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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.A.No.2427 of 2010

The Executive Officer,
Arulmigu Badhrakaliamman Temple,
Andhiyur,
Bhavani Taluk,
Erode District.

...Appellant

vs.

1.Dr.Bakthavatchalam

2.The Arulmigu Badhrakaliamman Temple,
Andhiyur,
Renovation Committee rep.by its President,
A.K.Venkatachalam,
Andhiyur Town.

...Respondents

PRAYER : Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of C.P.C, against the order of remand dated 29.04.2010 made in A.S.No.43 of 2007 on the file of the Additional District Judge, Fast Track Court No.4, Bhavani, reversing the judgment and decree dated 30.07.2007 made in O.S.No.430 of 2005 on the file of the Principal District Munsif Court, Bhavani.

For Appellant : Mr.D.Sathiya
for M/s.Zeenath Begum

For Respondents : Mr.V.Balamurugane for R1
R2-Given up

O R D E R

The Judgment and Decree dated 29.04.2010 passed in A.S.No.43 of 2007 is under challenge in the present Civil Miscellaneous Appeal.



2. The respondent is the plaintiff in O.S.No.430 of 2005 and the suit was instituted for declaration and permanent injunction. The suit was decreed in part. Challenging the said decree, the appellant in the present appeal filed an appeal in A.S.No.43 of 2007. The appeal suit was adjudicated by the First Appellate Court and the matter was remanded back to the Trial Court on the ground that an additional chief examination is to be taken and accordingly, the trial Court was directed to permit additional chief examination and thereafter, consider the facts and dispose of the suit.

3. The learned counsel appearing on behalf of the appellant/Temple mainly contended that even in case such examination is required, it is only an additional chief examination which can be done by the First Appellate Court itself instead of remanding the matter back to the trial Court which would cause hardship to the parties. Further, the case will be prolonged.

3(a) Learned counsel for the respondent raised objection by stating that the First Appellate Court remanded the matter for the purpose of taking additional chief-examination and, therefore, there is no infirmity as such. This apart, additional chief-examination is to be conducted elaborately and the chief-examination also is required. Thus, the First Appellate Court remanded the matter on account of infirmities and there is no error apparent as such, and this appeal is liable to be rejected.

4. This Court is of the considered opinion that all the appeal suits are to be disposed of finally. Under Order XLI Rule 23 of C.P.C contemplates that the Appellate Court shall remand the matter back to the trial Court. However, such remand can be made only if the suit was decided on preliminary issues. Once the suit was disposed of on merits by considering the documents and evidence made available, then the Appellate Court cannot remand the matter back to the trial Court. Omission or commission, if any, can very well be done by the First Appellate Court. Section 107 of C.P.C. empowers the Appellate Court to receive the additional documents and to examine the witnesses, if required. Order XLI Rule 24 also stipulates that "Where evidence on record sufficient, Appellate Court may determine case finally - Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds". Thus, in all cases, the Appellate Court is expected to dispose of the appeal suits finally except



when the trial Court disposed of the suit on certain preliminary issues without considering the documents and evidence made available.

5. Remand is an exception. Rule contemplates that the appeal is to be decided finally. Thus, the order of remand is to be passed only on exceptional circumstances, where it is not possible for the Appellate Court within the provision of the Code of Civil Procedure to dispose of the appeal suit. The various circumstances under which the appeal suits shall be decided by the Appellate Court has been enumerated in Order 41 Rule 23, 23(A), 24 and 25. Therefore, the Appellate Court must be cautious while remanding the matter back to the trial Court and unnecessarily remanding the matter, undoubtedly, would cause prejudice to the interest of the parties. This being the principles to be followed, the findings of the First Appellate Court that the additional chief examination is to be conducted or additional documents are to be received cannot be an appropriate ground for remanding the matter back to the trial Court. Contrarily, such an exercise can be done by the First Appellate Court in order to complete the trial and pass final order on merits and in accordance with law and by affording opportunity to all the parties concerned. Thus, this Court is of the considered opinion that the First Appellate Court is empowered to take additional chief examination or accept additional documents and permit the petitioner to examine and cross-examine the witnesses, if necessary and by affording opportunity to all the parties and thereafter, decide the matter on merits and in accordance with law.

6. In this view of the matter, the judgment and decree dated 29.04.2010 passed in A.S.No.43 of 2007 is set aside and the matter is remanded back to the First Appellate Court for taking additional chief examination or receiving additional documents or for examination of witnesses, if necessary and dispose of the suit on merits and in accordance with law and by affording opportunity to all the parties concerned. The said exercise is requested to be done within a period of six months from the date of receipt of a copy of this order. The parties to the appeal suits are directed to co-operate for earlier disposal of the appeal suit. Unnecessary adjournments shall not be granted on flimsy ground. Even for adjournment on genuine grounds, the reasons must be recorded by the Courts.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar



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To

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1. Additional District Judge,
Fast Track Court No.4,
Bhavani.
 2. Principal District Munsif Court,
Bhavani.
- +1 cc to M/s.V.Balamurugane, Advocate Sr.No.14683.

C.M.A.No.2427 of 2010

SMI [co]
NSK 30/07/2021