



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.04.2016

CORAM:

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

C.M.A. (MD) No.416 of 2015

and

M.P. (MD) No.1 of 2015

Duraisamy

... Appellant / 2nd respondent /
2nd defendant

Vs.

1.Padbanaban

... Respondent / appellant /

plaintiff

2.Seethalakshmi Ammal

3.Deenadayalan

4.Sundaram

... Respondents / respondents /
defendants

PRAYER: The Civil Miscellaneous Appeal filed under Order 43 Rule 1 (U) and Section 104 of C.P.C., to set aside the judgment and decree dated 21.01.2015 in A.S.No.11 of 2014 passed by the Principal District Judge, Karur, remanding the judgment and decree dated 21.03.2012 in O.S.No.5 of 2005 passed by the Subordinate Judge, Kulithalai.

For Appellant : Mr.K.Govindarajan

For R1 : Mr.S.Jeyavel

JUDGMENT

This Civil Miscellaneous Appeal is filed to set aside the judgment and decree dated 21.01.2015 in A.S.No.11 of 2014 passed by the learned Principal District Judge, Karur, remanding O.S.No.5 of 2005 to the learned Subordinate Judge, Kulithalai.

2.The appellant herein is the 2nd defendant, the 1st respondent is the plaintiff and the respondents 2 to 4 are the defendants 1, 3 and 4 in the suit in O.S.No.5 of 2005 before the Sub Court, Kulithalai.



3.The learned counsel for the appellant has given up the respondents 2 to 4 and made an endorsement to that effect.

4.The 1st respondent filed a suit in O.S.No.5 of 2005 before the Sub Court, Kulithalai, for recovery of possession and for mesne profit. According to the 1st respondent, his father one Sundararaj Naidu, who purchased the properties, was the owner of the properties. After the death of his father, his mother was looking after the properties. The 1st respondent was working and staying at Trichy. After the death of his mother, one Thanthoni Naidu, was paying the proceeds to him till his death. The 1st respondent claimed the properties based on a Will dated 20.06.1970 alleged to have been executed by his father Sundararaj Naidu.

5.After the death of Thanthoni Naidu, the appellant and other respondents attempted to interfere with the property of the 1st respondent. Therefore, the 1st respondent has filed the above said suit for recovery of possession. The appellant filed written statement and the same was adopted by the other defendants, denying the execution of the said Will by Sundararaj Naidu in favour of the 1st respondent. The appellant in the written statement stated that the relinquish deeds dated 22.08.1968 and 28.04.1969 are not true and valid documents and Sundararaj Naidu did not execute the Will dated 20.06.1970.

6.The Trial Court framed necessary issues. After considering the pleadings, oral and documentary evidence and arguments, the Trial Court dismissed the suit in O.S.No.5 of 2005. Against which, the 1st respondent preferred an appeal in A.S.No.11 of 2014 before the Principal District Court, Karur. The learned First Appellate Court after considering the facts and circumstances of the case and also considering the dismissal of the suit and three applications in I.A.Nos.165 of 2010, 3 and 4 of 2011 filed by the first respondent, for proving the Will, remanded the matter to the Trial Court to give an opportunity to prove the genuineness of the Will. The learned first appellate Judge remanded the matter, as the Trial Court erred in holding that the Will put forth by the first respondent was not proved by him, even though the trial Judge rejected the three applications filed by the first respondent. The first appellate Court held that the suit is not barred by limitation.

7.Against that order of remand, the present Civil Miscellaneous Appeal is filed.

8.The learned counsel for the appellant contended that the 1st respondent was given ample opportunity to prove the Will and also other contentions raised by him in the plaint. He examined ~~himself~~ ^{himself} and examined three witnesses and marked 19 documents. Therefore, the First Appellate Court is not correct in remanding the matter to the Trial Court, giving opportunity to the



1st respondent to prove the Will. Therefore, the First Appellate Court is not correct in remanding the matter to prove the Will and ought to have dismissed the appeal for non joinder of necessary parties and the suit is barred by limitation.

