



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 23.06.2015

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CORAM:
THE HONOURABLE **MS. JUSTICE V.M.VELUMANI**
C.M.A. (MD) Nos.1226 and 1227 of 2014
and
M.P (MD) Nos.1 and 1 of 2014

C.M.A (MD) No.1226 of 2014:

Chandrasekaran ... Appellant/Appellant/Defendant

vs.

1.P.Devadass

2.P.Anandan Respondents/Respondents/Appellants

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule (1) of C.P.C against the Judgment and decree, dated 29.07.2011 passed by the learned Principal District Judge, Theni in A.S.No.19 of 2010 remanding the judgment and decree in O.S.No.202 of 2008, dated 24.03.2010 on the file of the Sub-Court, Theni and allow the Civil Miscellaneous Appeal.

For Appellant : Mr.G.R.Swaminathan

For Respondents : M/s.D.Devisaravanapriya for
Mr.P.T.S.Narendra Vasan

C.M.A (MD) No.1227 of 2014:

Chandrasekaran .. Appellant/Appellant/Plaintiff

vs.

1.P.Devadass

2.P.Lashmanan

3.P.Anandan

4.R.Nagalakshmi

5.Santhi .. Respondents/Respondents/Defendants

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule (1) of C.P.C against the Judgment and decree, dated 29.07.2011 passed by the learned Principal District Judge, Theni in A.S.No.18 of 2010 remanding the judgment in O.S.No.201 of 2008, dated 24.03.2010 on the file of the Sub-Court, Theni and allow the Civil Miscellaneous Appeal.

For Appellant : Mr.G.R.Swaminathan

For Respondents : M/s.D.Devisaravanapriya for
Mr.P.T.S.Narendra Vasan

**COMMON JUDGMENT**

Both the appeals are preferred against the common judgment and decree, dated 29.07.2011 passed by the learned Principal District Judge, Theni. By this common judgment, A.S.Nos.18 and 19 of 2010 were allowed setting aside the common judgment and decree, dated 24.03.2010 in O.S.Nos.201 and 202 of 2008 passed by the learned Sub-Judge, Theni, remanding the suits to the trial Court for fresh disposal on merits.

2. Since the issue raised in both the appeals is common, the following common judgment is passed.

3. The facts of the case are as follows:

(i) The appellant herein filed O.S.No.201 of 2008 on the file of the Sub-Court, Theni, for partition of suit properties allotting his 7/30 shares and for temporary injunction restraining the respondents in C.M.A.No.1227 of 2014 from interfering with his possession and for other reliefs.

(ii) The respondents in C.M.A(MD).No.1226 of 2014 filed O.S.No.202 of 2008 against the appellant for permanent injunction restraining the appellant from interfering with the peaceful possession and enjoyment of the suit schedule property.

(iii) According to the appellant, the suit properties and other properties originally belonged to Subbian Chettiar grandfather of the parties herein. After his death, his two sons Palchamy @ Gurunathan Chettiar and Palanivel Chettiar, father of the parties herein inherited all the properties. They by the registered partition deed, dated 17.12.1973, partitioned the landed properties. The house property was partitioned by the unregistered partition deed. By un-registered partition deed, the suit properties were allotted to the father of the parties. From that date onwards, Palanivelu Chettiar, his sons and daughters as joint Hindu family members were in absolute possession and enjoyment of the landed properties as also the suit properties. Palanivelu Chettiar settled a portion of one of the properties on his daughter, fourth defendant in the suit. After the death of Palanivelu Chettiar, on 25.12.1998, the appellant and the respondents 1 to 3 sold one property by deed of sale, dated 22.10.2001.

(iv) The mother of parties herein Avadaiammal, appellant and respondents 1 to 3 divided the landed properties among themselves by registered partition deed, dated 06.02.2002 and they are in possession and enjoyment of the properties allotted to them.

