

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2016

CORAM

THE HON'BLE JUSTICE T. MATHIVANAN

CIVIL MISCELLANEOUS APPEAL Nos.1055 & 1056 of 2009
&
M.P.No.1 of 2009

R.Manoharan,
S/o.M.Ramasamy, City Thottam,
Kalipalayam, Velaimadai,
Coimbatore North Taluk,
Coimbatore District.

Appellant (In both the CMAs)/4th
Defendant in both appeal

Vs

1. N.Devaraj,
S/o. Narayanasami Naidu,
No.5/3B, Gandhi Nagar,
Kavandanpalayam,
Coimbatore-30

2. N.Nandakumar,
S/o. Narayanasami Naidu,
No.13/11, Raja Annamalai Road,
Saibaba Mission Post,
Coimbatore

..1st & 2nd Respondents/Plaintiffs
in both Appeals

3. Devakiammal,
W/o.Late Palanisamy,
54, Metupalayam Road,
Coimbatore 641 043

4. Shanthi Selvaraj,
W/o. Selvaraj,
Rep. by her Power Agent,
S.Vasanthamani,
117, Bhashyakaralu Road,
R.S.Puram,
Coimbatore- 2

5. Kirthi Sridharshani,
D/o. I.S.Ramakrishnan,
Sridharshini,
R.K.Main Road,

Bishop's Town,
Udhagamandalam

..3rd to 5th Respondent/Defendant
1 to 3 in both appeals

Prayer:

These appeals are filed against the judgment and decree dated 09.01.2009 and made in the Appeals in A.S.Nos.5 and 6 of 2008 on the file of the District Court, Nilgiris District at Udhagamandalam, setting aside the judgment and decree dated 07.11.2007 passed in O.S.No.70 of 2005 on the file of the Sub-Court, Udhagamandalam and remanding the matter back to the Trial Court.

For appellant :- Mr. K.Govi Ganesan
assisted by Mr. R.Bharathkumar

For Respondents:- Mr. Muthumani Doraisami,
1,2,4 & 5 learned senior counsel
for Mr. Kandhan Duraisami
for R3 no appearance

JUDGMENT

Invoking the provisions of Order 43 Rule 1(u) of the Code of Civil Procedure the appellant in both the appeals who is the fourth defendant in the Suit in O.S.No.70 of 2005 has preferred these Civil Miscellaneous Appeals challenging the legality of the common Judgment, dated 09.01.2009 and made in the Appeals in A.S.Nos.5 and 6 of 2008, on the file of the learned District Judge, Nilgiris District Udhagamandalam remanding the suit in O.S.No.70 of 2005 back to the file of the trial Court, Udhagamandalam after setting aside the judgment and decree and made in the Suit, with a direction to answer each and every issues distinctively as contemplated under Order 14 Rule (2) of CPC and order 20 Rule 5 of CPC.

2. With the issue in both the Civil Miscellaneous Appeals is one and the same and the parties to the Appeals are also one and the same, both the Appeals have been consolidated together, heard jointly and disposed of in this common Judgment.

3. Heard Mr. K.Govi Ganesan learned counsel assisted by Mr. R.Bharathkumar, learned counsel, who is on record for the appellant in both the appeals and Mr. Muthumani Doraisami learned senior counsel assisted by Mr. Kandhan Duraisami learned counsel for the first, second, fourth and fifth

respondents in both the appeals. Second respondent has not chosen to appear either in person or through his counsel.

4. The conspectus of the case is given below:

5. The respondents 1 and 2 herein are the plaintiffs in the suit in O.S.No.70 of 2005, whereas the respondents 3 to 5 herein are the defendants 1 to 3 and the appellant herein is the fourth defendant in the said suit.

6. The suit in O.S.No.70 of 2005 was filed by the respondents 1 and 2/plaintiffs as against the respondents 3 to 5 and the appellant and thereby sought the relief of partition, directing the division of the suit property into six equal shares and allot one of such shares to them by metes and bounds with reference to the good and bad soils.

7. For easy reference and for the sake of convenience the respondents 1 and 2 may hereinafter be referred to as the plaintiffs and the respondents 1 to 3 and the appellant herein be referred to as the defendants 1 to 4, wherever the context so require.

8. The plaintiffs 1 and 2 claim to be the brother's and sister's sons of one S.Palanisamy Naidu. The first defendant is the wife of S.Palanisamy Naidu and the defendants 2 and 3 are the brother's daughter of the said S.Palanisamy Naidu. The fourth defendant is the purchaser of the suit property from the first defendant. The suit property is a housing property situated in an extent of 45 cents in the heart of Coimbatore town.

