

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.A.No.318 of 2015
and
M.P.No.1 & 2 of 2015

1.A.Chinnammal

2.A.Mohan

3.A.Gopalan

.. Petitioner

vs.

1.K.Sampath

2.K.Ramalingam

3.K.Loganathan

4.K.Shanmugham

5.E.Ganesan

.. Respondents

PRAYER : Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of the Civil Procedure Code, to set aside the judgment and decree dated 09.12.2014 in A.S.No.30/2014 on the file of the Principal Sub-ordinate Judge, Salem remanding the judgment and decree dated 03.01.2014 in O.S.No.528 of 2011 on the file of the 1st Additional District Munsif Court,

Salem and allow the present appeal and award enhanced compensation as prayed for.

For Petitioner : M/s.Revathy
For M/s.R.Nalliyappan

For Respondent : Mr.C.Prabakaran for R1 & R4

ORDER

The Judgment and Decree dated 09.12.2014 passed in [A.S.No.30 of 2014](#) is under challenge in the present Civil Miscellaneous Appeal.

2. The plaintiffs are the appellants in the suit and the suit was instituted for grant of permanent injunction. The suit was decreed in favour of the plaintiff. The defendants filed [A.S.No.30](#) of 2014 before the Principal Sub-Ordinate Court, Salem and the first Appellate Court set aside the judgment and decree of the trial court remanding the matter back for re-trial.

3. The reasons stated for remanding the matter by the first Appellate Court are that *“the trial Court had given a finding that it is only a two cubit pathway and restraining the appellants/defendants not to alter or extend the two cubit pathway above the two cubit pathway but this court finds that*

the Commissioner had failed to measure the pathway with assistance of the qualified surveyor. The pathway marked in the photo/Ex.A20 would clearly prove that it is definitely above the breadth of two feet. Further, the respondent/plaintiff also failed to prove the recitals in Ex.A1 regarding the two cubit pathway and the reference of two cubit pathway to reach the well is a confused in nature and it will be clarified only by way of remanding the appeal to the trial Court and to re-issue the commission and to measure the property with the assistance of the qualified surveyor. Further the plaintiff and the defendants are permitted to adduce further oral evidence and documentary evidence to prove their case”.

4. This Court is of the considered opinion that when the documents and evidence are very much available before the first Appellate Court, the first Appellate Court is expected to pass final order on merits and in accordance with law as contemplated under Order XLI Rule 24 of **C.P.C.** An order of remand cannot be passed in a routine manner. If the trial Court failed to adjudicate the issues with reference to the documents and evidences, then alone, an order of remand can be passed by the first Appellate Court and

with reference to certain lapses or defects or filing additional documents, it can be done before the first Appellate Court itself by the respective parties. Order XLI Rule 24 of C.P.C enumerates that “where evidence on record sufficient, Appellate Court may determine case finally”. In the present case, the first Appellate Court has gone into the merits of the case and appreciated the pathway marked in Ex.A20. This apart, the defect identified by the first Appellate Court is regarding the report of the Commissioner, more specifically, the measurement of the pathway. If necessary, the first Appellate Court would have done the exercise by appointing another Commissioner and get report or decide the matter with reference to the documents available on record. Contrarily, the case cannot be remanded back to the trial Court for appointing a second Commissioner so as to inspect the suit pathway with the assistance of the qualified surveyor. Remanding the matter back to the trial Court would cause longevity to the litigation and the parties would get frustrate and it will take long time. In view of the facts and circumstances, this Court is of the considered opinion that the reasons recorded by the first Appellate Court for remanding the matter back to the trial Court is not convincing. The first Appellate Court is

empowered to decide the issues by receiving additional documents or by taking evidence, if necessary, in respect of lapses or defects committed in measurement of the suit properties or otherwise. Accordingly, the judgment and decree dated 09.12.2014 passed in [A.S.No.30](#) of 2014 is set aside and consequently the appeal suit in [A.S.No.30](#) of 2014 stands remanded back to the First Appellate Court for deciding the case on merits and in accordance with law, if necessary, by accepting additional documents and evidence or examining the witnesses and affording opportunity to all the parties. The First Appellate Court is requested to dispose the suit as expeditiously as possible preferably within a period of six months from the date of receipt of a copy of this Order.

5. 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.

6. With these observations, the Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected miscellaneous petitions are also closed.

25.01.2021

Speaking Order/Non-Speaking Order.

Internet : Yes/No.

Index: Yes/No.

ssb



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S.M.SUBRAMANIAM, J.

ssb

To

1. The Principal Sub-ordinate Judge, Salem
2. 1st Additional District Munsif Court, Salem.



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