



C.M.A.(MD)No.206 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 11.12.2023

PRONOUNCED ON : 07.02 .2024

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.A.(MD)No.206 of 2011

and

M.P.(MD)No.1 of 2011

1.Thankaraj

2.Mony Varghese

... Plaintiffs 1 and 3 / Respondents 1 and 3
in A.S.No.4 of 2004 / Respondents 1 and
3 in A.S.No.57 of 2004 / Respondents 2
and 4 in Cross – Appeal in A.S.No.4 of
2004 / Appellants

Vs.

1.Kuzhithurai Municipality,
Represented by its Commissioner,
Municipal Office,
Vettuvenni,
Nallor Village,
Vilavancode Taluk,
Kanyakumari District.



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2.The State of Tamil Nadu,
Represented by District Collector,
Kanyakumari at Nagercoil.

3.The Tahsildar,
Kuzhithurai,
Vilavancode Taluk,
Kanyakumari District.

4.Thankaraj (Died)

5.P.Yesupalaki

6.M.Parthose

7.Devasahaya Paul Raj

8.M.Johnson

9.Francis ... Defendants 2 to 9 / Appellant and
Respondents 4 to 10 and Non-party in
A.S.No.4 of 1004 / Respondent No.1,
Appellants 1 and 2 and Respondents 5 to
10 in A.S.No.57 of 2004 / Respondents 1,
2, 4 and 5 and Cross-Appellants in Cross-
Appeal in A.S.No.4 of 2004/Respondents

10.Sanjayaraj ... 10th respondent

*(R10 is brought on record as LRS of deceased R4, vide
Court order dated 13.07.2017 made in M.P.(MD)No.1 of
2015 in C.M.A.(MD)No.206 of 2011)*

PRAYER: Civil Miscellaneous Appeal filed under Order 43, Rule 1 of
C.P.C., against the Judgment and decree dated 26.11.2010 made by the



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Court of the learned Subordinate Judge, (Kuzhithurai Camp) in A.S.No.4 of 2004 and Cross Appeal in A.S.Nos. 4 and 57 of 2004.

For Appellants : Mr.K.N.Thambi
For R-1 : Mr.Aathimoolapandian
For R-2 & R-3 : Mr.N.GA.Natraj
For R-5 to R-9 : Mr.A.Sivaji

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the Judgment and decree dated 26.11.2010 made by the Court of the learned Subordinate Judge, (Kuzhithurai Camp) in A.S.No.4 of 2004 and Cross Appeal in A.S.Nos. 4 and 57 of 2004.

2. For the sake of convenience, the parties are referred herein as per their rank before the Trial Court.

3. The brief facts of the case are as follows:

(i) The A.S.No.4 of 2004 has been preferred by the 1st defendant and



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A.S.No.57 of 2004 has been preferred by the 2nd and 3rd defendants and Cross Appeal has been preferred by the defendants 4 to 9 against the Judgment and Decree passed by the Principal District Munsif Court, Kuzhithurai in O.S.No.273 of 1991.

(ii) The plaint A schedule property is old Survey Number 1357 A of Nalloor Village. It comprises a total extent of 49 cents. The name of the property is Kottayathuvilai Purayidom and the same corresponds to the Resurvey numbers D1/56, D1/57, D1/58, D1/59 and D1/60. The plaint B schedule property is comprised in an area of 9 cents in the eastern side of old survey No.1357 A co-relating to resurvey No.D1/60 of Nalloor Village. The first plaintiff is entitled to the southern 18 ¼ cents by purchase under the sale deed No. 1493/1972 dated 15.05.1972 executed by Karunakaran and others. The second plaintiff is entitled to the next 8 ½ cents in the north vide sale deed No.2234 / 1121/ 1945 M.E and No.940/1964 and the third plaintiff is entitled to the southern 5 7/8 cents under sale deed Nos. 4399/1862 and 938/1964 respectively in the A schedule property. The balance area in the northern portion of old survey No.1357 A of Nalloor Village was purchased by one Ponnu. The plaintiffs have put up strong



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masonry compound walls along the eastern boundary of the plaint A schedule property after obtaining the permission and approval of the blue prints by the Kuzhithurai Municipality in the year 1972. The house of the plaintiffs situated within the plaint A schedule property was constructed before 20-30 years. The latrines, cattle sheds, bath room and other structures are also old and they are situated in the plaint B schedule property. The 1st defendant is the Kuzhithurai Municipality and the 1st defendant has accepted the title and possession of the plaintiffs over the plaint B schedule property by approving and giving permission to put up houses and other structures. On 13.03.1991, the 1st defendant sent a notice to the plaintiffs calling upon them to remove the encroachments from the plaint B schedule property. On enquiry, the plaintiffs came to know that as per the recent resurvey and settlement, a new sub division in resurvey No.D1/60 has been carved as public pathway within plaint A schedule property. The State of Tamil Nadu is not entitled to carve a poramboke sub division D1/60 within plaint A schedule property. Such a survey and settlement is against the documents of title, possession and lay of the property.



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(iii) In such circumstances, the plaintiffs are entitled to get the title and possession declared over the plaint B schedule property which is a part of plaint A schedule property. The plaintiffs are also entitled to get an injunction restraining the defendants from causing the removal of the structure in the plaint B schedule property and from disturbing the plaintiffs possession over the same. Hence, the plaintiffs issued a legal notice under Section 80 CPC. On expiry of the statutory period plaintiffs reserved their right to implead the State of Tamil Nadu as an additional defendant in the Suit. Hence, this Suit came to be filed seeking to declare the plaintiffs title and possession over the B schedule property and restraining defendants from causing the removal of the structures put up by the plaintiffs in plaint B schedule property.

4. The defence of the 1st defendant:

(i) The contentions put forth by the plaintiffs are not fully correct. The actual area of old survey No.1357 A was less than the settlement area. The area comprised in T.S.No.D1/60 is a Municipal road and it does not form a part of old survey No.1367 A. There was an old pathway poramboke even in old settlement which has become as Municipal road in



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the course of time and the same has been resurveyed as T.S.No.D1/60. The plaintiffs have deliberately given wrong descriptions for T.S.No.D1/60, with a view to protect the encroachments made by them. The 1st defendant is not aware about the exact source of title of plaintiffs and they are entitled to strictly prove the same. It is true that at various point of time, some of the plaintiffs applied for permission and they were granted permission as per law. The permissions were granted to put up constructions within their patta land only and not in poramboke, which is a Municipal road. The plaintiffs did not put up the constructions as per the permission given by this defendant. The age of the constructions pleaded in the Plaint is incorrect. The defendant had never accepted the title and possession of the plaintiffs in plaint B schedule property at any point of time. As and when the defendant was getting knowledge about encroachments, the 1st defendant issued notices as per law, seeking to remove the encroachments in the Municipal road.