9. The plaintiffs have claimed that the first defendant and her husband S.Palanisamy Naidu had been living separately for about eight years prior to the filing of the suit. The said S.Palanisamy Naidu had executed a registered Will, dated 07.12.1998 bearing document No.32 of 1998 in the Office of the Joint Registrar, Udhagamandalam and thereby bequeathed one third undivided share in 50% of the schedule mentioned property in favour of the second defendant and another one third undivided share in 50% of the schedule mentioned property in favour of the third defendant and the remaining one third share in the 50% of the schedule mentioned property was given to the plaintiffs.

10. The said S.Palanisamy Naidu being the maternal uncle of the plaintiffs had died on 07.03.2005 at Coimbatore. Before his death, he had not executed any other Will in respect of the schedule mentioned property, excepting the Will, dated 07.12.1998 and hence this Will had come into effect on and from 07.03.2005, on which date, S.Palanisamy Naidu had passed away. The plaintiffs were also put into possession of the entire suit property in order to maintain and safeguard them from 01.01.1999 onwards. Neither the first defendant nor her son P.Ravindran had any semblance right over the suit property.

11. The plaintiffs have also claimed that the said S.Palanisamy Naidu, prior to his last breath on 07.03.2005, had executed a registered Will in respect of the house property situated at No.117, Bhasyagarlulu Road, Coimbatore in favour of Thirupathi Thirumala Devasthanam, Thirupathi. After execution of the said Will, the said S.Palanisamy Naidu had died on the same date i.e., on 07.03.2005.

12. That on 18.03.2005 the first defendant and her son P.Ravindran had demanded the plaintiffs to vacate and handover the possession of the schedule mentioned property to them. That on 26.03.2005 at the instigation of the first defendant and her son some unknown persons tried to encroach the suit property and they also tried to dispossess them from the suit property. In this connection, the plaintiffs had lodged a complaint with the concerned Police.

13. Under these circumstances, the plaintiffs were constrained to file the suit in O.S.No.45 of 005, seeking the relief of permanent injunction. The Sub Court, Udhagamandalam had also granted an ad interim injunction against the first defendant and her son on 21.03.2005 in the Application in I.A.No.194 of 2005.

14. Since the plaintiffs had felt that it was no longer possible for them to have a joint ownership with defendants over the suit property without any specific boundaries, they were constrained to file the suit for partition, as afore stated.

15. After filing of the suit, the plaintiffs were put to understand that the first defendant and her son had executed two registered sale deeds on 23.05.2005 and 14.06.2005 in respect of the suit property in favour of the fourth defendant..

Therefore, the fourth defendant has been impleaded in the suit for proper adjudication.

16. The first defendant had contended that there was no misunderstanding between her and her husband S.Palanisamy Naidu during his life time. She had also contended that her husband S.Palanisamy Naidu had never executed any Will voluntarily in favour of the plaintiffs as well as in favour of the defendant on 07.12.1998. According to the first defendant, her husband had executed a Will on 03.11.2004 in her favour bequeathing the schedule mentioned property. She had vehemently disputed the alleged execution of the Will by her husband S.Palanisamy Naidu in favour of the plaintiffs and the defendant on 07.12.1998. She would further contend that even, if it is assumed that a Will was executed by her husband Palanisamy Naidu on 07.12.1998, it would automatically become invoked by the execution of the subsequent Will in her favour on 03.11.2004. She claims right and interest over the entire suit property saying that the plaintiffs had never been in possession and enjoyment of the suit property at any point of time. According to the first defendant, the suit in O.S.No.45 of 2005 filed by the plaintiffs was dismissed on 28.09.2006.

17. The second defendant had claimed that as per the Will dated 07.12.1998, one third share in 50% of the suit property was bequeathed in her favour and another one third share in 50% was bequeathed in favour of the third defendant while the remaining one third in 50% of the suit property was bequeathed in favour of the plaintiffs. The third defendant had also claimed one third share in the 50% of the suit as per the Will, dated 07.1.1998.

18. The fourth defendant, who is the appellant herein has contended that he had purchased a portion of the suit property from the first defendant under a registered sale deed, dated 23.05.2005 and the remaining portion of the suit property was purchased by his son, Vaheen Ramon Mano from the first defendant under a registered sale deed dated 14.06.2005. After their purchase, they had been in possession and enjoyment of the entire suit property. The fourth defendant has further contended that he had leased out a portion of the suit property, measuring atleast 1000 sq.ft. to one Raviprakash, retaining the remaining portion. Since he is the bona fide purchaser, he has urged the dismissal of the suit.

