



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.11.2017

CORAM

WEB COPY

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A(MD)No.1449 of 2006
and
M.P(MD).No.1 of 2006

1.Subbiah Asari(died) ... Appellant/Respondent/Defendant
2.Sundari
3.Shanker Narayana ... Appellants 2 & 3/---/---

Vs.

1.Shanmugavelsami ..Respondent/Appellant/Plaintiff
2.R.Lakshmi
3.S.Shanthi
4.Renuka .. Respondents 2 to 4/--/---

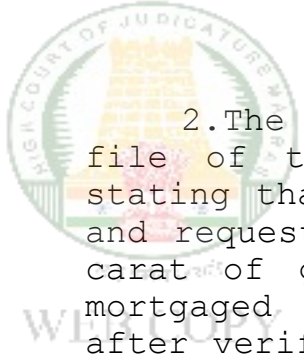
(Appellants 2 and 3 and respondents 2 to 4 were brought on record as Legal heirs of the deceased sole appellant vide Court order dated 24.11.2017 in C.M.P(MD).No.10044 to 10046 of 2017)

PRAYER: The Miscellaneous Appeal has been filed under Section 43 Rule 1 of Code of Civil Procedure against the order of remand dated 16.09.2005 in A.S.No.128 of 2005 on the file of the II Additional Sub Judge, Tirunelveli by reversing the Judgment and Decree dated 28.04.2003 in O.S.No.728 of 1996 on the file of the District Munsif cum Judicial Magistrate, Nanguneri.

For Appellant : Mr.A.Arumugam
For Respondents : Mr.J.Ashok

JUDGMENT

The Civil Miscellaneous Appeal has been filed by the appellant against the order of remand dated 16.09.2005 in A.S.No.128 of 2005 on the file of the II Additional Sub Judge, Tirunelveli by reversing the Judgment and Decree dated 28.04.2003 in O.S.No.728 of 1996 on the file of the District Munsif Cum Judicial Magistrate, Nanguneri.



2.The plaintiff has filed a suit in O.S.No.728 of 1996 on the file of the District Munsif Cum Judicial Magistrate, Nanguneri stating that he has given 500 grams of gold jewel to the defendant and requesting him to melt them and make a new ornaments with 22 carat of gold. After making a new ornaments, the plaintiff has mortgaged the said jewels to the bank and the bank's appraiser, after verifying the jewels, has stated that the said jewel contents had only 18 to 20 carat of gold. Due to the cheating committed by the defendant, the plaintiff had filed the above said suit. It was further contended that without appreciating the records properly, the District Munsif Cum Judicial Magistrate, Nanguneri has dismissed the suit.

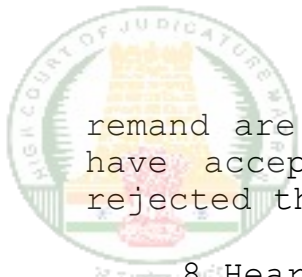
3.Before the District Munsif Cum Judicial Magistrate, Nanguneri, five witnesses viz., P.W.1 to P.W.5 were examined and twenty five documents viz., Ex.P.1 to P.25 were marked. On the side of the respondent, the defendant himself examined as R.W.1 and no document was marked.

4.Aggrieved over the order of the District Munsif Cum Judicial Magistrate, Nanguneri, the plaintiff has filed an appeal suit in A.S.No.128 of 2005 on the file of the II Additional Subordinate Judge, Tirunelveli. On perusal of oral and documentary evidence, the Appellate Court has remanded the suit back to the District Munsif Cum Judicial Magistrate, Nanguneri for fresh consideration.

5.Against the order of the appellate Court, the appellant/defendant has preferred the Civil Miscellaneous appeal.