9. The learned counsel for the appellant relied on a decision reported in a) **2010(3) CTC 512 (Thangavelu vs Sampooranam and others)**, wherein in Paragraph No.9 it has been held as follows:

"9. But in the instant case, on a perusal of the order of remand, I find that no valid reason has been assigned by the Lower Appellate Court for remand of the matter except for the reason of marking the document through witnesses. As contended by the learned counsel appearing for the appellant, the Appeal proceedings is a continuation of the original proceedings. Under Such circumstances, the Lower Appellate Court itself ought to have allowed the parties concerned to mark the additional document by examining the witnesses and also by affording opportunity to cross-examine by the other side. Therefore, I am of the opinion that the order of remand passed by the Lower Appellate Court is liable to be set aside and accordingly, the order of remand dated 30.06.2009 in A.S. No.326 of 2002 passed by the Additional District Judge, Fast Tract Court, Namakkal is hereby set aside and the matter is remitted to the Lower Appellate Court with a direction to permit the first respondent to mark the document by examining the witnesses, affording an opportunity to the appellant herein to cross-examine the witnesses and decide the case afresh in the Appeal once for all. No costs. Consequently, connected M.P. is closed. "

b) A case in C.M.A.No.1280 of 2010 dated 12.08.2015 in **(Krishnappa and others Vs. Aswathappa)**, wherein in paragraph No.20 it has been held as follows:

"20. The scope for passing an order of remand under Amended Order 41 Rules 23 and 23-A is dealt with by the Supreme Court in the judgment reported in 2002 (2) SCC 686 - P.Purusottam Reddy and another V. Pratap Steels Ltd., referred to in para 10 of the judgment reported in 2010 (6) CTC 65 M.Kuppasamy V. K.L.Jain and others the Supreme Court has held "after the amendment all the cases of whole sale remand are covered by Rules 23 and 23A. It is only in exceptional cases where the Court may now exercise the power of remand dehors Rules 23 and 23A. To wit the superior Court, if it finds that the judgment under Appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3, or Order 41, Rule 31 CPC and hence it is no judgment, in the eye of



the law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25, CPC. An unwarranted order or remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

10. Per contra, the learned counsel appearing for the 1st respondent submitted that the First Appellate Court rightly held that the Trial Court erred in holding that the 1st respondent failed to prove the Will, after dismissing the application filed by the 1st respondent. In the circumstances, the order of remand is correct.

11. Heard the learned counsel for the appellant and the learned counsel for the 1st respondent.

12. The points for consideration are

(i) whether the order of remand is proper in view of the provision of Order 41 Rules 23 to 25 of CPC.

(ii) whether the First Appellate Court ought to have decided the issue on merits or directed the Trial Court to record the evidence with regard to genuineness of the Will and send the evidence so recorded with its finding.

13. **Point Nos. (i) and (ii)** The power of Appellate Court to remand a matter is contemplated in Order 41 Rules 23 to 25 of C.P.C.. Order 41 Rules 23 to 25 of C.P.C. read as follows:

"23 . Remand of case by Appellate Court— Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. Remand in other cases— Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than upon a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same



powers as it has under rule 23.]

24. 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.

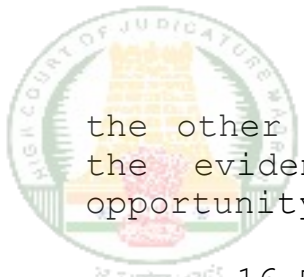
25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from— Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

14. Rule 25 is the relevant provision to decide the above issue. In the present case, the First Appellate Court held that the Trial Court did not give proper opportunity with regard to issue No.3 framed by the Trial Court and the first point for consideration framed by the First Appellate Court. Issue No.3 of the Trial Court and point No.1 of the First Appellate Court read as follows:

"3. Whether Sundararaj Naidu executed a Will in favour of the plaintiff on 20.06.1970 in respect of the suit properties?

1. Whether the Will dated 20.06.1970 (Ex.A3 and Ex.A16) is true and valid?"

15. The First Appellate Court is right in holding that the Trial Court denied opportunity to the 1st respondent to prove the Will as per Sections 68 and 69 and 71 of the Indian Evidence Act. The First Appellate Court held that the Trial Court ought to have allowed the applications filed by the 1st respondent to prove the Will by filing additional documents and examining son of one of the defendants as a witness and his signature in Ex.P.16 Will. The learned First Appellate Court erred in remanding the matter for recording evidence in this aspect and decide the suit afresh. On



the other hand, the First Appellate Court ought to have recorded the evidence, both oral and documentary and also affording opportunity to cross examine by either side.