19. Based on the material proposition of the case, the trial Court, Udhagamandalam had formulated as nearly as three

issues and thereafter five additional issues were also formulated on 27.09.2007.

20. The parties to the suit, in order to substantiate their respective cases were directed to face the trial. The first plaintiff was examined as P.W.1 and three more witnesses were examined on his part as P.Ws.2 to 4. During the course of their examination as nearly as 14 documents were exhibited and marked. On the other hand, one I.S. Ramakrishnan was examined as D.W.1 and the first defendant, Devakiammal was examined as D.W.2. Besides their evidence, three more witnesses were examined on their part, which includes the fourth defendant/appellant as D.Ws. 3 to 5 respectively. During the course of their examination as nearly as 29 documents were exhibited and marked. The Will, dated 07.12.1998 which is disputed in the suit seems to have been marked as Ex.A2, whereas the Will, dated 03.11.2004 said to have been executed by S.Palanisamy Naidu in favour of his wife Devakiammal, who is the first defendant herein seems to have been marked as under Ex.B3.

21. The learned trial Judge, on meticulous analysis of the evidences both oral and documentary had found that the Will, dated 07.12.1998 through which the plaintiffs and the defendants 2 and 3 had claimed their title over the suit property was not proved; but on the other hand, the Will, dated 03.11.2004, (Ex.B3) which is said to have been executed in favour of the first defendant by her husband S.Palaniswamy Naidu was proved and in consequence thereof he had found that the plaintiffs as well as the defendants 2 and 3 were not entitled to have the relief of partition, in respect of their one sixth share in the suit property, as sought for by them.

22. It is pertinent to note here that the learned subordinate Judge, Udhagamandalam had consolidated all the issues i.e. issue nos.1 to 3 and the additional issue nos.1 to 5 and answered them in common without discussing each and every issue separately and distinctively which resulted in the dismissal of the suit. Having been aggrieved by the dismissal of the suit, the plaintiffs 1 and 2 had filed an Appeal before the learned District Judge, Nilgiris District in A.S.No. 5 of 2008 and the defendants 2 and 3 had also challenged the judgment and decree dated 07.11.2007 and filed an Appeal in A.S.No.6 of 2008. Both the Appeals were heard jointly and a common Judgment was pronounced on 09-01-2009, which resulted in the dismissal of the Appeals in A.S.Nos. 5 and 6 of 2008, after setting aside the Judgment and decree of the Court below on 07.11.2007 and the suit in O.S.No.70 of 2005 was remitted back to the trial Court, Udhagamandalam with a direction to pronounce its opinion on all

the issues separately and distinctively and thereafter to pronounce its Judgment in accordance with law and the trial Court was also directed, that before pronouncing its opinion on all the issues and pronouncing its Judgment, to give sufficient opportunities to both sides for enabling them to advance their arguments, if any, in the suit. It was also made clear that no fresh de novo trial was ordered.

23. The order of remand, dated 09.11.2009 and made in the common Judgment in the suits A.S.Nos.5 and 6 of 2008 has been challenged by the plaintiffs in these memorandum of Civil Miscellaneous Appeal Nos.1055 and 1056 of 2009.

24. The learned first Appellate Judge in order to dispose of the First Appeal had formulated the following three points:

- "(i) Without answering each and every issue separately, as contemplated under Order 14 Rule 2 and Order 20 Rule 5 of Code of Civil Procedure, deciding the case in favour of one party by giving one answer for all the issues is correct?;
- (ii) Whether the judgment and the decree of the trial Court are liable to be set aside?; and
- (iii) To what other reliefs the appellants are entitled to in both the Appeals?"

25. No doubt, Sub Rule 1 to Rule 2 of Order 14 of CPC envisages that notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub Rule (2) of Rule 2 of Order 14 CPC says that where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

- (a) the jurisdiction of the court, or
- (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

26. Rule (5) of Order 20 of CPC provides that in Suits in which issues have been framed, the court shall state its finding or decision, with the reasons there for, upon each separate issues, unless the finding upon any one or more of the issues is sufficient for the decision of the Suit.

27. In so far as the first Appellate Court is concerned, this Court would like to point out that Order 41 Rule 23 of CPC empowers the Appellate Court to order remand of case in certain circumstances. A remand by the Appellate Court cannot

be ordered lightly as it is obligatory for the Appellate Court to consider all the issues unless they have been given up and it is not permissible to deal with one issue and dispose of the Appeal. Remand is not meant to fresh opportunity to a party to litigate. The power of remand should be sparingly expressed and there should always be an endeavor to dispose of the case by the Appellate Court itself. Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.

