

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.04.2018

Pronounced on : 21.12.2018

C O R A M

THE HONOURABLE MRS.JUSTICE S.RAMATHILAGAM

C.M.A.No.2354 of 2013 & M.P.No.1 of 2013

A.Pakkirisamy ...Appellant/Defendant

Vs.

Sri Siddhi Vinayakar
Pillaiyar Koil
rep.by its Hereditary Trustee
Mr.M.Sowrirajan ...Respondent/ Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43, Rule 1 of C.P.C against the judgment and decree dated 06.04.2013 passed in A.S.No.45 of 2011 before the Subordinate Court, Nagapattinam remitting the matter after setting aside the judgment and decree dated 05.07.2010 passed in O.S.No.108 of 2009 on the file of District Munsif Court, Nagapattinam.

For Appellant : Mr.T.V.Ramanujam,
Senior Counsel
for Mrs R.Ramya

For Respondent : Mr.S.Sounthar

JUDGMENT

This Civil Miscellaneous Appeal is preferred against the judgment and decree dated 06.04.2013 in A.S.No.45 of 2011 passed by the Sub Court, Nagapattinam, remitting the matter after setting aside the judgment and decree dated 05.07.2010 made in O.S.No.108 of 2009 on the file of the District Munsif Court, Nagapattinam.

2.A.S.No.45 of 2011 was preferred against the judgment and decree made in O.S.No.108 of 2009 which was dismissed in consequent to the order passed by the District Munsif, Nagapattinam in I.A.No.777 of 2009 in O.S.No.108 of 2009 dated 05.07.2010.

3.The respondent herein/plaintiff has filed the main suit in the capacity of hereditary Trustee of Sri Siddhi Vinayagar temple. The said suit was dismissed by the Trial court on the findings that he has no right to file

the suit in that capacity because the petition filed by his father namely Malayaperumal before the Deputy Commissioner, HR & CE to declare him as Hereditary Trustee of the said Siddhi Vinayagar temple, was dismissed after enquiry on 30.09.1982 and the said Malayaperumal had not filed any appeal; hence, the suit filed by the respondent/plaintiff in the capacity of hereditary Trustee is not maintainable.

4.It has been stated by the respondent/plaintiff that he and his ancestors are administering the temple by performing poojas. The father of the defendant namely A. Narayana Pillai entered into a rental agreement and obtained the building mentioned in the suit property. After the death of the father of the defendant in the year 1973, the defendant has been in the building as a tenant in the capacity of legal heir of the said A.Narayana Pillai, but the defendant had taken away the valuable wood worth about Rs.5,00,000/- and damaged the house. Hence, the plaintiff has filed the suit for permanent injunction. It is further stated by the respondent/plaintiff that the father of the defendant, admitting the capacity of the plaintiff's father as a hereditary trustee, has entered into the rental agreement and as such, the defendant is now estopped from denying the same. With regard to the dismissal of the petition filed by the plaintiff's father before the Deputy Commissioner, HR & CE, for declaring himself as hereditary trustee, it is contended by the plaintiff that since no steps were taken against the order of the Deputy Commissioner, the right of the plaintiff 's father as hereditary trustee cannot be taken away.

5.The petition I.A.No.777 of 2009 was filed by the defendant in the suit, praying to decide the issue as to whether the plaintiff has right to file the suit in the capacity of hereditary trustee, as a preliminary issue.

6.The Trial Court, after analysing the entire evidence adduced on either side and after hearing the arguments, has given a finding that in view of the order of the HR & CE Board, under which the prayer of the plaintiff's father to declare him as hereditary trustee was rejected, the said issue need not be tried as preliminary issue, thus the Trial Court dismissed said petition viz. I.A.No.777 of 2009. Consequent to the said findings in I.A.No.777 of 2009, the Trial Court dismissed the suit in O.S.No.108 of 2009 by judgment and decree dated 05.07.2010. Aggrieved over the same, the plaintiff had preferred an appeal in A.S.No.45 of 2011 before the learned Subordinate Judge, Nagapattinam. In the meantime, as against the dismissal of the said I.A.777 of 2009, the plaintiff filed a Civil Revision Petition in

CRP.No.1546 of 2011 before this Court. By order dated 21.09.2012, this Court closed the said CRP giving liberty to the plaintiff to raise all the issues in the appeal suit pending before the first appellate Court.

7.In the first appeal, it has been observed by the First Appellate Court that though the defendant has raised a plea in the petition (I.A.No.777 of 2009) for taking up the plea as to whether the plaintiff can maintain a suit in the capacity of a hereditary Trustee or not as a preliminary issue, he has not made the plea as an additional issue in the main suit.