<https://hcservices.ecourts.gov.in/hcservices/> properties were not partitioned, but Palanivelu Chettiar, appellant and respondents 1 to 3 were in possession of separate portions on the mutual agreement and oral understanding



that they will not claim absolute right over the portions in their possession.

(vi) Avadaiammal died on 22.07.2002 leaving the appellant and the respondents 1 to 5 as her legal heirs. The cordial relationship between the parties diminished. The appellant in September, 2002, asked for partition. The respondents 1 to 3 are evading from partitioning the suit properties and they are trying to evict the appellant. Hence, he filed the suit.

(vii) The respondents 1 to 3 in their written statement had stated that the suit properties were partitioned by unregistered partition deed, dated 05.04.1990. The appellant signed the partition deed. Separate properties were allotted to father of parties, appellant and respondents 1 to 3. All were in possession and enjoyment of the properties allotted to them and are paying property tax, electricity charges etc., which were transferred in their names. Schedule-A property was allotted to Palanivelu Chettiar and Avadaiammal.

(viii) In respect of second item of suit property, Palanivelu Chettiar by registered Will bequeathed the property to minor sons of first respondent Vasantha Kumar and Sivakumar and minor sons of third respondent Ranjith Kumar and Madhan Kumar. By the said Will, mother of parties Avadaimall to enjoy the property till her life time and thereafter minor sons, will get absolute right. After the death of Avadaiammal, respondents 1 to 3 as guardians of minors took possession of the properties and necessary mutations were made in the statutory records.

(ix) The respondents 1 to 3 denied joint possession of the suit properties and submitted that on 05.04.1990 the suit properties were partitioned.

(x) The respondents 1 and 2 in C.M.A(MD)No.1226 of 2014 filed O.S.No.202 of 2008 seeking permanent injunction restraining the appellant from interfering with their possession. According to them, by unregistered partition deed, dated 05.04.1990, the properties were partitioned. Palanivelu Chettiar, appellant and the respondents 1 to 3 were allotted specific properties and they are in possession and enjoyment of the properties allotted to them.

(xi) By the Will dated 08.01.1997, Palanivelu Chettiar bequeathed the suit property to minor sons Vasantha Kumar, Sivakumar of first respondent and Ranjith Kumar and Mathan Kumar of second respondent. By the Will, life interest was given to the appellant and after her life time to the minors mentioned above. Avadaiammal died on 22.07.2002. After her death, the respondents in C.M.A(MD)No.1227 of 2014 took possession of the



property on behalf of the minors and mutations were effected in all the statutory records. Hence, they prayed for permanent injunction restraining the appellant from interfering with their possession and enjoyment of the property.

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(xii) The appellant has stated that his father was suffering for 10 ½ years of severe illness and he could not have executed the Will, dated 08.01.1997. The properties were not partitioned and the respondents cannot claim, absolute claim over the suit property.

4. Based on these pleadings, the learned Sub-Judge, Theni, framed issues in both the suits. In O.S.No.201 of 2008, additional issues were also framed.

5. The parties to the suit let in oral and documentary evidences. Considering all the materials on record, the learned Sub-Judge, Theni, dismissed O.S.No.201 of 2008 filed by the appellant and decreed the suit in O.S.No.202 of 2008 filed by the respondents 1 and 2 in C.M.A(MD)No.1227 of 2014.

6. Against the common judgment and decree, dated 24.03.2010, the appellant filed A.S.Nos.18 and 19 of 2010 on the file of the Principal District Judge, Theni.

7. The learned Principal District Judge heard both the appeals together. Considering the pleadings, evidence and rival arguments, came to the conclusion that the trial Court did not frame proper issues to decide the legal issues arising in the suits.

8. The learned Principal District Judge, framed issues as per provisions of Order 41 Rule 23 and 23(A) C.P.C and vide judgment dated 29.07.2011, set aside the judgment and decree of the trial Court and remanded both the suits to trial Court for fresh disposal after giving opportunity to all the concerned parties.

