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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.Nos. 1094 & 1095 of 2020

C.M.A.No. 1094 of 2020

Thularam Prasad (died)
T.Manohar Prasad

.. Appellant/Defendants 1 & 2

Vs

1.N.Surendran
2.N.Rajasekaran

.. Respondents/Plaintiffs

C.M.A.No. 1095 of 2020

Thularam Prasad (died)
T.Manohar Prasad

.. Appellant/Defendants 1 & 2

Vs

1.N.Surendran

2.N.Rajasekaran

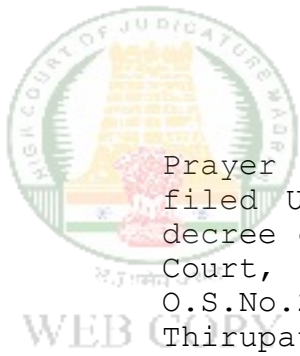
3.The Tahsildar,
Thirupattur.

4.The Village Administrative Officer,
Paachal Village,
Thirupattur Taluk.

5.The Sub-Registrar,
Thirupattur.

.. Respondents/Defendants 3 to 5

Prayer in C.M.A.No. 1094 of 2020: Civil Miscellaneous Appeal filed Under Order 43 Rule 1 (u) CPC against the judgment and decree dated 19.11.2019 in A.S.No. 49 of 2015 on the file of Sub Court, Thirupathur, in remanding the case to the trial Court in O.S.No.241 of 2009 on the file of Principal District Munsif, Thirupattur.



Prayer in C.M.A.No. 1095 of 2020: Civil Miscellaneous Appeal filed Under Order 43 Rule 1 (u) CPC against the judgment and decree dated 19.11.2019 in A.S.No. 64 of 2015 on the file of Sub Court, Thirupathur, in remanding the case to the trial Court in O.S.No.241 of 2009 on the file of Principal District Munsif, Thirupattur.

For Appellants : Mr.R.Mubarak Basha
in both CMAs

For Respondents : Mr.K.Mohan
for R1 & R2 in CMA 1094/20 &
C.M.A No.1095 of 2020

Mr.Y.T.Aravind Gosh
AGP (CS) for R3 & R4
in C.M.A No.1095 of 2020

Mr.P.P.Purushothaman
Govt. Advocate for R5
in C.M.A No.1095 of 2020

COMMON JUDGMENT

The defendants are the appellants in the present appeals. The respondents/plaintiffs instituted a suit for declaration and permanent injunction. Admittedly, the suit was decreed partly. The relief relating to the declaration was rejected and the relief of permanent injunction was granted. Thus, two appeals were filed in respect of the judgment and decree passed by the trial Court in O.S.No.241 of 2009.

2. The First Appellate Court adjudicated the issues with reference to the findings of the trial Court and thereafter arrived a conclusion that the vital document 'Will' was not produced before the trial Court by the parties and the said 'Will' is produced before the First Appellate Court as additional document by the parties and such an additional document was accepted by the First Appellate Court. Thus, the matter is to be remanded back to the trial Court for examination of witness with reference to the 'Will' and accordingly set aside the judgment and decree passed by the trial Court in the suit.

3. The question raised is whether the remand is required at all in such circumstances when the additional document is filed before the First Appellate Court, more specifically, in the present case is the 'Will'. The procedure relating to the appeals from the original decrees is provided in Order 41 of CPC, 1908. Various provisions relating to hearing of the appeal, remand of case, remitting the issue for trial, production of



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additional evidence in the appellate court are contained in Rules 16 to 29 under the sub-heading 'procedure on hearing'. Rules 23, 23A, 24 and 25 of Order 41 CPC read as under:

"23. Remand of case by Appellate Court.—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 the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit 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.

[23A. Remand in other cases.—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. 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.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.—Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;



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and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."

