

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

RSA.No. 270 of 2013 ()

**AGAINST THE JUDGMENT IN AS 8/2011 of DISTRICT COURT, THODUPUZHA
DATED 22-05-2012.**

**AGAINST THE JUDGMENT IN OS 107/2007 of MUNSIF COURT, DEVIKULAM
DATED 31-07-2010.**

APPELLANT/RESPONDENT/PLAINTIFF:

**KARUPPASWAMY, AGED 70 YEARS,
S/O VELU, HOUSE NO.CGP VII/141, BL RAM KARA,
CHINNAKKANAL VILLAGE, UDUMBANCHOLA TALUK.**

BY ADV. SRI.N.M.VARGHESE.

RESPONDENTS/APPELLANTS/DEFENDANTS:

- 1. BABY,, AGED 32 YEARS,
S/O THOMAS, VETTANCHIRAYIL HOUSE, THIDIR NAGAR,
BL RAM KARA, CHINNAKKANAL VILLAGE,
UDUMBANCHOLA TALUK, UDUMBANCHOLA P.O. - 685 554.**
- 2. ELDHOSE,, AGED 37 YEARS,
S/O THOMAS, VETTANCHIRAYIL HOUSE, THIDIR NAGAR,
BL RAM KARA, CHINNAKKANAL VILLAGE,
UDUMBANCHOLA TALUK, UDUMBANCHOLA P.O. - 685 554.**
- 3. PAILY,, AGED 35 YEARS,
S/O VARKEY, PLAMKUDY HOUSE, BL RAM KARA,
CHINNAKKANAL VILLAGE, UDUMBANCHOLA TALUK,
UDUMBANCHOLA P.O. - 685 554.**
- 4. ELDHOSE,, AGED 37 YEARS,
S/O VARKEY, PLAMKUDY HOUSE, BL RAM KARA,
CHINNAKKANAL VILLAGE, UDUMBANCHOLA TALUK,
UDUMBANCHOLA P.O. - 685 554.**

**R1 TO 3 BY ADVS. SRI.GRASHIOUS KURIAKOSE (SR.).
SRI.GEORGE MATHEWS.**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
05-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

amk

A.HARIPRASAD, J.

R.S.A No.270 of 2013

Dated this the 5th day of February, 2015.

J U D G M E N T

Second appeal against the judgment in A.S No.8/2011 on the file of the learned District Judge, Thodupuzha. Along with the appeal, an application under Order 39 Rule 2A C.P.C filed for prosecuting the defendant for the alleged violation of injunction was also considered in C.M.A No.6/2012 and the same was also dismissed.

2. Heard the learned counsel for the appellant. He challenges the common judgment in the appeal and the C.M.A on the ground that the lower court committed a mistake in finally deciding the case against the plaintiff/appellant and then remanding the matter for a fresh decision. Apprehension of the appellant is that if this remand order is allowed to stand, then there will be nothing left to the trial court to decide and the appellant/plaintiff will be put to great prejudice.

3. I have gone through the impugned judgment. From

the operative portion of the judgment, it is clear that the nature of remand order is an open remand. Order 41 Rule 23A C.P.C deals with the power of the appellate court to remand the case for proper reasons. It says that 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 powers to remand as provided in Order 41 Rule 23 C.P.C. Learned District Judge considered that the plaintiff and defendants both claimed the plaint schedule property, which admittedly belonged to the Government, on the basis of possession simplicitor. The court below rightly observed that the crucial question to be decided is as to who came into the possession of the property, on what time and also who is in possession of the property on the date of suit. According to the lower appellate court the decree passed by the trial court could

not be justified for the reason that on certain vital aspects evidence was missing. So much so, it decided to remand the case for allowing the parties to adduce evidence. Since the suit was dismissed, the court below took a view that the application for prosecution under Order 39 Rule 2 A C.P.C also need to be considered afresh. Learned counsel for the appellant submitted that elaborate discussion in the remand order will foreclose the issue and the lower court will be carried away by the observations in the remand order to the prejudice of the appellant. To alleviate that apprehension, I shall make it clear that the nature of remand is an open remand. The trial court shall dispose of the case on the basis of evidence already available in the records and also on the basis of additional evidence if any, to be adduced by the parties. The trial court shall not be guided by or be carried away by the observations in the remand order as the Code insist on afresh consideration based on the materials

before it. The parties shall be given opportunity to adduce evidence to substantiate their rival contentions and untrammelled by any observation in the remand order, the lower court shall dispose of the case.

With this observation, the regular second appeal is disposed of.

All pending interlocutory applications will stand dismissed.

**Sd/-
A.HARIPRASAD,
JUDGE.**

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P.A to Judge