6.The learned counsel for the appellant has stated that the plaintiff has discharged his burden of establishing his case and the trial Court has rightly dismissed the suit and hence appeal suit should also have to be dismissed, without appreciating the evidence. The First Appellate Court has held that Ex.B1 which was marked during the cross examination was not added to the list of exhibits in the Judgement passed and in the absence of any discussion, it has to be remitted back and held that the suit to be heard afresh is not right. The first appellate Court without actually verifying the existence or otherwise of Ex.B1 ought not to have ordered for remand. The first appellate Court ought to have straight away dismissed the first appeal instead of remanding it as the alleged substandard jewels were melted and made into different ornaments by the plaintiff himself and hence plaintiff could not successfully prove his case by any stretch of imagination. The first appellate Court ought to have disbelieved the entire version of the plaintiff in the absence of any valid evidence.

7.He further contended that the first appellate Court ought not to have interfered with the well reasoned findings of the trial Court and ought to have held that the evidence on record is sufficient to dismiss the appeal and the suit. All the reasons assigned by the first appellate Court in support of its order for



remand are legally untenable and the first appellate Court ought to have accepted the entire evidence of defendant and should have rejected that of the plaintiff.

8. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent and perused the materials available on record.

9. Based on the materials, it is seen that P.W.1-Shanmugavelsamy, who was the plaintiff in the suit has stated that the bill receipt book has been marked as Ex.B1 and the same has not been discussed by the lower Court. On perusal of the documents, it is found that the said Ex.B1-Bill receipt book was not found in the bundle and hence this Court finds the same was not sent along with the entire case records. The Lower Appellate Court is of the opinion that while framing of the fresh issues on 18.08.1993, the same has not been appreciated in a proper manner by the District Munsif Cum Judicial Magistrate, Nanguneri.

10. The Appellate Court has found that the Ex.B1 is missing in the bundle and also new issues have been raised and framed on 18.08.1993 and from the issues framed on 04.02.1992 also some of the issues have not been answered. There was no discussion of Ex.B1 in the Judgment passed by the lower Court, which is an important document and hence the appellate Court has directed the Lower Court to decide the same by remitting it back.

11. Based on the above discussion, to rectify the mistakes committed by the District Munsif Cum Judicial Magistrate, the II Additional Subordinate Judge, Tirunelveli has remanded back the matter to the District Munsif Cum Judicial Magistrate, Nanguneri on 16.09.2005 for fresh consideration.

12. After hearing both sides, this Court is of the opinion that the suit is pending for more than 20 years and appeal suit is of the year 2005 and the C.M.A(MD).No.1449 of 2006 is pending before this Court for the past 10 years, it would be proper to adjudicate the issues, the case has to be remitted back to the District Munsif Cum Judicial Magistrate, Nanguneri. Hence the Lower Court is directed to take up the matter on its file and decide the issues afresh within a period of six months from the date of receipt of a copy of this order.

13. In view of the above facts and circumstances, this Court is of the view that there is no infirmity or illegality in the order passed by the Appellate Court. Hence the matter is remitted back to the District Munsif Cum Judicial Magistrate, Nanguneri and the District Munsif Cum Judicial Magistrate, Nanguneri is directed to dispose the same within a period of six months from the date of receipt of a copy of this order after giving necessary opportunities to both the parties. If the District Munsif Cum Judicial Magistrate, Nanguneri finds that it is necessary in the interest of justice to



re-examine the witnesses, it can do so and both the parties are directed to co-operate with the proceedings without taking further adjournments.

14. The Registry is directed to send the entire case records to the District Munsif Cum Judicial Magistrate, Nanguneri along with this order copy. Accordingly, this Civil Miscellaneous Appeal is disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The II Additional Subordinate Judge,
Tirunelveli.
2. The District Munsif Cum Judicial Magistrate,
Nanguneri.

Copy To:-

The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.J.ASHOK, ADVOCATE IN SR No. 89853

MSA

TE/SV-MMS/SAR-3 : 17/01/2018 : 4P/6C

C.M.A(MD)No.1449 of 2006 and
M.P(MD) .No.1 of 2006
24.11.2017