(ii) The 1st defendant is competent to remove the encroachments made into its properties, public streets etc., as per law. The 1st defendant has also taken steps with Revenue authorities to exactly determine the encroachments. The 1st defendant has taken legal actions against the



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plaintiff only for the welfare of the public, since the public pathway was in existence from time immemorial and the same was rightly surveyed and classified in the resurvey and settlement operations as well. They did not carve out any portion of plaintiff's patta land and resurvey was done only as per title, possession and enjoyment. Hence, the plaintiffs are not entitled to any claim in this Suit and they cannot maintain any claim against the 1st defendant in respect of the Municipal road comprised in T.S.No.D1/60.

5. The defence of the 2nd and 3rd defendants

(i) The suit is barred by limitation and hence, the same is not maintainable. The total extent of old survey No.1357/A1, A2, A3 and A4 is 49 cents. The copy of land register is enclosed for reference with respect to resurvey Nos.D1/56, D1/57, D1/58 and D1/59 and the same corresponds to the old survey Nos.1357/A1, 1357/A2, 1357/A3 and 1357/A4 and resurvey No.D1/60 corresponds to old survey Nos. 1357/B1 and 1356/B and not for old survey No.1357A. Old survey No.1357 A is not correlated to resurvey No.D1/60 and the same has been classified as pathway poramboke. The resurvey No.D1/60 is not a portion of the patta land of the plaintiffs. The old survey number of the patta land of the plaintiffs is 1357 A. But the old survey numbers of poramboke land which comes within the field in



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resurvey No.D1/60 are 1357/B1 and 1356/B. The plaint B schedule property is not the eastern portion of plaint A schedule property. No portion of the patta land of the plaintiffs have been included in the poramboke land in resurvey No.D1/60 by the resurvey party. The plaint B schedule property is the pathway poramboke land in resurvey No.D1/60 of Nalloor Village. The plaintiffs have encroached the poramboke land in resurvey No.D1/60. The encroachment in the pathway poramboke land is highly objectionable and is liable to be evicted.

(ii) Hence, the land encroachment cases have been booked against the encroachments in B.Memo Nos. 4514/1400, 4515/1400 and 4516/1400. The resurvey party has surveyed the suit properties correctly on the basis of the old survey plan, the connected revenue records, possession and enjoyment of the lands on ground and prepared the records accordingly. Following which, the notification under Section 13 of the Survey and Boundaries Act (Act VIII of 1923) was published to the effect that the boundaries have been correctly determined and recorded. If there was any objection on the resurvey made by the resurvey party the plaintiffs ought to have filed the suit to modify the resurvey boundaries within 3 years from the date of notification under Section 13 and 14 of the Act VIII of 1923.



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But the plaintiffs have not made any objection at that point of time. Now the resurvey records have attained finality. Hence, the suit is barred by limitation and the same is not liable to be modified or set aside. The State of Tamil Nadu has every right over the plaint B schedule property as it is a poramboke land. The Collector and Tahsildar are the competent authorities to lease out the trees in poramboke land and to evict the encroachment. The plaintiffs are not entitled to get any injunction restraining the additional defendants 2 and 3 from taking steps to lease out the trees on the plaint B schedule property or to evict the encroachment from the plaint B schedule property, since the plaint B schedule property is a poramboke land and the additional defendants 2 and 3 are the competent authorities to deal with poramboke land. The plaintiffs are not entitled for an injunction against the State and the suit is not maintainable.

6. The defence of the defendants 4 to 9:

(i) The suit as laid is not maintainable in law or in facts. The plaintiffs are not entitled to get any relief in respect of the suit properties. The defendants are not aware about the title claimed by the plaintiffs in respect of plaint A schedule property. The plaintiffs are put to strict proof of their title in respect of plaint A schedule property. Resurvey No.D1/60 is



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not a patta land. But it is a revenue poramboke land. The old survey Number of D1/60 corresponds to resurvey Nos.D1/64, 65, 66, 72 etc., of Nalloor Village. These defendants are interested in resurvey Nos.D1/64, 65, 66, 72 etc., of Nalloor Village and they are getting access to their patta lands and also from Marthandam to Melpuram road only through plaint B schedule poramboke. The plaint B schedule poramboke is in existence for the past several years and they have filed this suit only with an object of knocking off plaint B schedule property which is a poramboke land. The plaintiffs made several attempts to close plaint B schedule property and they are making repeated attempts to close the entire plaint B schedule lane. If they succeed in closing that lane the defendants will be put to very great hardship and injury. These defendants are not aware about the blue-prints filed by the plaintiffs and the approval if any given by the Municipality. Even if there is any such approval the same is not binding on the general public who are using plaint B schedule property as a lane as of right. The general public of the locality who are using plaint B schedule property is not impleaded in this suit.

(ii) Hence, the suit is not maintainable on that single ground itself.

The allegation that latrine, cattle shed etc., of the plaintiffs are situated



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within plaint B schedule property is false and hence, denied. The contentions of the plaintiffs are barred by estoppel. Admitting plaint B schedule property is a public lane, the plaintiffs have taken several documents. The plaintiffs have also filed some of those documents in this suit. The resurvey settlement is valid and competent. The plaintiffs are bound by the resurvey settlement and the plaintiffs have not raised any objection against the resurvey settlement in respect of plaint B schedule property. So, the claim of the plaintiffs are barred by res-judicata by reasons of the decisions in the resurvey and settlement. The claim of the plaintiffs for setting aside the resurvey settlement is barred by limitation. Hence, the plaintiffs are not entitled to get any relief.