4. Thus, the First Appellate Court shall have the power to remand if a re-trial is considered necessary. The power of remitting the matter is ordinarily to be resorted to when the trial Court has omitted to try any material issue or to determine any question of fact. The proper procedure in a case where the trial Court will dispose of the suit on merits has failed to determine one or more of the material issues/questions to remit the issues/ 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 41 CPC, the matter is retained on the file of the First Appellate Court and only the issues/questions were remitted to the trial Court for findings. When the order of remand is made under Order 23 and 23A CPC, the whole case goes back to the decision for trial Court except on which the First Appellate Court has given findings, if any. While making an attempt under Order 23 and 23A CPC, the judgment and decree of the trial Court is required to be set aside but it is not necessary to set aside the judgment and decree when taking recourse to Rule 25 of Order 41 CPC.

5. The comprehension of the Scheme of the provisions for remand as contained in Rule 23,23A of Order 41 CPC is not complete without reference to the provisions contained in Rule 24 of Order 41 that empowers the First Appellate Court to dispose of the case. Finally, without a remand if the evidence of record is sufficient notwithstanding the appellate court proceeds on the ground, namely different from that on which the trial Court had proceeded. A conjoint reading of Rules of 23,23-A under Order 41 CPC stipulates if the power of remand without the available evidence is sufficient to dispose of the matter then the appropriate course for the appellate court is to follow the procedure of Rule 41 CPC and to determine the suit finally. Thus, the Courts of remand must be adopted only on exceptional circumstances where the trial Court disposes of the suit on certain preliminary points without considering the documents and evidence.

6. This Court is of the considered opinion that the remand is an exception. The Code of Civil Procedure mandates that the appeal suits are to be decided finally on merits. Thus, if the remand is considered, as imminent then alone the First Appellate Court can pass order of remand and not otherwise. Under Section 107 CPC, the Appellate Court is empowered to receive additional evidence. In the present case, the application for additional evidence was allowed and the 'Will' was accepted as an



additional document before the First Appellate Court at the first instance. Thus, the First Appellate Court is empowered to conduct an examination of witness, if required or sought for by the parties to establish the genuinity and the sanctity of 'Will' submitted as additional document, such an exercise shall be done by the First Appellate Court itself. In other words, the First Appellate Court is well within its powers to examine the witness, cross-examination of witness or permit the parties to take additional evidence, if required in order to ascertain the truth and by providing opportunity to the parties concerned. This being the scope of Order 41 CPC, the First Appellate Courts are expected to avert unnecessary remand of the matter which would cause prejudice to the interest of the parties. In the event of remand in a routine manner, the litigations are prolonged, parties are subjected to further examination/re-examination before the same trial Court. The longevity of the litigation is also expanded and, therefore, the Courts are expected to dispose of the case finally, more specifically, when there is a provision to accept additional document and examination of witnesses, etc.

7. In the present case, the 'Will' is accepted as additional document. Thus, the First Appellate Court is empowered to examine the witness, if required and cross-examine, by affording opportunity to all the parties concerned and dispose of the appeal suit finally on merits and in accordance with law.

8. This being the principles to be followed, the judgment and decree dated 19.11.2019 passed in A.S.Nos. 49 and 64 of 2015 is set aside. The matter is remanded back to the First Appellate Court for examination of witnesses or accepting additional documents or cross-examination, if necessary and by affording opportunity to all the parties concerned. The First Appellate Court is requested to complete the said exercise within a period of six months from the date of receipt of a copy of this judgment. The parties to the appeal suit are directed not to seek unnecessary adjournments on flimsy grounds. Such adjournments are to be rejected by the First Appellate Court in limine. If adjournments are to be granted in unavoidable circumstances, then the reasons are to be recorded by the Court.

In view of the above, C.M.A.Nos. 1094 & 1095 of 2020 stand allowed. No costs. Consequently, C.M.P.Nos. 6915 & 6916 of 2020 are closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ssm



To

1. The Village Administrative Officer,
Paachal Village,
Thirupattur Taluk.

2. The Sub-Registrar,
Thirupattur.

3. The Sub Judge,
Thirupathur.

4. The Principal District Munsif,
Thirupattur.

5. The Tahsildar,
Thirupattur.

+2ccs to Mr.R.Mubarak Basha, Advocate, S.R.No.14055, 14056

+1cc to the Special Government Pleader(CS), S.R.No.14282

+1cc to the Government Pleader, S.R.No.14432

C.M.A.Nos. 1094 & 1095 of 2020

NMI (CO)
HS (08/09/2021)