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C.M.A.Nos.2699 & 2700 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.10.2023

CORAM

THE HONOURABLE MR.JUSTICE **M.DHANDAPANI**

C.M.A.Nos.2699 & 2700 of 2012

M.Madheswaran

...Appellant in both CMA's

Vs.

1. Thangamuthu
2. Palanisamy ...1st and 2nd Respondents in both CMA's.
3. The Commissioner,
Panchayat Union, Erode ...3rd Respondent in CMA.No.2699 of 2012
4. Dhanayal ...3rd Respondent in CMA.No.2700 of 2012
5. Muthumani ...4th Respondent in CMA.No.2700 of 2012

Prayer in CMA.No.2699 of 2012: Civil Miscellaneous Appeal filed under Order 43 Rule I of Civil Procedure Code as against the Judgment and decree dated 29.02.2012 in A.S.No.91 of 2011 on the file of the Principal Sub Court, Erode against O.S.No.480 of 2005 on the file of II Addl. District Munsif Court, Erode.

Prayer in CMA.No.2700 of 2012: Civil Miscellaneous Appeal filed under Order 43 Rule I of Civil Procedure Code as against the Judgment and decree dated 29.02.2012 in A.S.No.93 of 2011 on the file of the Principal Sub Court, Erode against O.S.No.756 of 2006 on the file of II Addl. District Munsif Court, Erode.



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In both CMA's.:

For Appellant : Mr.A.Sundaravadhanan
For Respondents : Mr.S.Kaithamalai Kumaran, for R1 & R2
in both CMA
: Dr.S.Suriya, AGP, for R3
in CMA.No.2699 of 2012
: No Appearance, for R3 & R4
in CMA.No.2700 of 2012

COMMON JUDGEMENT

Since the issue involved in both the appeals are interconnected, they are disposed of by way of this common judgment.

2. The appellant has come up with these Appeals challenging the Judgment and decree dated 29.02.2012 made in A.S.Nos.91 & 93 of 2011, on the file of the Principal Sub-Court, Erode, reversing the Judgments and Decrees made in O.S.No.480 of 2005 and 756 of 2006, on the file of the II Additional District Munsif Court, Erode.

3. The case of the appellant is that, the appellant is a plaintiff who filed suits in O.S.No.480 of 2005 and 756 of 2006 as against the respondents,



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seeking to declare that the suit property belongs to the appellant and sought for permanent injunction as against the respondents/defendants and also to restrain them from maintaining the disputed wall put up by the appellant. Both the suits came to be decreed in favour of the appellant. As against the above said decrees made in the respective suit, the defendants therein filed appeals in A.S.Nos.91 & 93 of 2011 and the said appeals were allowed, by setting aside the respective orders passed by the trial court, on the ground that, the suit properties were not properly measured by the Advocate Commissioner and the matters were remanded to the Trial Court for appointment of Advocate Commissioner and for measuring and identifying the boundaries and also for receiving additional evidences. Aggrieved by the said order, the present appeal has been preferred by the plaintiff.

4. The main grievance canvassed by the learned counsel for the appellant is that though Section 107 of the Code of Civil Procedure provides power to the lower appellate court to receive additional documents, yet, without appreciating the same, the lower appellate court has passed the said order, which is grossly irregular and unsustainable and therefore, the same needs to be interfered with.



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5. On the above contention, this Court heard the learned counsel appearing for the respondents, who fairly submits that the lower appellate court has powers to entertain reception of additional evidence and has power to appoint Advocate Commissioner. However, he submits that the lower appellate court having remanded the matter to the trial court, no prejudice would be caused to the appellant herein to contest the case before the trial court itself.

6. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.

7. Section 107 of the Code of Civil Procedure pertains to the power of the appellate court, which are as under :-

"107. Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;



(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

8. Remand of cases by the lower appellate court on appeal is provided for under Order 41 Rule 23 and 23-A of the Code of Civil Procedure and the same is quoted hereunder :-

"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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."



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9. From the above provisions of law, more particularly Section 107 CPC, the appellate court is clothed with power to take additional evidence or require such evidence to be taken, literally meaning thereby that the lower appellate court can record evidence. Therefore, only in cases, which are covered under the provisions of Order 41 Rule 23 of the Code of Civil Procedure, where a decree of the trial court, passed on a preliminary point, is reversed in appeal, the lower appellate court, if it thinks fit, may remand the case for adjudication of issue or issues that are to be tried. Under Rule 23-A, where the decree is passed otherwise than on a preliminary point, and where retrial is considered necessary, only in such cases, remand of the matter needs to be made.

10. In the case on hand, the decree passed by the trial court is not on a preliminary point and no further issues have been framed by the appellate court, which requires adjudication by the trial court. Only to the limited extent of receiving certain documents and for appointing Advocate Commissioner for the purpose of measuring and identifying the boundaries of the subject property, the order of remand has been passed, which is grossly erroneous, as Section 107 of the Code of Civil Procedure clothes the lower appellate court with powers to



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receive additional evidence. Therefore, the order under challenge is wholly unsustainable and, therefore, deserves to be interfered with.

11. For the reasons aforesaid, these Civil Miscellaneous Appeals stand allowed, by setting aside the Judgment and decree dated 29.02.2012 made in A.S.Nos.91 & 93 of 2011 and the Principal Sub Court, Erode is directed to pass appropriate orders on the application to be filed either by the appellant/plaintiff or by the respondents/defendants and if any additional evidence is produced by the parties, the Lower Appellate Court shall mark the same in terms of Section 107 of C.P.C and Order 41 Rule 23 and 23A of C.P.C., within a period of four weeks from the date of receipt of a copy of this order. Thereafter, the Lower Appellate Court shall conclude the entire appeal proceedings within a period of six months thereafter, after providing opportunity to the appellant as well as the respondents. No costs.

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Index : Yes/No

Speaking order : Yes/No

NCC : Yes/No

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M.DHANDAPANI, J.

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To:

1. The Principal Sub Court, Erode
2. The II Additional District Munsif Court, Erode.
3. The Section Officer, V.R. Section, High Court, Madras.

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