7. The plaintiffs have filed the replication and the same is extracted as follows:

(i) The actual area of old survey number 1357 is also 49 cents as described in the settlement records. The land comprised in T.S.D1/60 is not a Municipal road. There was no pathway within old survey No.1357 A at any time. So there is no scope for the resurvey and settlement to carve out any portion of S.No.1357A as poramboke land. T.S.D1/60 by resurvey and settlement is quite against the documents of title and possession of the



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plaintiffs and their predecessors in interest. Plaintiffs have not given wrong descriptions regarding T.S.D1/60 in the plaint B schedule property. The plaintiffs applied for permission to reconstruct compound walls on the eastern side by producing plans drawn to scale on 15.06.1972. Objection notice was issued by Commissioner on 23.06.1972. At that time when permission was sought for, the first defendant referred the matter to the Village Officer, Nalloor who after survey and inspection issued certificate on 24.06.1972 that, the first plaintiff was in possession of the patta land and there was no objection in granting permission. The first defendant then gave permission to the first plaintiff to construct the compound wall on 03.07.1972 and accordingly the compound wall was constructed in 1972. Again the same was approved in 1981, at the time of construction of house. The other plaintiffs also applied for permission to the first defendant and constructed compound walls. The plaintiffs have not made any encroachments. There was no public pathway within old survey number 1357A at any time. The resurvey and settlement has not been done correctly as per order in I.A.No.747 of 2003 dated 19.12.2003 as per title and long possession of the plaintiffs and their predecessors in interest.

(ii) The plaintiffs are entitled to get all the reliefs as prayed for in the



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suit. The land encroachment cases are booked on the basis of the wrong resurvey and settlement and hence, the B memo cases have to be cancelled.

The resurvey party has not surveyed on the basis of the old survey plan, connected records, possession and enjoyment of the lands on the grounds etc. Boundaries have not been correctly demarcated by the resurvey party.

The first plaintiff has applied to the Assistant Settlement Officer, who in his order dated 03.01.1974 has directed the Tahsildar, Villavancode to transfer T.S.D1/59 with an area of 18 ¼ cents in favour of the first plaintiff.

First plaintiff only claims this area of 18 ¼ cents. The compound wall of the first plaintiff comes within the said 18 ¼ cents. First plaintiff has still more area outside the compound wall to which he is entitled as per law.

The first plaintiff has every right to reconstruct the eastern wall without leaving any area on the eastern side. Being a suit for declaration of plaintiffs title and possession of the plaintiff over the suit A schedule property and B schedule property, the suit is not barred by the law of limitation. The suit is maintainable even after 3 years from the date of the finalisation of the resurvey. The State of Tamil Nadu has no right over the plaint B schedule property and the same is not poramboke land.

8. On the basis of the aforesaid pleadings, the learned Trial Court



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framed four issues and the one witness, first plaintiff / Thankaraj was examined as P.W.1 and Ex.A-1 to Ex.A-54 were marked on the side of the plaintiffs. Four witness, D.W.1 to D.W.4 were examined and Ex.B1 to Ex.B35 were marked on the side of the defendants. The Commissioner was appointed by the Trial Court and his report and plan were marked as Ex.C1 to Ex.C-3 and one P.S.Ruskin Raj was examined as Court witness C.W-1.

9. On the basis of the evidence adduced by both the parties, documents available on record and the arguments made by the respective parties, the learned Trial Court came to conclusion that old survey No. 1357A formerly belonged to a Nair tarwad called Kottayathu vilai Puthen veedu. The first plaintiff has purchased the same under Ex.A-2 / A-3 dated 15.05.1972. The first plaintiff purchased not only the land but also other structures such as cattle shed, bathroom cum latrine and external kitchen which were in existence in the eastern most portion of the property. The 18.250 cents correlates to R.S.No.D1/59 and D1/60 part. The 2nd plaintiff has purchased 3 cents out of 49 cents in survey No.1357 A from Nadan Kutty Nadan and Ponnu Muthu by way of sale deed as Doc.No.8857/1119 M.E. under Ex.A-53/ A-54. Later, the 2nd plaintiff has purchased 5.500 cents in respect of his property which is marked as Ex.A-4/A-5.



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Accordingly, he became entitled to 8.500 cents. This 8.500 cents correlates to R.S.No.D1/58 and D1/60 part. The 3rd plaintiff is the son of the Nadan Kutty who retained half a cent purchased under Ex.A-53, when he executed Ex.A-4/A-5 sale deed. Again the Nadankutty purchased 5 3/8 cents as per Ex.A-8/A-9 sale deed. The total area of 5 7/8 cents was inherited by the 3rd plaintiff. Each plaintiffs have their buildings with compound wall within the suit property. Ex.A-12, A-13 and A-14 are the tax receipts in the name of plaintiffs 1, 2 and 3 respectively. Ex.A-44 is an old Land Tax receipt in the name of the 1st plaintiff's vendor Karunakaran Nair. Ex.A-43 is the patta in the name of the said Karunakaran Nair. Thus, Ex.A-2/A-3, A-4/A-5, A-53/A-54, A-8/A-9, A-12, A-13, A-14, A-44, A-48 proves the plaintiffs title and possession over the suit property. Ex.A15 is the site plan approved by the 1st defendant Municipality on 03.07.1972. The license issued by the Municipality under Ex.A-17 shows that the Municipality had granted licence for construction of compound wall on the site of old eastern and southern sides of 1st plaintiff's house. Ex.A-16 is the miscellaneous receipt for collection of fee for license for compound wall construction. Thus, Ex.A-15 to A-17 show that 1st defendant Municipality approved the site plan for construction of the compound wall recognising 1st plaintiff's title and possession over the plaint schedule property. The



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Municipality has again granted Ex.A-27 site plan for reconstruction of a building within a plot No.4. Ex.A-28 is the licence for the construction of the building. Ex.A-29 is the registered security bond executed by the 1st plaintiff in favour of the State for securing housing loan from the Government page 8 of which contains the area and boundaries of the property given as security. Ex.A-30 is the legal opinion given by then Government pleader for securing the loan. In the legal opinion, it is categorically stated that the 1st plaintiff has ownership over 18.250 cents land.

10. On the side of the defendants, it has been both in evidence and written statements that S.No.1357A is about 49 cents. Ex.B-33 plan produced by the defendants stating that S.No.1357 A is an extent of 49 cents and old S.No.1357 B is an extent of 7 cents. Ex.B-33 is the very old plan which is declared in the Odukoor award which has been produced by the defendants to prove the plaintiff's title. The evidence of the D.W-1 to D.W-3 admitted that the S.No.1357 A is an extent about 49 cents. The Commissioner has submitted Ex.C-1 report and C-2 and C-3 plans.

