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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.A.NOS.3438 & 3451 OF 2012

AND

M.P.NOS.1 & 1 OF 2012

Arulmighu Sulaikal Mariamman
Temple, Bisil Karuvalur Mariamman and Mahaliamman Temples
Rep.by its Trustees

1.S.Palanisamy

2.S.M.Palanisamy ...Appellants / Appellants / Plaintiffs
in C.M.A.No.3438 of 2012

1.S.Palanisamy

2.S.M.Palanisamy ...Appellants / Appellants / Defendants 1 & 2
in C.M.A.No.3451 of 2012

VS

1.Thangaraj @ Marannan

...1st Respondent / 1st Respondent / Defendant
in CMA No.3438 of 2012

2.Kariammal

...2nd Respondent / 2nd Respondent / 2nd Defendant
in C.M.A.No.3438 of 2012

3.Velusamy

...3rd Respondent / 3rd Respondent / 3rd Defendant
in C.M.A.No.3438 of 2012

...2nd Respondent / 2nd Respondent / 3rd Defendant
in C.M.A.No.3451 of 2012

4.Sarojini

...4th Respondent / 4th Respondent / 4th Defendant
in C.M.A.No.3438 of 2012

...1st Respondent / 1st Respondent / Plaintiff
in C.M.A.No.3451 of 2012



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5. President,
Karapadi Panchayat Board,
Karapadi Village and Cusba,
Sathyamangalam Taluk, Erode District.

...5th Respondent / 5th Respondent / 5th Defendant
in C.M.A.No.3438 of 2012

6. Rajendran ...3rd Respondent / 3rd Respondent / 4th Defendant
in C.M.A.No.3451 of 2012

7. Subramaniam ...4th Respondent / 4th Respondent / 5th Defendant
in C.M.A.No.3451 of 2012

COMMON PRAYER : Civil Miscellaneous Appeals are filed under Order 43 Rule 1(u) of the Civil Procedure Code, against the judgment and decree made in A.S.Nos.40 & 45 of 2011 on the file of the Sub-ordinate Judge, Sathyamangalam dated 06.09.2012 reversing the judgment and decree in O.S.Nos.34 & 157 of 2009 dated 08.09.2011 on the file of the District Munsif Court, Sathyamangalam and remanding back to the Lower Court.

For Appellants in both Appeals	:	Mr.R.T.Doraisamy
For Respondent in C.M.A.No.3438 of 2012	:	Mr.S.Parthasarathy for RR2 & 4 Batta due for RR1, 3 & 5
For Respondent in C.M.A.No.3451 of 2012	:	Mr.S.Parthasarathy for R1 Batta due for RR1, 2 & 4

C O M M O N O R D E R

The Judgment and Decree dated 06.09.2012 passed in A.S.Nos.40 & 45 of 2011 is under challenge in the present Civil Miscellaneous Appeals.

2. Two suits were instituted both by the appellant and the respondents. Both suits were partly decreed. Against which, the respective parties filed A.S.Nos.40 & 45 of 2011. The first Appellate Court adjudicated the facts and circumstances as well as the grounds raised and set aside the judgment of the trial Court and remanded the matter back for fresh disposal.



3. The first Appellate Court remanded the matter back mainly on the ground that "after curing the infirmity in the deposition of P.W.1 and P.W.3 in O.S.No.34 of 2009 and to get the Will of Nanjappa gounder dated 19.10.1987 marked by the parties by allowing them to let in further evidence regarding all issues and to consider the said Will of Nanjappa Gounder dated 19.10.1987 or if the said Will of Nanjappa Gounder dated 19.10.1987 is not marked by the parties inspite of time granted to them, also to consider the same and to dispose the suit afresh at the earliest".

4. This Court has to examine the reasons for remanding the matter back for re-trial before the trial Court by the First Appellate Court. Rule 23 of Order XLI C.P.C contemplates that "where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in this case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

5. Rule 24 of Order XLI C.P.C enumerates 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."

6. The reasons furnished for remand by the first Appellate Court in the case on hand are to be considered with reference to Rule 23 and Rule 24 of Order XLI C.P.C. Rule 23 of Order XLI of C.P.C unambiguously held that when there is no material or evidence on record to consider and pass a final order in the suit, then alone, the remand is to be ordered. An order of remand cannot be passed in a mechanical manner. The



First Appellate Court has got powers under Section 107 of C.P.C, to receive additional evidence and documents and examine the witnesses. When the First Appellate Court has got powers to examine the witnesses and receive the additional documents, if any, from the parties, there is no reason whatsoever to remand the matter back to the trial Court for re-adjudication.

7. The scheme of the provisions for remand enunciated under Rule 23 and 23 A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order XLI that enables the Appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the Appellate Court proceeds on a ground entirely different from that on which the trial Court had proceeded. Thus, Rule 24 is also to be kept in mind, while deciding the appeal, whether the first Appellate Court is right in remanding the matter back to the trial Court for re-trial and adjudication. Rule 24 shall be invoked when the evidence and the documents available are sufficient to dispose of the matter, then the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It is to be understood that an order of remand may not be passed in a routine manner. An unwarranted order of remand will elongate the litigation and result inconvenience. Repeatedly approaching the trial Court will frustrate the mind set of the litigants and the longevity would cause further expenditure. Therefore, this Court is of the considered opinion that as far as possible, remanding the matter is to be avoided, if the evidence or documents available on record are sufficient to decide the case. The First Appellate Court is expected to decide the issues on merits and pass final orders. In the absence of any materials on record to decide those issues, then alone, the first Appellate Court is empowered to adopt course contemplated for remand under Order XLI Rule 23 and Rule 23(A) of C.P.C.

8. Considering the reasons adopted for the purpose of remanding the matter back by the first Appellate Court, this Court is of the considered opinion that curing the infirmity in the depositions of P.W.1 and P.W.3 in O.S.No.34 of 2009 shall be done by the First Appellate Court itself. Such curing is



permissible and well within the powers of the first Appellate Court, if necessary, by taking further evidence or examining the witnesses or receiving the additional documents. In respect of Will dated 19.10.1987, either of the parties are at liberty to file the same as additional documents before the first Appellate Court and take evidence, if necessary. Such exercise may be done by the first Appellate Court in order to avoid pro- longevity of the litigation. The defects occurred in the deposition of P.W.1 and P.W.3 may be cured and if necessary, additional documents including the Will can be examined by the First Appellate Court in order to avoid further delay. Accordingly, the First Appellate Court is directed to consider all the grounds raised for remand and take evidence, if necessary, cure defects occurred in the depositions of P.W.1 and P.W.3 and accordingly, proceed with the matter and decide the first appeal on merits and in accordance with law.

9. The parties to the litigations are entitled for an opportunity to defend their case in the manner known to law. Under these circumstances, the judgment and decree dated 06.09.2012 passed in A.S.Nos.40 & 45 of 2011 stand set aside and the matter is remanded back to the First Appellate Court for re-consideration and decide the appeal suit on merits and in accordance with law by affording opportunity to all the parties concerned. The First Appellate Court is requested to dispose the appeal suit as expeditiously as possible preferably 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 suit.

10. Accordingly, the Civil Miscellaneous Appeal stand allowed. No costs. Consequently, connected miscellaneous petition are also closed.

Sd/-
Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar

ssb



To

1. The Subordinate Judge,
Sathyamangalam.

2. The District Munsif Court,
Sathyamangalam.

Copy To

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

+1cc to Mr.S.Parthasarathy, Advocate SR.No.2037

C.M.A.Nos.3438 & 3451 of 2012

PPA(CO)
RVM(01/10/2021)