



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.11.2017

CORAM

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THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A(MD)No.1103 of 2011

and

M.P.(MD).No.1 of 2011

1.L.Andi
2.S.Sasikala
3.Mohan . . . Appellants/Respondents/Plaintiffs

Vs.

1.Chinnamal alias Arayee
2.Subramanian
3.Nagarajan
4.Durairaj . . . Respondents/Appellants/Defendants

Civil Miscellaneous Appeal is filed under Order 43 Rule 1 U of Civil Procedure Code, to set aside the Judgment and Decree passed by the learned Sub-Court Pudukkottai in A.S.No.3 of 2011 dated 30.06.2011, which remanded back the case for fresh consideration to the Trial Court, and to confirm the Judgment and Degree passed in O.S.No.193 of 2008 dated 31.08.2010 by the learned District Munsif-cum-Judicial Magistrate, Keeranur.

For Petitioners :Mr.M.Karthikeya Venkatachalapathy
For Respondents :Mr.K.Baalasundaram
For R1 to R4

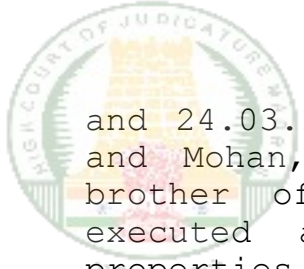
ORDER

This Civil Miscellaneous Appeal has been filed to set aside the Judgment and Decree passed by the learned Sub-Court Pudukkottai in A.S.No.3 of 2011 dated 30.06.2011, which remanded back the case to the Trial Court for reconsideration of the Judgment and Decree passed in O.S.No.193 of 2008 dated 31.08.2010 by the learned District Munsif-cum-Judicial Magistrate, Keeranur.

2. The case of the plaintiffs in the original suit, was for declaration of title and for permanent injunction against the defendants from interfering with the plaintiffs' properties.

3. The brief facts of the case, as per the plaintiffs' averments are as follows:

https://hcservices.ecourts.gov.in/hcservices/ "Online services"
Originally, the suit properties were purchased by the parents of the first plaintiff, namely, Lakshmanan and Deivanai, through various registered sale deeds dated 30.06.1939, 23.03.1970



and 24.03.1970. The second and third plaintiffs, namely, Sasikala and Mohan, are the daughter and son of Shanmugam, who is the brother of the first plaintiff. The deceased Lakshmanan, had executed a registered Will dated 14.06.1989 bequeathing his properties to the first plaintiff and the father of the second and third plaintiffs. The mother of the first plaintiff, died before Lakshmanan, and after her death, her husband Lakshmanan, and her two sons, namely, Andi, the first plaintiff and Shanmugam, were enjoying the properties. Subsequently, Lakshmanan also died in the year 1990, and before his death, a Will was also executed by him in favour his two sons, the first plaintiff and his brother Shanmugam, and hence, they were enjoying the suit properties jointly without effecting any partition. The brothers of the first defendant had filed a suit in O.S.No.157 of 1995, for declaration of title in respect of the suit properties against the first plaintiff and his brother Shanmugam, and the said suit was dismissed on 30.08.1996 in favour of the appellants herein. Thereafter, the brothers of the first defendant, had filed first appeal in A.S.143 of 1997 before the Sub-Ordinate Judge, Pudukkottai, which was also dismissed on merit. Subsequently, on 01.12.1997, a compromise decree was passed in the partition suit in O.S.No.106 of 1997 filed in respect of the suit properties between the first plaintiff and his brother, wherein, a part of the suit properties came into the hands of the plaintiffs 2 and 3. In view of the above suits, the plaintiffs 1 to 3 became the owners of the suit properties in the present suit. On 25.11.2008, the defendants, by claiming false right over the suit properties, had tried to trespass into the suit properties of the plaintiffs, and therefore, a suit in O.S.No.193 of 2008 was filed by the plaintiffs, for declaration of title and for permanent injunction.

