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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.NO.3144 OF 2011

AND

M.P.NO.1 OF 2011

1.Kunjappan
2.K.M.Madheswaran
3.K.Mani
4.Seerangammal
5.Palaniammal
(Appellants 4 and 5 brought on record
as Lrs of the deceased first appellant viz.,
Kunjappan vide Court order dated 04.01.2021
made in C.M.P.No.14180/2020)

..Appellants/Defendants 1 to 3

Vs.

1.B.Radha
2.O.M.Periyasamy
3.Jaganathan

..1 and 2 Respondents/Plaintiffs

..3rd Respondent/4th Defendant

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of Civil Procedure Code, against the judgment and decree dated 19.07.2011 made in A.S.No.58 of 2010 on the file of the Principal District Court, Erode remanding the matter to the trial Court by reversal of the judgment and decree dated 09.06.2010 made in O.S.No.5 of 2006 on the file of the Sub Court, Bhavani.

For Appellants : Mr.N.Manokaran

For Respondents : M/s.Sathya Satheese
For Mr.V.Rajesh
[For R1 & R2]



JUDGMENT

The judgment and decree dated 19.07.2011 passed in A.S.No.58 of 2010 is under challenge in the present Civil Miscellaneous Appeal.

2. The defendants are the appellants and the suit was instituted by the respondents for Declaration and possession. The suit was dismissed by the trial Court. The plaintiffs filed A.S.No.58 of 2010, challenging the judgment and decree passed by the trial Court. The First Appellate Court remanded the matter back to the trial Court to re-examine the witnesses by providing an opportunity to the appellants. For the said purpose, the suit is remanded back to the trial Court. Challenging the said order of remand, the present Civil Miscellaneous Appeal is filed.

3. The findings of the First Appellate Court for remanding the matter are furnished in Paragraph Nos. 21 and 22 of the judgment, which are extracted hereunder:

"21. In this case, the appellants filed a suit for declaration, injunction and mandatory injunction against the respondents alleging that the 1st respondent executed a power of attorney deed in favour of one Boopathi, who had executed sale deed in favour of the appellants and on that basis the appellants filed a suit for the same. The respondents contended that the 1st respondent has not executed any power of attorney in favour of one Boopathi, who is none other than the husband of the 1st appellant and the 2nd appellant is a close relative of the said Boopathi and the said Boopathi misrepresented the 1st respondent and obtained the said power of attorney and on that basis he executed the sale deed in favour of the appellants which is not valid and prayed to dismiss the suit.

22. The Lower Court after considering the evidence adduced on behalf of both sides, and documents dismissed the suit against which the present appeal has been filed. The appellants also filed petition to examine the persons as additional witnesses and the said petition has



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been allowed by this Court giving an opportunity to prove the case of the appellants. So, if the additional evidence has to be taken by the appellants, an opportunity must be given to the respondents also to cross examine the witnesses and they must be allowed to give evidence to rebut the evidence which is going to be taken by the appellant. For that purpose, the judgment and decree of the lower Court has to be set aside and it has to be remitted back to the lower Court to adduce evidence to prove the execution of power of attorney deed and an opportunity has to be given to the respondents also to cross examine the witnesses who have to be examined by the appellants and they have lot in evidence to rebut the evidence adduced on behalf of the appellants. So, it is a fit case for remand. The above point is answered accordingly."

4. Perusal of the above findings, this Court is of the considered opinion that the said opportunity as contemplated by the First Appellate Court can very well be provided to the appellants before the First Appellate Court itself. Instead of re-examining the witnesses, if necessary and in the interest of justice, the First Appellate Court unambiguously remanded the matter back for re-examination. The First Appellate Court is well within its powers to re-examine the witnesses, if necessary, accept additional documents by providing opportunity to all the parties. Order 41 Rule 23 and 23A C.P.C., contemplates circumstances under which remand can be made. Only if the suits are decided on preliminary issue, the suit is remanded back to the trial Court for re-trial. Contrarily, for re-examination or for accepting the additional documents, the suit need not be remanded back to the trial Court. Such exercise can very well be done by the First Appellate Court itself in order to pass final orders in the appeal suit.

