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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2021

CORAM

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

C.M.A.NO.368 OF 2011

AND

M.P.NO.1 OF 2011

Ganesan

... Appellant/6th Respondent/9th Respondent

Vs.

1.K.Ismail Khan

... Ist Respondent/Appellant/Plaintiff

2.Sydhani Bee

3.K.Azeezkhan

4.Zaithun Bee

5.Saminllah Khan

6.Asaithambi

7.Iyyappan

8.Karthikeyan

9.Balamurugan

10.Kaliammal

11.Valli

12.Santhi

13.Thaiyalnayaki

14.Lakshmi

15.Renuka

16.Rajeswari

... Respondents 2 to 16/
Respondents 1 to 5, 7 to 16/
Defendants 2 to 6, 10 to 19

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of CPC, to set aside the judgment and decree in A.S.No.31 of 2009 dated 30.10.2010 on the file of the learned Principal District Judge, Cuddalore District, Cuddalore, reversing the judgment and decree dated 29.06.2009 passed in O.S No.3 of 2001 on the file of the learned Subordinate Judge, Panruti.



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For Appellant : Mr.Sabarish
For Mr.S.K.Rakhunathan
For Respondents : Mr.D.Baskar for R1
R2 to R13 - Exparte
R14 to R16 - Not ready in notice

JUDGMENT

The judgment and decree dated 30.10.2010 passed in A.S.No.31 of 2009 is under challenge in the present Civil Miscellaneous Appeal.

2. The first respondent is the plaintiff, who instituted the suit for partition. The appellant is the ninth defendant in the suit who filed the present appeal. The suit was dismissed. Challenging the dismissal of the suit, the appeal suit was filed by the first respondent in A.S No.31 of 2009. The first Appellate Court though considered the issues arrived a conclusion that the trial Court has not gone into the merits of the case. Para 21, 22 and 23 of the judgment reveals that the first Appellate Court instead of deciding the issues on merits unnecessarily remanded the matter back to the trial Court for reconsideration. Non-consideration of certain documents are points raised in the suit cannot be a ground to remand the matter. The issues have not considered and not properly appreciated by the trial Court can be reconsidered by the first Appellate Court and such powers are vested under Section 107 CPC.

3. This Court is of the considered opinion that unnecessary remanding of the cases are to be avoided. Only on continuing circumstances, if the first Appellate Court is unable to decide the matter on account of certain serious lapses, then alone the cases can be remanded and with reference to all other grounds, the first Appellate Court can independently decide the issues with reference to the documents marked or to take further evidence or mark additional documents and decide the case on merits and in accordance with law.

4. Remanding of the matter would cause greater prejudice to the interest of the parties. Once again the parties re-adjudicate the matter in the event of remand, such a retrial result in prolongation or protraction of the litigation. Appeal orders take to reach finality as far as the dispute raised between the parties are concerned. Thus, Courts as far as possible must decide the issues on merits in all circumstances.

5. The first Appellate Court is proper and decide the matter even framing additional issues or conducting evidence or



examination of witnesses including cross examination. The first Appellate Court is exercising the power of the trial Court for the purpose of deciding the issues and dispose of the first appeal on merits and in accordance with law. Such powers are vested with the first Appellate Court. Unnecessary remanding of the matter would cause hardship to the litigant. Such grounds of non-consideration of the documents in a right perspective cannot be a ground for remanding the matter back for retrial.

6. The principles in this regard are settled by the Apex Court of India. In the case of Municipal Corporation, Hyderabad vs. Sunder Singh reported in 2008 SCC 485, the Hon'ble Supreme Court held that "A distinction must be borne in mind between diverse powers of appellate court to pass order of remand. The scope of remand under Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 CPC was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce the secondary evidence of the Court".

7. Above finding is unambiguous that unnecessary remand of the cases are to be avoided by the Courts. Once the suit was decided based on a preliminary issue, absolutely there was no adjudication of the issues with reference to the documents and evidences then alone the cases can be remanded and not otherwise. In appreciation of facts and evidences and documents are not at all the grounds for remanding the matter back for reconsideration.

8. Section 107 C.P.C., enumerates the powers of the appellate Court. The appellate Court shall take additional evidence or require such evidence to be taken. Even under Order 41 Rule 24 of the Code of Civil Procedure, where evidence on record is sufficient, the appellate Court may determine the case finally. The provision states that 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.

9. Order 20 Rule 5 of the Code of Civil Procedure contemplates the Court to state its decision on each issue. The provision reads that the suits in which issues have been framed, the court shall state its finding or decision, with the reasons there for, upon each separate issues, unless the finding upon any one or more of the issues is sufficient for the



decision of the Suit. Therefore, it is not necessary that all the issues framed by the trial Court are to be discussed elaborately. In all circumstances when the first issue which is vital to continue the suit proceedings are decided in either way, then the Court can arrive a conclusion for the purpose of deciding the suit itself.

10. For example in the suit for specific performance, agreement for sale is a vital document which is relied upon for the purpose of granting the relief of specific performance. In the absence of the sale agreement, it is not possible for the Courts to grant relief of specific performance. Thus, if the sale agreement is found to be null and void or fraudulent or fabricated and the factum is established with strong evidence, the trial Court is empowered to decide the suit on such issues without going into the further discussion with reference to the other issues of readiness and consideration etc. Such a procedure is already approved by the Code of Civil Procedure. Therefore, the first Appellate Court is wrong in arriving the conclusion that the trial Court must decide all the issues elaborately even after arriving at a conclusion that the suit sale agreement is invalid and fabricated.

11. Why the powers are conferred on the first appellate Court, is in view of the fact that under order 41 rule 33 of the Code of Civil Procedure, and under Section 107 C.P.C., the appeal suit is the continuation of the original suit proceedings and therefore, all the powers vested on the original Court of jurisdiction may be exercised by the first appellate Court in order to resolve the disputes in a complete manner. This being the principles to be followed, this Court is of the considered opinion that the matters cannot be remanded on certain trivial issues. As far as possible the Courts are bound to decide the matter and pass a final judgment. Remanding of the matter may be an easy way out for the Courts, but this Court is not inclined to appreciate such way of disposal of the cases. Thus in all circumstances, the Courts are bound to consider the issues as a whole and attempt to provide complete justice to the parties. Contrarily by remanding the matter, the parties are made to suffer further and the long pendency would cause denial of justice to the either of the parties.

12. In view of the facts and circumstances, the judgment and decree dated 30.10.2010 passed in A.S No.31 of 2009 is set aside and the present Miscellaneous Appeal No.368 of 2011 stands allowed. No costs. The matter is remanded back to the first Appellate Court for reconsideration of the entire issues by examining the documents and evidence if required and dispose of the Appeal Suit on merits and in accordance with law by



affording opportunities to the parties concerned. The said exercise is requested to be done as expeditiously as possible and preferably within a period of six months from the date of receipt of a copy of this judgment. Consequently, the connected Miscellaneous Petition is closed.

13. 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 readily by all Courts. The parties cannot be given privilege of getting adjournments for their benefit in order to prolong and protract the issues. Thus, the first appellate Court is bound to consider all these aspects and dispose of the cases on merits and in accordance with law.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge
Cuddalore.
2. The Subordinate Judge
Panruti.

Copy To

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

C.M.A.No.368 of 2011
M.P.No.1 of 2011

PVS (CO)
RLP(18/05/2022)