11. On carefully considering all the materials available on record and



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the evidence deposited by the respective parties and the arguments by the respective parties, the learned Trial Court proceeded to conclude that the plaintiffs are entitled to get a declaration to their title and possession over the schedule properties. It was further observed by the learned Trial Court that the survey and boundaries Act is never a bar for that relief and the land which was converted or allotted to the path, part of D1/60 by the Government ought to have initiated acquisition proceedings. However, no such proceedings was adopted by the defendants. It was also held by the learned Trial Court that the defendants failed to establish how the B schedule property was classified as pathway, without adopting the procedure established by law. Further, it was observed that the defendants failed to adduce the relevant documents to show by which procedure the Mutation of property in the revenue records was created and concluded and that such a creation of revenue records will neither create or extinguish the title nor has it any presumptive value of title. The learned Trial Court further concluded that the area of 6.065 cents of B schedule property of patta land has been wrongly classified into poramboke land and the entries were wrongly made in the revenue records.



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12. It is pertinent to mention here that the learned Trial Court also observed that the defendants have substantiated the documentary evidence in favour of the plaintiffs by producing the Ex.B-33 which is vital document for the plaintiffs relief sought in the plaint which is decided during the Odukoor settlement award. Finally, the learned Trial Court concluded that the defendants 1 to 3 have wrongly classified the 6.065 cents of plaint B schedule property as a public path way. However, the same includes latrine, bath room, cattle shed of the plaintiffs and the same is also the part and parcel of the A schedule property. It was also declared as 6.065 cents in survey No.1357 A of B schedule property of Nalloor village is wrongly classified as pathway or poramboke is hereby cancelled. Thereafter, the decree of permanent injunction was passed in favour of the plaintiffs by restraining the defendants from interfering with the possession and enjoyment of the plaint A schedule and B schedule property.

13. The learned First Appellate Court by considering the fact that the Commissioner appointed by the Trial Court had submitted two plans and they were marked as Ex.C-2 and C-3. It was observed by the learned First Appellate Court that the Commissioner had measured the property as per old survey, new survey and as per lay and compound wall. The old survey



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measurements were mentioned in green line. New survey measurements were noted in red line. The learned First Appellate Court proceeded to observe that more than half of the area of old survey No.1357 B pertaining to Ex.A-1 old survey plan do not include the B schedule path way in the R.S.D1/60. The learned First Appellate Court further observed that the B schedule path way as per resurvey lies to some extent on the south lane in the old survey No.1357 B. The path way covered under old survey No. 1357 B is added in old survey No.1299 and 1298. But the commissioner did not measure the property covered under old survey No.1299 and 1298. It was observed by the First Appellate Court that it is very important to identify the area of plaint B schedule property comprised in old survey No. 1299 and 1298. Though the Commissioner had identified that the area of 49 cents is available in 1357A, considering the submissions of the defendants that the area of 1357 A even as per admitted documents of Ex.A-1 and Ex.B-33 and the Odukoor plan for survey No.1357 A and 1357B in Odukoor case No.565 is only 42 cents. By considering the objections made by the defendants 4 to 9 that the Commissioner report, along with a plan prepared by one retired Taluk Surveyor and with calculation memo produced along with arguments notes, the learned First Appellate Court proceeded to conclude that the report and plan of the



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Commissioner did not contain the full particulars regarding measurements sufficient enough to dispose the case. There must be some additional particulars are left unanswered.

14. So, it decided that the title of the plaint B schedule property, the measurements of the old survey Nos.1356, 1299, 1298, 1297, 1295, 1358, 1354 are needed. It was further observed by the First Appellate Court that the old survey numbers measured for plaint B schedule property could be easily located and the same were co-related under old survey Nos.1299, 1298, 1297 and 1295. Since the Commissioner did not measure the said survey numbers, it is observed by the learned First Appellate Court that the defendants filed resurvey field map, and exhibit as Ex.B35 which covered the measurements in ward No.D Block No.1 sub division Nos.43, 54 to 75 and 92. The learned First Appellate Court observed that the consolidated old survey map for the disputed area is also needed and concluded that only on the field measurement of the old survey numbers mentioned supra and the co-related new survey numbers, the disputed area would be culled out and the plaint B schedule path way could be identified. It was further observed by the First Appellate Court that, the Lower Court failed to consider the objections filed by the defendants to Commissioner report.



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The First Appellate Court held that since the said objections were considered the objections filed by the parties whether the re issue of warrant or call for other particulars is necessary. However, the commission petition was closed before receiving the objection. So, on that basis, the First Appellate Court found it necessary to reissue the commission warrant and call for additional reports.

15. It was further observed that the Trial Court failed to consider the path way comprised in 1357 B added in the field of old survey No.1299 and 1298. The exclusion of the old path way in new survey path way on the northern side was also not considered by the Trial Court. Hence, the learned First Appellate Court, on the basis of the Commissioner's report, plan and evidence deposed by the Commissioner had set aside the judgment and decree passed by the learned Trial Court. Thereafter, directed the learned Trial Court to reissue the Commission warrant to the very same Commissioner or appoint a new Commissioner and further directed the Commissioner to inspect the property with the help of Taluk Surveyor and measure the property comprised in old survey numbers 1357 A, 1357 B, 1356, 1299, 1298, 1297, 1295, 1358 and 1354 as per old survey measurement and resurvey measurement in respect of R.S.No.D1/43,



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D1/54 to D1/75 and D1/92. Further, the Commissioner was also directed by the First Appellate Court to measure the property of the plaintiffs and R.S. D1/56 (Plot No.1) as per lay and compound wall and file his additional report with plan along with plan duly prepared by a qualified surveyor and super imposed plan.

16. That apart, the Lower Court was also directed to dispose the case afresh according to law after giving opportunity to the both parties to give further evidence if any on any aspect. The same order was passed by the First Appellate Court in A.S.No. 4 of 2004, A.S.No.57 of 2004 and Cross Appeal in A.S.No.4 of 2004 by setting aside the judgment and decree passed by the learned Trial Court in O.S.No.273 of 1991 on the file of the Principal District Munsif, Kuzhithurai. Challenging the judgment and decree passed by the First Appellate Court, this Civil Miscellaneous Appeal came to be filed.

17. Mr.K.N.Thambi, the learned Counsel for the appellant vehemently submitted that the defendants 1 to 3 have not filed their objections to the Commissioner's report and plans which were marked as Exhibits C1 to C3 and the Trial Court never received any objections from



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the respondents 1 to 3 at any point of time and the First Appellate Court has gone wrong in accepting their submissions against Exhibits C1 to C3.

