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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.01.2021

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No.3286 of 2017

and

C.M.P.No.20746 of 2017

1.Duraisamy
2.Adhimoolam
3.Chandrasekharan
4.Ramalinga Naicker
5.Ponnusamy
6.Santhanam

..Appellants/Defendants

Vs.

Ramasamy

..Respondent/Plaintiff

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of C.P.C., against the Judgment and Decree dated 27.07.2017 passed by the Additional Subordinate Judge, Chingelput in A.S.No.15 of 2013, remitting/remanding the appeal to the Hon'ble District Munsiff, Chingelput and appointing an Advocate Commissioner to inspect the suit property to find out whether the plaintiff's claim of way is acceptable.

For Appellant : Mr.T.S.Vijaya Raghavan

For Respondent : Mr.J.Srinivasa Mohan

J U D G M E N T

The Judgment and decree dated 27.07.2017 passed by the Additional Subordinate Judge, Chingelput in A.S.No.15 of 2013 is under challenge in the present Civil Miscellaneous Appeal.

2. The suit was instituted by the respondent for permanent injunction. The suit was dismissed by the trial Court. The respondent filed the appeal suit in A.S.No.15 of 2013. The First Appellate Court adjudicated the issues on merits. However,



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remanded the matter back to the trial Court for appointment of an Advocate Commissioner to inspect the suit property in the presence of both the parties and their counsel and to submit a Plan and Report showing the actual facts as they are found and as they exists.

3. Once the First Appellate Court adjudicated the issues on merits with reference to the documents and evidences, the appeal suit is to be disposed of on merits and in accordance with law and by affording opportunity to the all parties. Remanding of the matter of appointment of an Advocate Commissioner is unnecessary. Under Section 107 of the C.P.C., the First Appellate Court has got powers to take additional evidence, examine witnesses and decide the matter on merits. Even in case, the trial Court failed to appreciate the evidences or to consider the documents, the said exercise can very well be done by the First Appellate Court and for that purpose, the cases cannot be remanded back. Only if the suit is decide on preliminary issue, then alone, the suit can be remanded for re-trial and not otherwise.

4. The question would arise whether the order of remand falls under Order 41 Rule 23 or Rule 23A of C.P.C. Order 41 Rule 23 unambiguously enumerates 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."

5. Order 41 Rule 24 stipulates 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 Appellate Court proceeds".

6. Therefore, the Appellate Court has got powers to find out the facts, if necessary and decide the matter finally instead of remanding the matter back. Remanding the matter would cause prejudice to the interest of the parties. The duration of the suit is lengthened and going back to the trial Court will cause frustration in the minds of the litigants. Therefore, the Courts are expected to decide the matter on merits in all circumstances and only on exceptional circumstances, where the suits are decided on preliminary issue, then alone, an order of remand is to be passed and not otherwise.

7. In the present case, the trial Court adjudicated the issues on merits and with reference to the documents and



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evidences. If at all, the First Appellate Court raised a doubt regarding the physical features of the suit properties, then the First Appellate Court can very well appoint a Commissioner, examine the suit property and decide the matter on merits and in accordance with law and by affording opportunity to all the parties. Contrarily, for the purpose of appointment of Commissioner, the appeal suit cannot be remanded back for re-trial. Such a course would cause inconvenience to the litigants and would do no service to the cause of justice. Therefore, the Courts are expected to remand the matter only on exceptional circumstances, when the issues are not decided by the trial Court with reference to the documents and evidences.

8. As far as the present case is concerned, it squarely falls under Order 41 Rule 24 and the First Appellate Court can very well decide the matter finally by receiving additional documents or by examining witnesses, if necessary. All such exercise can be done by the First Appellate Court itself with reference to the provisions of the Code of Civil Procedure. Accordingly, this Court is of an opinion that the First Appellate Court had committed an error in remanding the matter back for re-adjudication by appointing an Advocate Commissioner.

9. Accordingly, the judgment and decree dated 27.07.2017 passed by the Additional Subordinate Judge, Chingelput in A.S.No.15 of 2013 is set aside and consequently, the Civil Miscellaneous Appeal in C.M.A.No.3286 of 2017 stands allowed. The First Appellate Court is directed to dispose of the First Appeal suit as expeditiously as possible and preferably within a period of six (6) months from the date of receipt of a copy of this judgment. The parties to the First Appeal are directed to co-operate for the early disposal of the appeal suit.

10. 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-V)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional Subordinate Judge,
Chingelput.
2. The District Munsif,
Chengalpattu.
3. The Sub-Assistant Registrar,
A.E.Section,
High Court of Madras.

Copy To

The Section Officer,
V.R. Section,
High Court, Madras - 104.

+1cc to Mr.J.Srinivasa Mohan, Advocate, S.R.No.2648

+1cc to Mr.T.S.Vijaya Raghavan, Advocate, S.R.No.2316

C.M.A.No.3286 of 2017

SV(CO)
RLP(02/09/2021)