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**Jebakumar Vs. Robert Solomon**

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**SooperKanoon Citation** : sooperkanoon.com/44841

**Court** : Chennai

**Decided On :** Feb-09-2015

**Judge** : D.Hariparanthaman

**Appellant** : Jebakumar

**Respondent** : Robert Solomon

**Judgement** :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED : 09.02.2015 CORAM THE HONOURABLE MR.JUSTICE D.HARIPARANTHAMAN C.M.A.(MD)Nos.129 of 2013 and 433 of 2013 and M.P.(MD)Nos.1 and 1 of 2013 Jebakumar .Appellant in CMA(MD)No.129/2013 & Respondent in CMA(MD)No.433/2013 Vs Robert Solomon .Respondent in CMA(MD)No.129/2013 & Appellant in CMA(MD)No.433/2013 Appeals filed under Order 43 Rule 1(U) of the Code of Civil Procedure, against the judgment and decree dated 11.12.2012 in A.S.No.6 of 2012 on the file of the Principal District Judge, Tirunelveli, setting aside the judgment and decree dated 05.07.2011 made in O.S.No.188 of 2010 on the file of the Additional Subordinate Judge, Tirunelveli.

!For Appellant in CMA(MD)No.129/2013 & Respondent in CMA(MD)No.433 of 2013 : Mr.G.R.Swaminathan ^For Respondent in CMA(MD)No.129/2013 & Appellant in CMA(MD)No.433 of 2013 : Mr.H.Arumugam :COMMON

JUDGMENT

With the consent of both the parties, CMA(MD)Nos.129 of 2013 and 433 of 2013 are taken up together for final disposal.

2.CMA(MD)No.129 of 2013 is filed by the plaintiff in O.S.No.13 of 2008 on the file of the District Court, Tirunelveli, wherein the respondent in CMA(MD)No.129 of 2013 is the sole defendant.

The aforesaid suit in O.S.No.13 of 2008 is a suit for specific performance of an agreement dated 30.03.2007 entered into between both the parties in respect of the sale of property.

The plaintiff issued legal notice dated 07.02.2008 directing the defendant to perform his part of the contract by coming to Registrar's Office to execute the sale deed on 08.02.2008, otherwise the plaintiff would take proper legal action.

3.While so, the plaintiff filed O.S.No.13 of 2008 as stated above.

Thereafter, the case was transferred to the file of the Additional Sub-Court, Tirunelveli and it was renumbered as O.S.No.188 of 2010.

4.After hearing both the sides, the Additional Sub-Court, Tirunelveli, decreed the suit on 05.07.2011.

As against the judgment and decree dated 05.07.2011 in O.S.No.188 of 2010, the defendant therein filed A.S.No.6 of 2012 before the District Judge, Tirunelveli.

5.After hearing both the sides, the Principal District Judge, Tirunelveli passed a judgment and decree dated 11.12.2012 setting aside the judgment and decree dated 05.07.2011 of the Trial Court and remanded the matter back to the Trial Court to frame the issues as to whether the plaintiff is ready and willing to perform the contract, since admittedly no such issue was framed, and also as to whether cause of action arose on 08.02.2008 when the plaintiff issued notice dated 07.02.2008 directing the defendant to perform his contract on or before 08.02.2008.

6.As against the judgment and decree dated 11.12.2012 made in A.S.No.6 of 2012, the plaintiff has filed CMA(MD)No.129 of 2013 and the defendant has filed

7.Both the learned counsel for the parties, ie., both the plaintiff and defendant has jointly submitted that the order of remand is bad and the fiRs.Appellate Court should have disposed of the appeal on merits in view of the statutory mandate envisaged in Section 107 of CPC r/w Order 41 Rule 24 of CPC.

It is submitted by both of them that the fiRs.Appellate Court could frame issues and render its judgment on those issues, if evidence is already available.

It is submitted by both the counsel that if no evidence are available, even then the fiRs.Appellate Court, can record evidence on its own and dispose of the matter, after framing the issues that was not framed by the Trial Court or alternatively, the fiRs.Appellate Court could remand the matter to frame issues and record evidence on those issues and to pronounce judgment thereon.

8.But, in this case, it is submitted by both the counsel that sufficient evidence is available on record to decide the issues, viz., whether the plaintiff is ready and willing to perform the contract as well as, as to whether cause of action arose on 08.02.2008, when the plaintiff issued notice on 07.02.2008.

Therefore, there is no necessity for the fiRs.Appellate Court to remand the matter for trial to the Trial Court.

9.It is relevant to extract Section 107 of CPC and Order 41 Rule 24 of CPC.

?.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.?.

?.Order 41 Rule 24 of CPC.

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.?.

10.Section 107 of CPC r/w Order 41 Rule 24 of CPC make it very clear that the appellate Curt could frame the issues that were not framed by the Trial Court, when framing of such issues are necessary for the disposal of the suit and also to render its decision on the issues based on the evidence that are available on record.

I am of the view that the word ?.may?.

appears in Order 41 Rule 24 has to be read as ?.shall?.

and the fiRs.Appellate Court shall determine the suit finally after framing the issues, without remanding the suit to the Trial Court, particularly when evidence is available.

11.In view of the submissions made by the learned counsel on either side, the Civil Miscellaneous Appeals are allowed and the order dated 11.12.2012 of the fiRs.Appellate Court in A.S.No.6 of 2012 is set aside, and the matter is remanded viz.

A.S.No.6 of 2012 is remanded back to the Principal District Judge, Tirunelveli to dispose of the same by framing the issues as to whether the plaintiff is ready and willing to perform the contract and as to whether cause of action arose on 08.02.2008 for filing the suit, based on the evidence available on record, since it is

stated that there are sufficient evidence to decide those issues.

The fiRs.Appellate Court viz., the Principal District Judge, Tirunelveli is directed to dispose of A.S.No.6 of 2012 within a period of three months from the date of receipt of a copy of this judgment.

Consequently, the connected miscellaneous petitions are closed.

No costs.

Index : Yes/No 09.02.2015 Internet : Yes/No KM Note to the Registry: Registry is directed to return the papers forthwith to the fiRs.Appellate Court.

To 1.The Principal District Judge, Tirunelveli.

2.The Additional Subordinate Judge, Tirunelveli.

**D.HARIPARANTHAMAN, J.**

KM C.M.A.(MD)Nos.129 and 433 of 2013 and M.P.(MD)Nos.1 and 1 of 2013 09.02.2015

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