5. Under Section 107 C.P.C., the First Appellate Court has got powers to take additional evidence, if necessary, to examine the witnesses for the purpose of reaching finality. Thus, only on exceptional circumstances, if the decree and judgment falls under the ambit of Order 41 Rule 23 & 23A, the matter is to be remanded, otherwise the Appellate Courts are



expected to pass final orders on merits and in accordance with law. Order 41 Rules 24 contemplates 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 the Appellate Court proceeds." With reference to Section 107 and Rule 24 to Order 41 of C.P.C., the First Appellate Court, if necessary can re-examine the witnesses, if further clarifications are required or an opportunity is provided to either of the parties to the appeal suit and if necessary, additional documents can be admitted and scrutinized. Such clarifications or further examinations may be done by the First Appellate Court under the provisions of the C.P.C., Contrarily, if each and every examination or re-examination, the First Appellate Court shall not remand the matter back to the trial Court. Such remand would cause greater hardship to the interest of the parties to the suit. The appeal suits are remanded for such issues, it will enhance the longevity of the civil litigations and further, the litigants would get frustrated. Thus, an order of remand is to be avoided in all circumstances and the appeal suits are to be decided on merits, if necessary, by examining additional witnesses or by accepting additional documents. Only if the suits are decided on certain preliminary issues, then alone, for an order of remand can be passed for re-trial by the trial Court.

6. The power of remitting is ordinarily to be resorted to when the trial Court has omitted to try any material issue or to determine any question of fact. In other words, the proper procedure in a case, where the trial Court, while dispose of the suit on merits, had failed to determine one or more of the material issues/questions is to remit the issue/question (s) under Rule 25 and not to remand the whole case for re-trial. Ordinarily, in the case of an order under Rule 25 of Order XLI, the matter is retained on the file of the Appellate Court and only the issue/question(s) are remitted to the Trial Court for findings. On the other hand, when an order of remand is made under Rule 23 or Rule 23A, the whole case goes back for decision to the Trial Court except on the point on which the Appellate Court has returned concluded finding, if any. While making a



remand under Rule 23 or Rule 23A, the judgment and decree of the Trial Court is required to be set aside but it is not necessary to set aside the impugned judgment and decree when taking recourse to Rule 25 of Order 41.

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7. In the present case, the judgment and decree of the trial Court was dismissed and the suit was remanded back to the trial Court under Rule 23 to Order 41 of C.P.C., Thus, such a remand is unnecessary as the trial Court has elaborately adjudicated the issues with reference to the documents and evidences. If further clarifications or re-examinations are required, the said exercise can very well be done by the First Appellate Court by affording opportunity to all the parties to the appeal suit.

8. This being the principles to be followed, the judgment and decree dated 19.07.2011 passed in A.S.No.58 of 2010 is set aside and the Civil Miscellaneous Appeal in C.M.A.No.3144 of 2011 stands allowed. The First Appellate Court is directed to proceed with the appeal suit, if necessary, by providing opportunity to all the parties to re-examine any witnesses or for filing additional documents and dispose of the appeal suit on merits and in accordance with law. The First Appellate Court is directed to complete the said exercise within a period of eight months from the date of receipt of a copy of this judgment. The parties are at liberty to establish their case in the manner known to law.

9. The parties to the appeal are restrained from seeking unnecessary adjournments. Adjournments are to be granted only on genuine grounds and by recording reasons. Adjournments on flimsy grounds are to be rejected in limine by all Courts. The parties cannot be given privilege of getting adjournments for their benefit in order to prolong and protract the issues. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Deputy Registrar(TNMCC)

// True Copy //

Sub Assistant Registrar

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To

1. The Principal District Judge,
Erode.

2. The Subordinate Judge,
Bhavani.

Copy To

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

+1cc to Mr.N.Manokaran, Advocate, S.R.No.5695

+1cc to Mr.V.Rajesh, Advocate, S.R.No.5826

C.M.A.No.3144 of 2011

BS(CO)
RLP(21/10/2021)