4. The case of the defendant is as follows:

"The suit has been laid suppressing the fact that Lakshmanan is the husband of the first defendant and father of the defendants 2 to 4. It is false to allege that Lakshmanan had executed a registered 'Will' in favour of the first plaintiff and his brother Shanmugam on 14.06.1986. In order to deprive the defendants from the legitimate share in the suit properties, the first plaintiff's brother Shanmugam with the connivance of the first plaintiff has created the Will. Lakshmanan till his death lived with his two wives Deivanai and the first defendant along with his children. Based upon the forged Will, suits were filed one after another to create documents to defeat the right of the defendants. Lakshmanan had no right to execute the Will, more so, when he had already orally partitioned the properties into two equal shares and had allotted one share to each of his two wives and their children. After the death of Lakshmanan, joint patta was issued in favour of the plaintiffs and the defendant. The defendants are enjoying the share allotted to them in the oral partition and as such, the suit filed by the plaintiffs seeking the relief of declaration of title in respect of the entire suit properties is not maintainable. Since the



first plaintiff's brother Shanmugam, who is the father of the plaintiffs 2 and 3, is not added as a party to the suit, the suit is bad for non-joinder of necessary parties and prayed for dismissal of the suit.

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5. The said suit was contested by both the parties and the District Munsif cum Judicial Magistrate, Keeranur, in O.S.No.193 of 2008, has granted the Judgment and Decree in favour of the plaintiffs, declaring that the plaintiffs are the absolute owners of the suit property except the property situated in SF.No.46/3, and in respect of the said Survey No, the Trial Court declared that the plaintiffs are entitled for 0.16.5 hectares out of the total extent of 0.26.0 hectares, and Permanent injunction was also granted in favour of the plaintiffs. Hence, an appeal suit in A.S.No.3 of 2011 was filed by the defendants before the Sub-Court, Pudukkottai, against the said Judgment and Decree, wherein, the Sub-Judge, had passed an order, remanding back the case to the Trial Court for reconsideration of the Judgment and Decree passed in O.S.No.193 of 2008 dated 31.08.2010.

6. The defendants, who are the appellants in A.S.No.3 of 2011, had claimed title and share in the suit property, stating that it is a joint family property and hence, the share of the suit properties, should be divided equally to all the legal heirs of the deceased Lakshmanan.

7. The appellants in first appeal, had submitted that the first defendant is the second wife of deceased Lakshmanan and the defendants 2 to 3 are also the sons of deceased Lakshmanan, and thereby, they denied the execution of the Will. It is also submitted that the said Lakshmanan, father of the first plaintiff, lived happily with the two wives, and since, the second and third plaintiffs' father Shanmugham is an Advocate, he has forged the documents and they have no rights to claim title and permanent injunction against the defendants. Further, the defendants have also produced various documents before the Appellate Court to prove that they are also the legal heirs of the deceased Lakshmanan. The defendants further submitted that the father of the plaintiffs 2 and 3, is Shanmugam, and the plaintiffs, without adding him as a party to the suit even though he is one of the legal heir of the deceased Lakshmanan, had added his son and daughter as parties in the suit, and hence, the Trial Court ought to have dismissed the suit.

8. Based on the fresh documents submitted by the defendants, and also giving further opportunity to the defendants to prove that the said Will was not genuine, the Lower Appellate Court, had found that totally 15 properties were mentioned in the suit schedule of properties, as if they are connected to the said Will but out of which, only 9 items were shown in the list of properties in the Will and other 6 items mentioned in the suit schedule of properties i.e., 3, 9, 12, 13, 14, 15 have not been included in the said Will. Hence, the

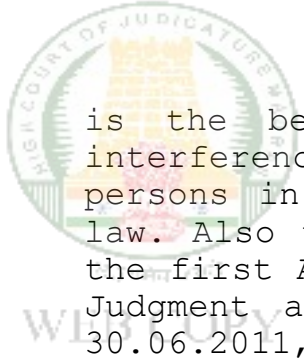


title for the other properties, have not been proved, when there was no mention about the properties which were allotted to the plaintiffs. The properties of deceased Deivanai, to an extent of 1 ¹/₂ acres, have also to be divided among all the legal heirs of her and therefore, the said Lakshmanan (deceased) has no right to bequeath the same by way of Will to the first plaintiff and his brother Shanmugham, and which is not legally acceptable; the other legal heirs, namely, Pappu and Bagyam, even though they have not claimed any share in the suit property, being the daughters were not made as parties, who are also necessary parties in the said proceedings. For the aforesaid reasons, the Lower Appellate Court remanded the matter back to the Trial Court.