He further contended that the Cross Appeal by the respondents 4 to 9 are in the appeal filed by the 1st respondent, and the same is not directed against the appellants, the first appellate Court has gone wrong in granting relief to them as against the appellants. He further submitted that the case in hand did not fall within the scope of the provision for remand of case. Hence, the First Appellate Court has erred in remanding the suit of the year 1991 to the Trial Court for fresh disposal. He also submitted that since all the relevant materials necessary for the decision of the case are already on record in the case, the lower appellate Court has gone wrong in setting aside the judgment and decree of the Trial Court and remanding the matter to the Trial Court without deciding the same by itself. Since all the necessary particulars necessary for the decision of the case are already available along with the Advocate Commissioner plan and report marked as Ex.C-1 to C-3 in the suit, the First Appellate Court has erred in holding that re-issue of the warrant of Commission or appointment of a fresh commission is necessary.



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18. He further insisted that the First Appellate Court failed to fully consider the admission, on the side of the defendants that, old survey No. 1357 A is comprised in a total area of 49 cents. That apart, directing the Advocate Commissioner to measure the umpteen number of properties which are not the subject matter of the suit is without jurisdiction and the same is not sustainable. The First Appellate Court ought not have relied upon the plan allegedly prepared by a retired Taluk Surveyor and the connected calculation memo and the same is unauthorized, without jurisdiction, illegal, having no probative value and liable to be rejected, since the same was neither marked thorough the defendants of the Trial Court in the course of Trial nor marked as the Court document. He vehemently submitted that the First Appellate Court without considering the dismissal of I.A.Nos.323 of 2006 and 324 of 2006 filed by the respondents 2 and 3 for setting aside the Commissioner's report and for appointment of a Commissioner for local inspection to measure the suit property as per the re-survey, respectively has proceeded to remand the case back to the Trial Court and the same is perse illegal.

19. Finally, he categorically submitted that reasons for remand has not been properly given by the First Appellate Court and the portions for



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measuring the properties related to the plaint schedule properties is also not stated. Neither the plaintiffs nor the defendants had any case as to measure the properties in old survey Nos.1356, 1299, 1298, 1297, 1295, 1358, 1354 and the First Appellate Court had proceeded to remand the case back to the Trial Court beyond the scope of the pleadings of the respective parties. On that basis, he pressed for allowing this Civil Miscellaneous Appeal.

20. Per contra, the learned Government Advocate appearing for the respondents vehemently submitted that only one Civil Miscellaneous Appeal has been filed as against the two appeals and as far as Court fee is concerned, it was not correctly paid in this C.M.A. He further submitted that the First Appellate Court after elaborately considering the facts and circumstances and evidence on record had rightly set aside the judgment and decree and the learned Trial Court had remanded the same back for appointment of Advocate Commissioner and for producing necessary particulars and the said exercise is fully correct. Hence, the same need not be interfered and he pressed for dismissing this Civil Miscellaneous Appeal.



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21. Analysis:

The learned Trial Court based on the averments of plaintiffs and the written submissions of the defendants framed the following four issues.

(i) Whether the plaintiffs are entitled to the decree for declaration for their title and for possession over the plaint B schedule property?

(ii) Whether the plaintiffs are entitled to the decree for cancelling the entry relating to the plaint B schedule property as Poramboke in revenue records?

(iii) Whether the plaintiffs are entitled to the decree for injunction against the defendants from causing removal of the structures (i.e.) Latrine, Bath room, Kitchen, Cattle shed in the suit?

(iv) To what relief and costs?

22. Before arriving at a conclusion the learned Trial Court carefully considered the documents available on record, the evidence of the



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respective parties, the arguments and the argument notes filed by the plaintiffs and the defendants. The learned Trial Court proceeded upon the issues 1 to 3 by carefully analysing the sale deed bearing document No. 1493/1972 which is marked as Ex.A-2 Tamil copy Ex.A-3 which was purchased by the first plaintiff. The total extent of old survey No.1357 A measures 49 cents. It is recorded by the learned Trial Court that old survey No.1357 A correlated to R.S.No.D1/56, D1/57, D1/59 and D/60 part. It is observed that the entire D1/60 measuring 3.95 ares (9760 cents) was classified in their settlement records as pathway. On the basis of the Ex.A-54, the learned Trial Court has recorded that the 2nd plaintiff has purchased 3 cents out of 49 cents in survey No.1357 A from Nadan Kutty Nadan and Ponnu Muthu vide sale deed Doc. No.8857/1119 M.E and he also purchased 5 ½ cents vide sale deed Doc. No.940/1964 which was marked as Ex.A-5. It was clearly recorded by the learned Trial Court that on the basis of Ex.A-4/A-5 sale deeds, the 3rd plaintiff, who is the son of the Nadan Kutty who retained half a cent and remaining 5 ½ cents was executed through Ex.A-4/A-5 sale deed. The very same Nadankutty purchased 5 3/8 cents vide Ex.A-8/A-9 sale deeds and the ½ cent retained by him was added along with the area purchased vide Ex.A-8/A-9. The total area is 5 7/8 cents and the same was inherited by the son of Nadan



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Kutty, that is, the father of the 2nd plaintiff.

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23. Thus, the anomaly is with respect to the inclusion of part of plaintiffs patta land in R.S.No.D1/60 as pathway and inclusion of part of pathway in old S.No.1357 B along with the eastern property as patta land through settlement proceedings. The cause of action for the suit arose, on the issuance of notice dated 13.03.1991 by Kuzhithurai Municipality on the basis of wrong resurvey, for removal of the old compound wall and other structures on the eastern part of old S.No.1357 A. So, the plaintiffs filed this suit for declaration of their title and for possession of plaint B schedule property which is part and parcel of the patta land of the plaintiff lying within their compound wall and forming a part of R.S.No.D1/60. The main contention of the 1st defendant Municipality is that R.S.No.D1/60 is a Municipal Road and it does not form a part of Old S.No.1357 A. The learned Trial Court has observed that the Municipality had pleaded that they have given permission to the plaintiffs for construction of compound wall and build within their patta land and not on the poramboke land. The 1st defendant had granted permission for construction of a compound wall in S.No.1357/A-4, Nalloor Village, which was marked as Ex.A-17.



