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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2021

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No.1331 of 2014

and

M.P.No.1 of 2014

Kaliyan

... Appellant/Plaintiff

Vs.

1.Rajan

...1st Respondent/3rd Defendant

2.Kanagasabhai

3.Srinivasan

...2nd & 3rd Respondents/1st and 2nd Defendant

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1(u) of the C.P.C., against the judgment and decree dated 28.10.2011 made in A.S.No.12 of 2011 passed by the Additional Subordinate Judge, Vridhachalam, Cuddalore District, reversing the judgment and decree dated 30.11.2010 made in O.S.No.552 of 2007 passed by the II Additional District Munsif, Vridhachalam, Cuddalore District.

For Appellant : Mr.S.Senthilnathan

For Respondent : Mr.C.Selvaraj
[For R1 to R3]

J U D G M E N T

The Judgment and Decree dated 28.10.2011 passed in A.S.No.12 of 2011 by the Additional Subordinate Judge, Vridhachalam, Cuddalore District, is sought to be set aside in the present Civil Miscellaneous Appeal.

2. The plaintiff is the appellant and the suit was instituted for Declaration and for mean profits. The suit decreed in favour of the plaintiff. The defendant filed A.S.No.12 of 2011. The First Appellate Court remanded the matter back to the trial Court for re-adjudication mainly on the ground that as per the additional written statement, additional issues



are not framed by the trial Court and therefore, it is an important issue, the trial Court ought to have adjudicated. The earlier suit was withdrawn and a fresh suit was filed and the validity of the institution of the fresh suit is also to be adjudicated. In view of these issues, the First Appellate Court set aside the judgment and decree passed by the trial Court and remanded the matter back for re-trial. The appellant raised a point that the earlier suit filed in O.S.No.45 of 2005 is a suit for Partition and O.S.No.522 of 2007 is a suit for Declaration and possession and therefore, there is no bar under Order 23 Rule 1 of the Code of Civil Procedure.

3. In view of the fact that the present suit is for Declaration, the suit is maintainable and the trial Court has not committed any error. With reference to the additional written statement filed by the 3rd defendant, the appellant states that the statements are vague and the contradictions noticed are unacceptable.

4. This Court is of the opinion that even in case of any contradictions or an interpretation under Order 23 Rule 1 is required with reference to the facts and circumstances, the First Appellate Court itself can frame an issue and dispose of the case on merits and in accordance with law. For framing of the additional issue, the suit need not be remanded back to the trial Court for re-adjudication. Such a remand is impermissible and in fact, the First Appellate Court is well within its powers to frame additional issues, examine witnesses and appreciate the other documents, if necessary and decide the matter finally on merits and in accordance with law.

5. Section 107 of the Code of Civil Procedure empowers the trial Court to frame issues and take additional evidence or to take such evidence required to be taken. Order 41 of the C.P.C., 1908, provides various provisions relating to hearing of an appeal, remand of case by the Appellate Court, Production of Additional Evidence in Appellate Court. Order 41, Rules 16 to 29 under the Sub heading 'Procedure on hearing' is clear in this regard. Order 41 Rules 23 and 23A speaks about Remand. 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."



6. Therefore, the Appellate Courts are expected to be slow in remanding the matter. Even for small errors including non appreciation of evidence or documents, cannot be a ground to remand the matter back to the trial Court. The Appellate Court has got powers to re-frame the issues or frame an additional issue or take evidence or examine witnesses, if the trial Court adjudicated the issues. Order 41 Rule 23 contemplates, if the suit was decided on preliminary issue, then the only the remand would be proper and if the trial Court has adjudicated the issues with reference to the documents and evidence or framing additional issues, the case need not be remanded back to the trial Court. This being the spirit of Order 41 Rule 24, the present judgment passed by the First Appellate Court, remanding the matter back is not in accordance with the provisions in Order 41 and therefore, the present case falls within the scope of Order 41 Rule 24 of C.P.C.

7. Accordingly, the judgment and decree dated 28.10.2011 passed in A.S.No.12 of 2011 is set aside and the Civil Miscellaneous Appeal in C.M.A.No.1331 of 2014 stands allowed. The First appellate Court is directed to frame additional issues, take evidence or examine witnesses, if necessary by affording opportunity to all the parties and decide the appeal suit finally. The said exercise is directed to be done within a period of six (6) months from the date of receipt of a copy of this judgment. The parties to the are directed to co-operate for the early disposal of the appeal suit.

8. 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/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional Subordinate Judge,
Vridhachalam, Cuddalore District.

2.The 2nd Additional District Munsif,
Vridhachalam,
Cuddalore.

Copy To

The Section Officer,
VR Section,
High Court, Madras.

C.M.A.No.1331 of 2014

AD(CO)
GN(21/12/2021)