9. Against the said judgment and decree, the present two appeals are preferred.

10. Heard the learned counsel for the appellant and the learned counsel for the respondents.

11. The learned counsel for the appellant contended that the lower appellate Court erred

1. In not considering the well settled position of law governing exercise of jurisdiction available under Order 41 Rule 23 C.P.C.

2. Having found inherent defects in O.S.No.202 of 2008, the lower appellate Court ought to have dismissed the said suit.

3. The order of remand cannot be made to give one more



opportunity to the plaintiffs to fill up the lacuna in their case.

4. The lower appellate Court ought to have decided the issues as the evidence on record is sufficient to decide the issues.

5. The first appellate Court erred in granting leave to the trial Court and plaintiffs to amend the plaint.

12. Per contra, the learned counsel for the respondents contended that the lower appellate Court has properly considered the materials and passed the judgment and decree and therefore, there is no reason to set aside the order of remand.

13. I have carefully considered the materials on record, the judgments of Courts below and the rival contentions.

14. The issue to be decided is whether the order of remand passed by the lower appellate Court, can be substantiated or liable to be set aside.

15. The trial Court based on the pleadings framed issues and additional issues. The parties did not seek recasting of issues or framing of additional issues. Parties have let in oral and documentary evidence to substantiate their case as pleaded.

16. The trial Judge considered the pleadings, evidence, arguments and dismissed the suit filed by the appellant and decreed the suit filed by the respondents 1 to 3 in the C.M.As.

17. On appeals by the appellant, the lower appellate Court came to the conclusion that the trial Court did not frame proper issues and did not decide the legal issues. The lower appellate Court framed issues, which according to the lower appellate Court are necessary to decide the legal issues involving in the suits and the trial Court did not frame the issues as framed by the appellate Court. For the above reasons, the lower appellate Court set aside the judgment and decree of the trial Court and remanded the suits to the lower Court for fresh trial and direct the trial Court to give opportunity to the parties.

18. The lower appellate Court has erred in remanding the suits to the trial Court. The lower appellate Court failed to consider the provisions under Order 41 Rule 24 C.P.C. The said provision reads as follows:

Order 41 Rule 24 C.P.C:



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 the Appellate Court proceeds. "

19. The lower appellate Court did not give any finding as to whether the evidence on record is sufficient to decide the issue after recasting the issues. The lower appellate Court has remanded the suits for deciding the legal issues. It is well settled law that order of remand cannot be passed as a matter of course. Remand is permissible only when the appellate Court comes to the conclusion that remand is appropriate in the interest of justice.

20. The lower appellate Court should give a finding that the judgment and decree of the trial Court, is erroneous on the evidence on record. The order of remand should not be made to fill up the lacuna by allowing the party to let in evidence or amending the pleadings. Similarly, if the defect is due to the negligence of party, the appellate Court should not remand the suits as the same will benefit the erring party.

21. The lower appellate Court held that remand is necessary to decide the legal issues. But, failed to consider the provisions of Order 41 Rule 24 of C.P.C. The lower appellate Court failed to give finding that the evidence available on record is not sufficient to decide the issue framed by it. If it appears to the lower appellate Court that further evidence is necessary and essential to the right decision of the suit, then appellate Court can refer the matter to the trial Court as per Order 41 Rule 25 C.P.C and direct the trial Court to take evidence on record and return the evidence with the finding therein and reasons therefor.

22. In the result, both the Civil Miscellaneous Appeals are allowed and the common judgment and decree of the lower appellate Court, dated 29.07.2011 made in A.S.Nos.18 and 19 of 2010 is set aside and the lower appellate Court is directed to hear the appeals afresh and pass orders on merits. No Costs. Consequently the connected Mps are closed.

Sd/-

Assistant Registrar(Crl.Side)

/True Copy/

Sub Assistant Registrar



To

1.The Principal District Judge,
Theni.

2.The Sub-Court,
Theni.

+1cc to MR.G.R.Swaminathan, Advocate Sr.No.33063

pm

AA/09.09.2015/ 7p- 4c/

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22.06.2015