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24. The evidence of D.W-1, the 1st defendant's subordinate who is a clerk namely Pargavan before the learned Trial Court wherein he deposed in his evidence that the extent of S.No.1357 A is about 49 cents to the west of suit property a road is running towards Melpuram. There was no compound wall in the year of 1972. He further stated that the extent of the S.No.1357 B is 7 cents. However, he denied the extent for the S.No.D1/60 and also old S.No.1298. He also deposed that the compound wall was constructed as per the approved plan which was marked as Ex.A-15. He admitted that the said compound wall was constructed before 60 years. That apart, the 2nd defendant admitted in the written statement that the extent for the S.No.1357 A is 49 cents and the same is also recorded by the learned Trial Court.

25. Further on the side of the defendants Ex.B-1 to B-35 produced and marked. For which, Ex.B-33 plan and other documents were with respect to the entries after resurvey settlement proceedings. Ex.B-33 is the Odukoor plan for old Survey No.1357 A and B in the Odukoor case No. 565. The same would reveal that old Survey No.1357 A 1 has an extent about 15.375 cents, 1357/3 has an extent about 9.500 cents and 1357/4 has an extent about 18.750 cents totally 49 cents and the Survey No.1357 B 1



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has an extent about 7 cents.

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26. Only after marking the documents Ex.A-1 to Ex.A-54 on the side of the plaintiffs and Ex.B-1 to Ex.B-35 on the side of the defendants and the court documents Ex.C-1 to C-3, the learned Trial Court came to the conclusion in favour of the plaintiffs with the following observations:

(i) The old S.No.1357 A formerly belonged to a Nair tarwad called Kottayathu Vilai Puthan Veedu. From the allottee of plot No.4 as per the Odukoor award which was marked as Ex.B-33 in the Odukoor Plan in case No.565. The 1st plaintiff purchased the same under Ex.A-2/A-3 dated 15.05.1972. Even in the said plot No.4 the old tarwad houses of the Nair family were situated which was purchased in the year 1972. So, the 1st plaintiff purchased not only the land but also other structures such as cattle shed. Bath room cum latrine and external kitchen which were in existence in the eastern most portion of the property and the said 18.250 cents correlates to R.S.No.D1/59 and D1/60 part.

(ii) The 2nd plaintiff purchased 3 cents out of 49 cents in old S.No. 1357 A from Nadan Kutty Nadan and Ponnu Muthu by way of sale deed as



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Doc.No.8857/1119 M.E. which was marked as Ex.A-53/54. Later, the 2nd plaintiff purchased 5.500 cents from the Nadan Kutty and Ponnu Muthu which was marked as Ex.A-4/A-5. Accordingly, he became entitled to 8.500 cents and the same is correlated to R.S.No.D1/58 and D1/60 part.

(iii) The 3rd plaintiff is the son of the above mentioned Nadan Kutty who retained half a cent under Ex.A-53. Again the Nadankutty purchased 5 3/8 cents as per Ex.A-8/A-9 sale deeds. Thereby, the total area is an extent of 5 7/8 cents and the same was inherited by the 3rd plaintiff and each plaintiffs had their buildings with compound wall within the suit property.

(iv) Ex.A-12, A-13, and A-14 are the tax receipts in the name of plaintiffs 1, 2 and 3 respectively. Ex.A-44 is an old land tax receipt in the name of the 1st plaintiff's vendor Karunakaran Nair. Ex.A-43 is the patta in the name of the said Karunakaran Nair. Thus Ex.A-2/A-3, A-4/A-5, A-53/A-54, A-8/A-9, A-12, A-13, A-14, A-44 and A-48 proves the plaintiffs title and possession over the plaint schedule properties.

(v) Ex.A-15 is the site plan approved by the 1st defendant Municipality on 03.07.1972. The licence issued by the Municipality under



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Ex.A-17 shows that the Municipality has granted licence for construction of compound wall on the site of old earthen bund on the eastern and southern sides of the 1st plaintiff's house. Ex.A-16 is the miscellaneous receipt for collection of fee for licence for compound wall construction. Thus, Ex.A-15 to A-17 show that 1st defendant Municipality approved the site plan for construction of the compound wall recognising 1st plaintiff's title and possession over the plot No.4 as per the Odukoor award. Ex.A-27 is the site plan for reconstruction of a building within plot No.4 as issued by the Municipality. Ex.A-28 is the licence for the construction of the building. Ex.A-29 is the registered security bond executed by the 1st plaintiff in favour of the State for securing housing loan from the Government, page 8, of the same contains the area and boundaries of the property given as security. Ex.A-30 is the legal opinion given by the then Government Pleader for securing the loan. In the legal opinion, it is categorically stated that the 1st plaintiff has ownership over 18.250 cents in old S.No.1357 A.

(vi) The learned Trial Court categorically observed that the defendants in their evidence and written statements had admitted that S.No.1357 A is about 49 cents. Ex.B-33 plan produced by the defendants



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stating that S.No.1357 A extent about 49 cents and S.No.1357 B is 7 cents.

Ex.b-33 is the very old plan which is declared in the Odukoor award which was produced by the defendants to prove the plaintiffs title. The evidence of D.W-1 to D.W-3 has admitted as to the facts that the S.No.1357 A has an of extent about 49 cents.

(vii) Only after perusing the evidence and all the other documents marked on the side of the plaintiffs as well as the defendants, the learned Trial court proceeded to consider the Commissioner's report and plan C-1 to C-3 and relying upon the Commissioner's plan and report only for the purpose of finding out the respective areas in the possession of plaintiffs 1 to 3 and concluded that an area of 4.660 cents from the 1st plaintiff's property is included in D1/60. Likewise an area of 844 sq. links of 2nd plaintiff's property is included in R.S.No.D1/60 and an area of 561 sq. links forming part of the 3rd plaintiff's property is included in R.S.No.D1/60. Thus, the total extent if 6.065 cents is wrongly included in R.S.No.D1/60. So, the plaintiffs are entitled to get a declaration to their title and possession over the said plaint schedule property as part and parcel of the plaint A schedule property in old S.No.1357 A of Nalloor Village. Thereby, cancelling the wrong entry records made by the



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defendants 1 to 3 in their land register records wherein the said property has been entered as path way or poramboke and restraining the defendants from causing the removal of structures (i.e) Latrine, Bath room, Kitchen, Cattle Shed etc., which is situated within the plaint A and B schedule properties.

