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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.01.2021

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No.815 of 2008

and

M.P No.1 of 2008

V.P.Mani

...Appellant / Plaintiff

Vs.

1.Manicka Gounder (died)

2.Balaeaman

3.Jayaraman

4.Sambandan

5.Manoharan

6.Sharmila

...Respondents / Defendants

(RR 2 to 6 brought on record as LRs
of the deceased sole respondent viz.
Manicka Gounder vide order dated
06.01.2021 made in CMP Nos.23818,
23820 and 23821/2019 in CMA 815/2008(SMSJ)

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 of CPC, to set aside the judgment and decree dated 28.09.2007 in A.S.No.27 of 2006 on the file of the Subordinate Court, Vellore, remanding and setting aside the well-considered judgment and decree made in O.S. No.627 of 2001 dated 31.01.2006 on the file of the Principal District Munsif, Vellore.

For Appellant : Mr.T.R.Rajaraman

For Respondents : Ms.M.Subasree
For Mr.E.Kannadasan

J U D G M E N T

The Judgment and Decree passed in A.S.No.27 of 2006 dated 28.09.2007 is under challenge in the present Civil Miscellaneous Appeal.

2. The appellant is the plaintiff, who instituted the suit for declaration, recovery of possession and for mesne profits. The suit was decreed in favour of the plaintiff and the defendant had preferred an appeal in A.S No.27 of 2006. The First Appellate Court remanded the matter back to the trial



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Court on the ground that the metes and bounds of the suit property was not properly surveyed and for this purpose, an Advocate Commissioner has not been appointed. The first Appellate Court considered both the cross appeal as well as the appeal filed by the respective parties. The findings of the first Appellate Court reveals that the survey of the suit property had not been done properly with the assistance of a Court Commissioner and in such circumstances, the trial Court ought to have appointed an Advocate Commissioner for the purpose of ascertaining the metes and bounds of the suit property. For this reason, the suit was remanded back to the trial Court for the purpose of re-trial.

3. Order 41 Rule 33 of CPC enumerates Power of Court of Appeal. Accordingly, the Appellate Court shall have the power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

4. Thus, the first Appellate Court is empowered to deal with the evidences and documents and even a case, some lapses are found in following the procedures or considering the evidences instead of remanding the matter back to the trial Court. The first Appellate Court itself can appoint an Advocate Commissioner or call for the documents or additional documents and accordingly frame issues and decide the matter in the first appeal itself. Routine remanding of the matters are not preferable and such remand will cause greater prejudice to the litigants and also would cause protraction and therefore, the Courts as far as possible more specifically, the first Appellate Court shall decide the matters even in the case of some procedural lapses or even appreciation of vital documents or otherwise.

5. This Court is of the considered opinion that remanding of the matter at one point of view is evasion. The issues have to be decided on merits by every court of law, eventhough whatsoever under Order 41 Rule 33 CPC stipulates that the first Appellate Court has also exercising its power of the trial Court, there is no impediment for the first Appellate Court to entertain and accept the additional documents or evidences or if necessary, appoint an Advocate Commissioner for the purpose of appreciating the facts and render complete justice to the parties to the litigation. Contrary, if the matter is remanded back to the trial Court, it would prejudice the interest of the parties and further would cause prolongation of the litigation. Therefore, the first Appellate Court whenever forms an opinion



that certain title documents are not considered by the trial Court instead of remanding the matter should have decided the issues itself so as to give quietus to save the judicial hours also.

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6. The Apex Court also ruled that such routine or mechanical remand is impermissible and the Courts are bound to decide the issues on merits in all circumstances and only on exceptional circumstances, as it is impossible for the Appellate Court to decide the issues, then alone the case can be remanded and not otherwise. With the Code of Civil Procedure, the Appellate Court can entertain additional evidence, amendment of prayer, impleadment of necessary parties and appreciation of evidences and documents, appointment of Advocate Commissioner or Surveyor etc., The first Appellate Court is expected to exercise its powers in accordance with the provisions of the Civil Procedure Code instead of remanding the matter back to the trial Court.

7. The powers of the Appellate Court are well enumerated in Section 107 of Civil Procedure Code and the same is reads as under:

107. Powers of Appellate Court - (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power -

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

8. When the powers are conferred to the first Appellate Court to exercise its powers as stated above under Section 107 of CPC, there is no reason whatsoever for the first Appellate Court to remand the matter for re-trial before the trial Court. As far as the present appeal is concerned, the reason for remand is that the Advocate Commissioner has not been appointed for the purpose of surveying the suit property and to find out the metes and bounds of the suit schedule property. The said exercise can very well done by the first Appellate Court and therefore, the first Appellate Court is directed to exercise its powers under Section 107 of Civil Procedure Code and proceed with the appeal by taking all necessary actions.

9. This being the factum, the judgment and decree dated 28.09.2007 passed in A.S No.27 of 2006 is set aside and the



first Appellate Court, namely, the Subordinate Court, Vellore, is directed to continue the appeal by providing an opportunity to the parties concerned and by appointing an Advocate Commissioner to measure the metes and bounds of the suit property as required and dispose of the appeal on merits and in accordance with law preferably within a period of six months from the date of receipt of a copy of this judgment.

10. Accordingly, the Civil Miscellaneous Appeal No.815 of 2008 stands allowed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar (CS-IX)

// True Copy //

Sub Assistant Registrar

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To

- 1.The Subordinate Judge,
Vellore.
- 2.The Principal District Munsif,
Vellore.

Copy To :

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.E.Kannadasan, Advocate SR.No.724

+1cc to Mr.T.R.Raja Raman, Advocate SR.No.602

C.M.A.No.815 of 2008
M.P.No.1 of 2008

SR(CO)
RVM(20/09/2021)