY KARA, BHARANANAGANAM VILLAGE
MEENACHIL TALUK, KOTTAYAM DISTRICT 686 578
 2. GEETHAMMA
W/O.MATHEW, EZHOLIL HOUSE, EDAPPADY KARA
BHARANANGANAM VILLAGE, MEENACHIL TALUK
KOTTAYAM DISTRICT 686 578

R1 & 2 BY ADV. SRI.MATHEW JOHN (K)
R1 & 2 BY ADV. SRI.DOMSON J.VATTAKUZHAY

THIS FIRST APPEAL FROM ORDER – REMAND ORDER HAVING BEEN FINALLY HEARD ON 24-03-2015, ALONG WITH FAORO. 183/2014, FAORO. 205/2014, FAORO. 206/2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

F.A.O.(R.O.) Nos.181, 183, 205 & 206 OF 2014

Dated 24th March, 2015.

J U D G M E N T

The common judgment in A.S.Nos.48 and 49 of 2012 on the file of the II Additional District Court, Thodupuzha is under challenge in these appeals. The appeals arise from the suits O.S.No.1 of 2011 and O.S.No.76 of 2010 respectively on the file of the Sub Court, Thodupuzha. The subject matter of both the suits is one and the same.

2. O.S.No.76 of 2010 is a suit for cancellation of two sale deeds executed by the plaintiffs in favour of the first defendant in respect of the plaint schedule properties. O.S.No.1 of 2011 is a suit filed by the first defendant in O.S.No.76 of 2010 for a decree of prohibitory injunction restraining the plaintiffs in O.S.No.76 of 2010 from trespassing into the plaint schedule properties.

3. The case of the plaintiffs in O.S.No.76 of 2010 is that the plaint schedule properties belong to them and the first defendant has obtained the same from them by virtue of

the two documents sought to be cancelled by playing fraud on them.

4. The suits were tried together. The documents sought to be set aside were marked as Exts.A5 and A6. The trial court, on an elaborate consideration of the materials on record, found that Exts.A5 and A6 are duly executed and consequently dismissed O.S.No.76 of 2010 and decreed O.S.No.1 of 2011. The plaintiffs in O.S.No.76 of 2010 who are also the defendants in O.S.No.1 of 2011 challenged the decisions in the said suits in A.S.Nos.49 of 2012 and 48 of 2012. The appellate court, on a reappraisal of the materials on record, found that the first defendant in O.S.No.76 of 2010 could not establish that Exts.A5 and A6 are supported by consideration and consequently remitted the suits for fresh disposal. The relevant portion of the appellate judgment reads thus :

“On the other hand, it is to be considered that first defendant is unable to give convincing evidence regarding how he paid the consideration. As he was looking after the plaintiffs, which is his case, he will have knowledge as to how said amount was expended

by the plaintiffs. No evidence is adduced as to whether there was any necessity for the plaintiffs to execute sale deeds to raise money. It is to be noted that entire properties belonging to them were assigned in favour of their son-in-law. Nothing is left with them. This circumstance will indicate that sale deeds were executed so that first defendant can avoid a further claim over the property or in other words he is in a better position if the documents are styled as sale deeds. However these are all factors which are to be considered after adducing evidence. So I think that mere production of the document is not sufficient. All these factors are to be considered. Defendants are to be given opportunity to adduce evidence with respect to consideration. The burden of proof is also to be considered. The relationship between plaintiffs and defendants also assumes important. All these facts are to be considered and for that I think remand of the matter will serve the purpose."

5. Rules 23, 23A and 25 of Order 41 of the Code of Civil Procedure are the relevant rules dealing with the limits of the jurisdiction of the appellate court to remand a suit for fresh disposal. Rule 23 applies when the suit is disposed of on a preliminary issue, Rule 23A applies when the suit is disposed of otherwise than on a preliminary issue and Rule 25 applies when the appellate court finds that the trial court omitted to frame and try an issue which was essential for the right decision of the

suit. Rule 23A dealing with the suits disposed of otherwise than on a preliminary issue reads thus :

“R. 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.”

Rule 23A enables the appellate court to remand a suit for fresh disposal if the decree is reversed in appeal and a retrial is considered necessary. Rule 24 of Order 41 provides that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgement, the appellate court may finally determine the suit, notwithstanding that the judgement of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate court proceeds. Rule 24 of Order 41 has also conferred on the appellate court the power to resettle issues, if necessary for determining the suit finally. Therefore, it is evident that the scheme of Order 41 is that the appellate

court shall finally decide all the suits, except those which are coming under Rule 23 and Rule 25, to ensure speedy justice. If the provisions in Order 41 is understood in the aforesaid manner, it is clear that after the introduction of Rule 23A, the appellate court can remand a suit for fresh disposal only in cases where the decree is reversed in appeal and a retrial is considered necessary. In view of the express provisions in Order 41 as aforesaid, the appellate court cannot now have recourse to its inherent powers to make a remand, for, it is well settled that the inherent powers can be availed of *ex debito justitiae* only in the absence of the express provisions in the Code.

In the instant case, there is no finding by the appellate court that on the materials on record, the decision of the trial court is unsustainable and liable to be set aside. There is also no finding by the appellate court that a retrial is necessary for a complete adjudication of the disputes between the parties. The decision of the appellate court to remand the suit for fresh disposal, is therefore, unsustainable. Even

otherwise, both the plaintiffs and the defendants are aggrieved by the order of remand. Both of them maintain the stand that the materials on record are sufficient to decide the issues in dispute between the parties. In the circumstances, the impugned common judgment is set aside and the appellate court is directed to dispose of A.S.Nos.48 of 2012 and 49 of 2012 afresh after affording the parties an opportunity for hearing. The appeals being of the year 2012, I deem it appropriate to direct the appellate court to dispose of the appeals, as expeditiously as possible, at any rate, before 31.7.2015. The parties are directed to appear before the court below on 21.5.2015.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)