9. The learned counsel for the appellants/plaintiffs, would submit that there need not be any remand when there is no issues for fresh consideration when the Lower Appellate Court has not set aside the Judgment and Decree of the Trial Court. He further submitted that remanding the matter back for fresh consideration is illegal and direction to implead the sisters who are not at all necessary parties, which issue is standing outside the scope of the relief sought in the suit. The suit has been filed only when there was a dispute between the present parties for declaration and injunction. Based on Ex.A4, the same has been proved by examining the attesting witness - PW2 and the defendants herein are third parties to the said properties and the defendants are neither legal heirs of Deivanai nor beneficiary under the Will executed by Lakshmanan (deceased). The Trial Court has rightly prevented them from interfering by way of granting permanent injunction.

10. The Respondent counsel would contend that the Lower Appellate Court has come to the conclusion that the defendants 2 & 3 are the brothers of the plaintiffs, and the mother of the first plaintiff and the first defendant are the sisters. Hence, in order to prove the genuineness of the Will, the other persons also should be made as a party to the proceedings and necessary opportunity is to be offered to the plaintiffs. Hence, when the Will was not proved as genuine, the properties which have been bequeathed in the Will, and the legal heirs and the beneficiaries included in the Will, have to be decided afresh. Therefore, the Lower Appellate Court has rightly remanded the matter back to the Trial Court to reconsider the issue and to pass order.

11. The learned counsel for the appellants/plaintiffs, would further submit that the Lower Appellate Court has framed separate issues and called for finding from the Trial Court, by remanding them back to the Lower Court. The Appellate Court has failed to note that there is no pleading about any dispute among the plaintiffs and their sisters in respect of the suit properties and hence, remanding the matter back with the observation to implead the said sisters, is unwarranted. The first plaintiff and his brother are beneficiaries under Ex.A.4 and later, plaintiffs 2 and 3, got the properties through a Court decree from their father Shanmugam, who



is the beneficiary of the Will bequeathed by Lakshmanan. The interference of the Appellate Court, and direction to implead other persons in the suit, and also to take evidence afresh is against law. Also there are clerical mistakes in the said decree passed by the first Appellate Court, and hence, they sought to set aside the Judgment and Decree passed by the Sub- Court, Pudukkottai dated 30.06.2011, which had remanded back the case to the Trial Court for fresh consideration. They prayed to confirm the Judgment and Decree passed in O.S.No.193 of 2008 dated 31.08.2010.

12. Heard the learned counsel for the appellants and learned counsel for the respondents and perused the materials available on record.

13. The Lower Appellate Court has not considered the fact that the suit filed by the first defendant's brothers in O.S.No.157 of 1997 and the appeal suit were dismissed and went in favour of the first plaintiff and his brother Shanmugham. The deceased Lakshmanan executed Will on 14.06.1989 and the mother of the first plaintiff, Deivanai had died before Lakshmanan. After their death, the first plaintiff and his brother Shanmugham, had been enjoying their properties and therefore, the first plaintiffs mother's brothers had filed a suit for declaration and injunction.

14. The first defendant, being the second wife of Lakshmanan and the defendants 2 and 4 being their children, had not entered into the witness box to prove the relationship between the said Lakshmanan and the first defendant. When they have not taken enough steps to prove that they are the legal heirs to the first defendant, the Lower Appellate Court has directed the Lower Court to decide the issue once again. The Lower Appellate Court has given a finding that the plaintiffs have not proved the Will by examining the attesting witness properly. When the Lower Appellate Court has come to the conclusion that the Will has not been proved and some of the parties to be impleaded, etc, the Lower Appellate Court itself can decide the issue afresh, after giving opportunity to the parties.

15. The suit is of the year 2008 and the appeal is of the year 2011 and now, we are in 2017, hence, the Lower Appellate Court itself can frame issues afresh and decide the issues and pass order, instead of remanding the matter back to the Trial Court. If the matter is remanded back, it may cause more delay and take some more years to reach finality. Hence, the Lower Appellate Court is directed to frame issues and decide the issues framed afresh, after giving necessary opportunity to the parties to let in evidence regarding the same, on merits and in accordance with the law within a period of six months from the date of receipt of a copy of this order. Accordingly, this Civil Miscellaneous Appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.



Sd/-
Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

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To

1. The Subordinate Judge, Pudukkottai.
2. The District Munsif-cum-Judicial Magistrate,
Keeranur.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai (2 Copies)

+1CC to Mr.M.Karthikeya Venkitachalapathy, Advocate, SR.No. 89523
+1CC to Mr.K.Baalasundharam, Advocate, SR.No. 89016

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and
M.P (MD) No.1 of 2011
23.11.2017

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VE/JC/SAR 4/07.06.2018/6P/7C