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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.03.2021

CORAM:

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

C.M.A.No.989 of 2017
and C.M.P.No.4870 of 2017

T.Abdul Kadhar .. Appellant/Claimant

Vs.

Abdul Hameed Kadhir Foundation,
Thiruvarur,
Rep. by its Founder Abdul Hameed Kadhir,
No.5/19, Mela Chetty Street,
Adiakkamangalam,
Thiruvarur District. .. Respondent/Respondent

PRAYER : Civil Miscellaneous Appeal is filed under Order XLIII Rule 1(u) of C.P.C, praying to set aside the operation of the judgment and decree dated 23.12.2016 made under A.S.No.1 of 2016, on the file of the Subordinate Court, Thiruvarur, reversing the judgment and decree dated 30.06.2015, made in OS.No.57 of 2004, on the file of the District Munsif Court, Thiruvarur.

For Appellant : M/s.Srinath Sreedevan
For Respondents : Mr.M.Thamizhavel

J U D G M E N T

The appellant herein is the defendant in the suit in O.S.No.57 of 2004 filed by the respondent/plaintiff for the relief of recovery of possession and other consequential reliefs. The defendant also contested the case. After full trial, the trial Court dismissed the suit. Aggrieved by that, the plaintiff preferred the appeal in A.S.No.1 of 2016, before the Subordinate Court, Tiruvarur. The first Appellate Judge while disposing the appeal, remanded the entire case. Aggrieved by that judgment, the defendant preferred this appeal.

2. Point for consideration:

Whether the order of remand passed by the first appellate judge is maintainable in law?



3. On perusal of the records before the trial Court, it is seen that PW.1 has not been cross examined by the defendant inspite of several opportunities as the PW.1 was not availed himself for cross examination. Hence, the trial Court suo motu closed the plaintiff's evidence and posted for the defendant evidence.

4. On the side of the defendants DW.1 and DW.2 were examined and Exs.B1 to B10 were marked and DWs.1 and 2 were cross examined by the plaintiff. Therefore, the adverse inference can be drawn against the plaintiff that if the plaintiff not made himself available for cross-examination by the defendant's side, some facts would have been extracted from his mouth which might go against him and therefore, he deliberately evaded himself from being cross-examined. Thereafter, the recall petition was filed by the plaintiff was also dismissed. Moreover, while deciding the issue No.3, the trial Court concluded that there is no obligation on the part of the Court to decide the case for the simple reason that unless the lawyer satisfies the Court that there is some balance in his client's favour to alter the situation, it is not for the Court itself to decide the controversy. Hence, the trial Court answered the second issue in the negative in favour of the defendant and against the plaintiff that this Court has got no jurisdiction to decide the present suit as alleged by the defendant in his written statement.

5. The facts reveal that PW.1 was not made available himself for cross examination and reason for his absence also clarified by the plaintiff with sufficient reasons.

6. According to the plaint averments, the shop building and the suit property belong to the plaintiff trust. There is dispute between the parties with regard to the aforesaid properties. So the plaintiff approached the Court. The dispute between the parties from the year 2002 onwards.

7. The learned counsel for the respondent submitted that since PW.1 in abroad and he was able to secure him for the cross examination inspite of their best efforts. The suit is filed by the plaintiff for the year 2003 and as per the plaint averments and the defendant is a tenant.

8. Though it is the case of appellant/defendant that despite sufficient opportunities, PW.1 has not made himself available for cross-examination and remanding the matter to the trial Court leads to multiplicity of proceedings, this Court is of the view that the plaintiff had given justifiable reason for



non-appearance of PW-1 before the Court. Therefore, the order passed by the first Appellate judge is sustainable one. Hence, there is no merits in this appeal.

9. Accordingly, this appeal is dismissed, the order passed by the first Appellate Judge is confirmed. The trial Judge is directed to decide the suit in O.S.No.57 of 2004, on merits within three months from this judgment by hearing both sides, without giving unnecessary adjournments. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Court,
Thiruvarur.

2.The District Munsif Court,
Thiruvarur.

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

+1cc to Mr.M.Thamizhavel , Advocate SR.No.19789

+1cc to Mr.Srinath Sridevan , Advocate SR.No.19629

C.M.A.No.989 of 2017

CNR(CO)
CB(24/11/2021)