27. In the Appeal, the First Appellate Court without considering the significance of Ex.B-33 that is the Odukoor Plan for old S.No.1357A and B and Odukoor case No.565 with respect to the plaintiffs' property and other documents marked as Ex.A-1 to A-18 which are all the title deeds of the plaintiffs and also the other documents produced by the respective parties proceeded to decide the case. Fully relying upon the Commissioner report, the argument notes, the contentions of the defendants 4 to 9, and Commissioner report along with a plan prepared by one retired Taluk Surveyor with calculation memo which was not marked through Trial Court, which was filed along with argument notes, the First Appellate Court proceeded to conclude that, the title of the plaintiffs could be decided only if the property comprised in old survey numbers 1357 A, 1357 B, 1356, 1299, 1298, 1297, 1295, 1358, 1354 are duly measured. The



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area of those survey numbers are not part and parcel of the plaint schedule property and not related to the plaint schedule property even as to the pleadings and evidence submitted by the plaintiffs and defendants respectively.

28. The learned First Appellate Court failed to appreciate that the common issues which had arisen for determination before the Trial Court was fully adjudicated upon on the basis of the oral and documentary evidence putforth by the respective parties and the same was not decided on the preliminary point alone. The First Appellate Court miserably failed in observing that proper determination of the suit property has not been brought on record and that the evidence on record were insufficient to arrive at a proper finding giving a fresh lease of life to the long pending Civil dispute. The decree and judgment in O.S.No.273 of 1991 is to be set aside and the suit be remanded back to the Trial Court for appointment of the same Commissioner or a new Commissioner for measuring the old Survey Nos. 1357/A1, 1357/A2, 1357/A3 and 1357/A4 which are not related to the plaint schedule property disposal de novo after affording an opportunity to all the parties. The First Appellate Court ought not to have remanded the suit for appointment of Commissioner and fresh trail



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requiring the parties to adduce further evidence without any relief sought to that effect. The pertinent question which has to be decided by this Court as to the legality of the order of the First Appellate Court and whether the said Court is justified in remanding the matter for trial denovo, thereby, remanding the same back to the Trial Court for appointment of the Commissioner or appointment of the new Commissioner to adduce further evidence? The relevant portion of law for determining the question in issue is contained in Rules 23, 23-A, 24, 27(1)(b) and 33 of Order XLI of the Code of Civil Procedure, 1908.

29. The scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and the same is inapplicable to the facts and circumstances of this Case, because the suit in question had not been disposed of on a preliminary point. That apart, the basis on which the secondary evidence relied upon by the First Appellate Court is also not clear. Hence, the scope of remand under order XLI Rule 23 of CPC is certainly not available to the First Appellate Court. In the instant case, the First Appellate Court fully depending upon the Commissioner's report and the fact that the learned Trial Court did not consider the objections made by the defendants to the Commissioner's report, without considering the



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merits of the findings recorded by the Trial Court has passed an order of remand. Though the legal position as clarified now by Order 41 Rule 23A which has been inserted in the Code by Act No.104 of 1976, empowers the Appellate Court to remand the suit to the Trial Court only when the suit is disposed of otherwise than on a preliminary point and in that case the decree could be reversed in an appeal and retrial could be considered necessary.

30. But in the instant case, no such exercise has been followed by the learned First Appellate Court and without examining the findings recorded by the Trial Court on each and every exhibits marked on the side of the plaintiffs and the defendants and the contentions to the Commissioner's report which was marked as Ex.C-1 to C-3, the learned First Appellate Court proceeded to set aside the Judgment and decree passed by the learned Trial Court.

31. The Hon'ble High Court of Bombay Bench at Aurangabad in Appeal from Order No.94 of 2015 with Civil Application No.14264 of 2015 has dealt with the same issue and the relevant portion is extracted as follows:



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“11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23-A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaintiff to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to clause (e) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - in law and on facts.



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Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision".

32. Further, this Court, in the case of Elumalai .Vs. Kanthamani Ammal reported in 2017 (1) CTC 307 has dealt with a case of remand and the relevant portion is extracted hereunder:

*"14. Before embarking on the correctness or otherwise of the approach of the First Appellate Court in remanding the matter it is necessary to remember that the Supreme Court in **P.Purushottam Reddy v. Pratap Steels Ltd.**, AIR 2002 SC 771, has declared that *"..An unwarranted order of remand gives the litigation an undeserved lease of life and therefore, must be avoided". An Order of Remand in essence contributes to what may be termed as a Recycle-bin Syndrome as it leaves the same case rotating within the system without an exit, and stagnates if not adds to the burden that the legal system shoulders. Reference may be had to the authority of the Supreme Court in **Lisamma Antony v. Karthiyayani**, 2015 (11) SCC 782. It is therefore necessary that an Appellate Court should resort to remanding of cases to the Court below only sparingly and in exceptional cases. In this context principles governing the question of remand may be broadly stated:**



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- *An Appellate Court must ascertain if the Suit is decided on a preliminary point. Here the Appellate Court should be cautious not to misconstrue a Preliminary Point with preliminary issue under Order 14, Rule 2, C.P.C. Ordinarily, a Suit is said to have been decided on a Preliminary Point if the Trial Court has either failed to consider all the issues that arise for consideration or has ignored to decide that which the pleadings in the Suit require to be decided. This includes cases where burden of proof is wrongly fixed or where the case of one of the parties is failed to be considered on a misconception arising out of it.*
- *Even where a Suit is decided on a Preliminary Point but where the evidence is still available to decide the material points in controversy in a Suit, an Appellate Court should normally take recourse to Order 41, Rule 24, C.P.C., and decide the case. Even if proper issues are not framed but if those, who litigate have understood what they are litigating and have adduced necessary evidence, an Appellate Court must attempt to finally adjudicate the case. An Order of Remand should be read as an exception to what is contemplated under Rule 24. The first attempt is to proceed under Order 41, Rule 24, and if it is found not possible then to explore if the case at hand falls within Rule 25, situations and only if neither is possible, should an Appellate Court contemplate on resorting to remand under Rule 23 or 23-A. For the scope of Rule 25 refer **Jaganathan v. Raju***



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Sihamani, 2012 (5) SCC 540: 2012 (4) MLJ 314.