16. The decision of this Court reported in C.M.A.No.1280 of 2010 dated 12.08.2015 in **(Krishnappa and others Vs. Aswathappa)** (cited supra) in paragraph Nos.20 to 24, this Court has observed as follows:

"20. The scope for passing an order of remand under Amended Order 41 Rules 23 and 23-A is dealt with by the Supreme Court in the judgment reported in 2002 (2) SCC 686 - P.Purusottam Reddy and another V. Pratap Steels Ltd., referred to in para 10 of the judgment reported in 2010 (6) CTC 65 - M.Kuppusamy V. K.L.Jain and others the Supreme Court has held "after the amendment all the cases of whole sale remand are covered by Rules 23 and 23A. It is only in exceptional cases where the Court may now exercise the power of remand dehors Rules 23 and 23A. To wit the superior Court, if it finds that the judgment under Appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3, or Order 41, Rule 31 CPC and hence it is no judgment, in the eye of the law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25, CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

21. Another judgment of the Supreme Court referred to in paragraph 11 of the same judgment is Ashwinkumar K.Patel V. Upendra J.Patel and others 1999 (1) CTC 710 : 1999 (3) SCC 161 wherein it has been held that High Court should not ordinarily remand a case merely because it considers the reasoning of the lower Court to be wrong as remand of a case causes delay and prejudice to involved parties. Thus, when material is available before it, High Court should exercise its own discretion and decide the Appeal.

22. The Apex Court in the judgment reported in (2008) 12 SCC 372 Bachahan Devi and another V. Nagar Nigam, Gorakhpur and another it is held :

"The order of remand should not be passed as a matter of routine. The first appellate court which has the power to analyse the factual issues. In order to bring in application of Order 41 Rule 25 the appellate court must come to a



conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate court to do so. This is clear from the use of the expression may."

23.The Hon'ble Supreme Court while dealing with the powers of the appellate court in remanding the matter in (2011) 15 SCC 300 in Rajinder Sharma v. Arpana Sharma found fault with the High Court in remitting the matter to the trial Court and directed the trial Court to allow the application of the respondent for adducing additional evidence by giving corresponding right to the appellant to rebut that evidence and also directed the trial Court to decide the matter afresh. The Hon'ble Supreme Court having observed the documents which are sought to be adduced by way of adducing evidence are on record is pleased to hold that the High Court being the first appellate court, is a court of both fact and law and the High Court in the interest of justice ought to have decided the controversy in accordance with law and the order to remit the matter to the trial court is unwarranted and it will merely prolong the proceedings between the parties.

24.The observation of the Hon'ble Supreme Court in the judgments above cited would clearly go to show that the order of remand cannot be passed as a matter of routine and only in exceptional cases and the High Court can by itself take additional evidence and to decide the matter in controversy on merits. The same view is reiterated by the learned single judges of this court in the remaining three judgments above cited."

The said judgment is squarely applicable to the facts of the present case. The lower Appellate Court ought to have considered the applications on merits and allowed the parties to let in evidence both oral and documentary and decided the issue on merits. The order of remand is contrary to Order 41 Rules 23 to 25 CPC and well settled judicial pronouncements and the judgment is liable to be set aside.

17.In the result, the Civil Miscellaneous Appeal is allowed, setting aside the order of remand passed in A.S.No.11 of 2014 dated 01.01.2015 by the First Appellate Court with a direction to the First Appellate Court to record additional evidence to be produced by the 1st respondent herein with regard to



genuineness of the Will in question, afford an opportunity to both the appellant and the respondents to cross examine the witnesses so produced and decide the first appeal on merits and in accordance with law. No costs. Consequently, connected, M.P.is closed.

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Sd/-

Assistant Registrar(CS-II)

/True copy/

Sub Assistant Registrar

To

- 1.The Principal District Judge, Karur.
- 2.The Subordinate Judge, Kulithalai.

+1 cc to M/s.K.Govindarajan, Advocate in SR.No.22551

+1 cc to M/s.S.Jayavel, Advocate in SR.No.22383

Copy To:

The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.

Nbj

CSL/SK-SKN/15.06.2016 :8P/6C

C.M.A. (MD) No.416 of 2015
20.04.2016