28. Coming to the provisions of Rule 33 of Order 41 of CPC, this Court finds that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

29. Rule 33 to Order 41 of CPC was inserted in 1908. It is taken, for the most part, from Order 58, Rule 4 of the Rules of the Supreme Court of Judicature in England as then in force. This Rule enables the Appellate Court to make whatever order it thinks it fit not only between the appellant and the respondent but also as between the respondent and respondent. The Appellate Court may not only grant or refuse relief to the appellant by allowing or dismissing the Appeal, it may give such other relief to any of the respondents, as the case may require. This principle is laid down by the Hon'ble Supreme Court of India in Bihar Supply Syndicate V Asiatic Navigation (AIR 1993 SC 2054) : ((1993) 2 SCR 425).

30. In Chhaya Vs Bapu Saheb (1994) 2 SCC 41), the Supreme Court has held that the necessary conditions for exercising power under the rule is that the parties to the proceedings are before the Court and the question raised properly arises out of one of the Judgments of the lower Court. No hard and fast rule can be laid down as to the circumstances in which the power may or may not be exercised and each case must be decided on its own facts.

31. The object of the rule is to empower the Appellate Court is to empower the Appellate Court to do complete justice

between the parties. As afore stated under Order 41, Rule 23 it is obligatory for the Appellate Court to consider all the issues unless they have been given up and the remand by the appellate Court cannot be ordered lightly.

32. Thus, it is made clear that the Appellate Court has failed to follow the well- settled principles that Order 41 Rule 23 gives ample power to the Appellate Court to decide all issues. Instead of directing the trial Court to answer for all the issues, the Appellate Court itself could have answered all the issues in order to prevent the parties to the suit to face the ordeal of entering into the trial once again. Besides this Rule 33 of Order 41 also empowers the First Appellate Court to answer all the issues formulated by the trial Court without remanding the suit.

33. The Supreme Court in Choudhary Sahu V State of Bihar (AIR 1982 SC 98): ((1982) 1 SCC 232 has explained the object of Order 41 Rule 33 of CPC as follows:

"The object of this Rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from. Ordinarily, the power conferred by this Rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. "

34. As argued by Muthumani Doraisami, learned senior counsel for the appellant the Appellate Court ought to have made an endeavor to dispose of the Appeals on merits itself without remanding the matter back to the trial Court. If the Judgment of the trial Court is wholly unintelligible or incomprehensible, then the matter could be remanded back to the trial Court.

35. In so far as the present Appeals are concerned, this Court is the considered view that based on the principles laid down under Rules 23 and 33 of Order 41 CPC, the Appellate Court is having enormous power to answer all the issues and even if any issue is omitted to be formulated, the Appellate Court is also having the power to formulate that issue and answer in order to render complete justice to the parties to the suit. The Appellate Court has therefore committed a serious error in remanding the suit back to the trial Court for the purpose of

hearing the parties to the suit and answer the issues separately.

36. Having regard to the relevant facts and circumstances of this case, this Court is of the view that the Appellate Court can itself answer the issues distinctively based on the evidence available on record and for this reason, the common Judgment of the Appellate Court, dated 09.01.2009 rendered itself liable to be set aside.

37. Accordingly, both C.M.A.Nos.1055 and 1056 of 2009 are allowed and the in common Judgment ,dated 09.01.2009 and made in the Appeals in A.S.Nos.5 and 6 of 2008, on the file of the learned District Judge, Nilgiris District ,Udhagamandalam are set aside and the Appeals in A.S.Nos.5 and 6 of 2008 are remitted back to the file of the first Appellate Court, Nilgiris District, Udhagamandalam to dispose of the Appeals on merits and in accordance with law, after answering all the issues separately and distinctively as contemplated under the provisions of Order 14 Sub rule (2) of Order 20 Rule (3) of CPC. The First Appellate Court is directed to dispose of the Appeals within a period of three months from the date of receipt of a copy of this order. However, there will be no order as to costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The District Judge
District Court, Nilgris at Udhagamandalam.

2. The Sub Judge
Sub Court, Udhagamandalam

3. The Section officer
VR Section, High Court, Madras.

+2 Ccs to Ms. Muthumani Doraisamy, Advocate sr 39292 & 39292.
+2 Ccs to Ms.K. Govi Ganesan, Advocate sr 39269 & 39270.

C.M.A. Nos 1055 & 1056/2009

CNR(CO)
SP(06/11/2017)