- *Mere appearance of a disposal on a Preliminary Point should not automatically be construed as a sufficient ground to remand a case. It must be founded on circumstances such as for instance where evidence adequate to decide a case is found lacking, or where parties have been misled by the omission to frame appropriate issues resulting in their failure to provide necessary evidence, or where any of the parties are denied an opportunity to adduce evidence, or where an Appellate Court considers that the evidence on any of the issues germane for final adjudication of the case is insufficient.*
- *Where an Appellate Court encounters any exceptional situations arising out of the facts of the case that makes a final adjudication difficult to achieve is a situation when a case can be remanded. It may include any change of circumstances arising out of any subsequent events impacting the original cause of action; or discovery of a new fact requiring amendment of the pleadings within the scope of Order 6, Rule 17, other than those that may render a Suit bad for formal defect within the meaning of Order 23, Rule 1, C.P.C., or production of a new evidence subject to the limitations in Order 41, Rule 27, C.P.C., both of which may be of such nature that they are either inconsistent with any fact in issue or relevant fact already proved, or, which either by itself or in connection with other facts available on record make the existence or non-existence of any proved*



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fact in issue or relevant fact highly improbable and hence require proof. These are only illustrative and not exhaustive.

- *A remand should not be made to reconstruct a case, but only to prevent failure of justice. A litigant's recalcitrance and default cannot not be counted as a ground per se to remand.*
- *A remand is not required merely because of change of substantive law or advent of new law affecting the original cause of action, unless it also requires addition of parties or probe on facts.*

The bottom line is, can the case be finally decided on all material points in controversy without an Order of Remand? If it can be then there is no need for ordering remand of a case. In all cases, it is necessary for the Appellate Court to give reasons for the course it adopts.”

33. The Hon'ble Supreme Court in the case of **Siva kumar & Others. .Vs. Sharanabasappa and others** (reported in 2021) SCC 277 has dealt with a similar issue and the relevant portion is extracted as follows:

“26.2. Rule 23-A came to be inserted in Order 41 CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior



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to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the appellate court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23-A in Order 41 by the amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the appellate court shall have the power of remand, if a retrial is considered necessary.”

34. In view of the discussions in the various cases relied upon by this Court as extracted supra, I am of the considered view that the First Appellate Court ought to have examined whether the findings of the Trial Court was sustainable or not in law and facts. In the absence of proper findings by the Trial Court in the facts and circumstances of this case, the learned First Appellate Court being the Court of First Appeal, all the questions of fact and law which arose in the case were open before it for



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consideration and decision. Without elucidating the available materials on record, the order of remand directing the Trial Court to appoint the same Commissioner or a new Commissioner for measuring old S.No.1357 A of Nalloor Village came to be passed. Thus, the unwarranted order of remand has given the litigation, an undeserved lease of life and the learned First Appellate Court ought to have avoided the same. The learned First Appellate Court failed to consider that a remand should not be made to reconsider the case and fill up the lacunas of the lucid party.

35. The learned First Appellate Court failed to consider that the learned Trial Court had considered all the issues that had arisen for consideration on the basis of the pleadings putforth by the plaintiffs and the defendants respectively, on proper appreciation of the oral and documentary evidence and the arguments from the respective parties. Hence, it cannot set aside the learned Trial Court's judgment and decree until and unless the same was decided on a preliminary point alone. It was a well connected, well stated, well considered case of the Trial court. The learned First Appellate Court without appreciating the effective findings of the Trial court, solely relying upon the Commissioner's report and the



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objections which were taken into consideration by the learned Trial Court to the said Commissioner's report found that it is necessary that the suit be remanded back and the Trial Court has to be reconsidered, if necessary.

36. In the present case, the parties were given fullest opportunity to produce all available evidence to their fullest efforts and it had not been the case of the appellants that they were denied to produce any particular evidence. The conjoint reading of Rules 23, 23-A and 24 of Order 41 CPC makes it clear that the scope of the power of remand is limited to that extent that, when the available evidence is sufficient to dispose of the matter then the proper course for First Appellate Court to have followed is the mandate of Rule 41 CPC and to determine the suit finally. The order of remand would not rather be necessary depending on the facts and the given set of circumstances of a case.

37. That apart, it is pertinent to mention here that, the 1st defendant Municipality neither filed any application to receive objection to the Commissioner report nor any application to set aside the Commissioner's



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report and plan before the Trial Court. Further, the Municipality has filed two applications, one to receive objection to the Commissioner report and another to set aside the Commissioner report and plan before the First Appellate Court. Both the petitions are pending along with the appeals. However, the defendants 2 and 3 had already filed petition in I.A.No.323 of 2006 to set aside the previous Commissioner report and I.A.No.324 of 2006 to appoint a Commissioner for local inspection to measure the suit property as per the resurvey and both the petitions were dismissed by the First Appellate Court. Hence, the defendants have no locus standi to object the Commissioner report and plan at the time of argument. Without challenging the dismissal order of I.A.Nos. 323 and 324 of 2006, the defendants cannot raise the point of appointment of Commissioner for local inspection to measure the suit property as per the resurvey and to set aside the previous Commissioner's report at the time of arguments of the appeal.

38. That Apart, by its judgment and decree, the learned First Appellate Court setting aside the judgment and decree of the learned Trial Court directed the Trial Court to appoint either the old Commissioner or a



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new Commissioner for the purpose of measuring the old Survey Numbers which are unrelated to the plaint schedule property and the dispute in hand despite the fact that, such a kind of request has never been made either by the plaintiffs or by the respondent's pleadings or during the deposing evidence or at the time of arguments. Only for the first time before the First Appellate Court, the defendants 3 to 6 along with the argument notes had produced calculation memo with the objection to Commissioner's report and a plan prepared by one retired Taluk Surveyor. The learned First Appellate Court without duly marking the same, has relied upon the same to set aside the judgment and decree of the learned Trial Court. In view of the same, the entire exercise of remand of the case back to Trial Court is hereby observed as unwarranted and perse illegal.

39. For the aforesaid reasons, this Court hereby set aside the Judgment and decree passed by the First Appellate Court on 26.11.2010 and restores the Judgment and decree passed by the learned Trial Court on 05.11.2003.



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40. Accordingly, this Civil Miscellaneous Appeal is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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NCC : Yes / No
Index : Yes / No
Internet : Yes
Sml

To

1.The Principal District Munsif,
Kuzhithurai.

2.The Sub Judge,
Kuzhithurai (Camp)

Copy to

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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L.VICTORIA GOWRI, J.,

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