8.When a direction was given by this Court in CRP that the said issue has to be tried before the appellate Court, it is not proper on the part of the First Appellate Court to observe that the Trial Judge has not framed the said issue for deciding for the same to enable the plaintiff to put forth his contentions.

9.The points raised by the first appellate Court for consideration in the appeal is

"1.whether the learned Trial Judge is correct in deciding the case without framing the preliminary issue at all and consequently decided the suit on that basis?

2.Whether the judgment and decree passed by the learned District Munsif, Nagapattinam in I.A.No.777 of 2009 in O.S.No.108 of 2009 on 05.07.2009 and consequent judgment and decree passed in the suit in O.S.No.108 of 2009 on 05.09.2009 warrant interference by this Court?"

10.The first appellate Court has given a finding that the trial Court has not framed the issue as an additional issue regarding the capacity of the plaintiff as hereditary Trustee. It has also given a finding that the issue regarding the jurisdiction part was not raised by the defendant in the written statement. It is also discussed by the first appellate Court that the Trial Court ought to have framed a particular issue with regard to the maintainability of the suit by the plaintiff in the capacity of hereditary trustee. Further, the discussions made by the first appellate Court regarding the direction given by this Court in the Civil Revision Petition are that this Court closed the Civil Revision Petition by giving opportunity to the petitioner/plaintiff to raise all these issues in the first appeal. Further, it was observed that this Court did not express any opinion on the order passed by the Trial Court and as such, the first two lines found in para 8 of the order of this Court in CRP could not be treated as the findings given by this Court in view of the latter portion of the order

of this Court. Again it has stated that as the Trial Judge has not raised the particular point as preliminary issue, the fair and decreetal order passed in I.A.No.777 of 2009 and the consequent judgment and decree passed in O.S.No.108 of 2009, are not correct. Thus, the first appellate Court remanded the case back to the learned District Munsif, Nagapattinam with a direction to permit the defendant to raise all the pleadings by way of additional written statement and permit the plaintiff to file reply statement and to frame all the issues arisen in the suit and to dispose of the suit in accordance with law.

11.In the CRP, this Court had discussed that the only issue to be decided in the CRP is—

“whether the Court below was right in allowing the application filed by the defendant under order 14 Rule 1 and 2 CPC for deciding the issue that whether the suit is maintainable by the person, who is claiming be the hereditary trustee when actually he is not hereditary trustee by virtue of the order passed by the HR& CE, Department, Myladuthuri under Section 63(b) of the Tamil Nadu Hindu Religious and Charitable Endowment Act, 1959.”

Further, the application Order 14 Rule 1 & 2 CPC was filed by the defendant to try the issue as the preliminary issue and it was objected by the plaintiff by filing counter. The Trial Court went to the question in detail and found that the order passed by the HR & CE Department holding that the plaintiff is not hereditary and the said order has become final as no appeal was filed before the appellate authority challenging the order.

12.It is also observed by this Court in its order in CRP that the plaintiff, whose suit was dismissed, has preferred an appeal against the judgment and decree before the Sub-Court and as such, filing the revision petition before this Court under Article 227 of the Constitution of India is not maintainable. According, this Court had expressed its opinion with regard to raising the issue in the first appeal.

13.The order of this Court in CRP is very clear that once the appeal is preferred, filing a revision petition before this Court is not maintainable and once the preliminary issue raised is answered and the suit is no longer subsisting and the parties will have to work out the remedy only by way of appeal. Based on the said finding, direction was given to the first appellate Court, giving opportunity to the parties to raise all

these issues in the first appeal before the Sub-Court.

14. Whereas the first appellate Court interpreting the order of this Court as if no opinion has been given by this Court, discussed the order of the trial Court to the effect that no issues have been framed by the Trial Judge and it has not tried the suit accordingly and hence the dismissal of the suit on the said basis is not proper. When it has been clearly observed by this Court in the CRP that regarding the issue, a first appeal has been preferred and all the issue have to be dealt with in the first appeal. In view of the direction given in the CRP, it is for the first appellate Court to decide the issues by allowing the parties to raise all the issues. Hence, the first appellate Court cannot send back the case to the Trial Court against the direction of this Court. Hence, the first appellate Court once again need not remit the matter to the trial Court for deciding the said issue sought by the parties.

15. In view of the above discussion, the impugned judgment and decree passed by the First appellate Court is set aside and the case is remanded back to the first appellate Court for framing all the issues and to allow the parties to raise all issues. It is made clear that the first appeal has to be disposed of within a period of three months from the date of receipt of a copy of this order.

16. With the above terms, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (CS iii)

//True Copy//

Sub Assistant Registrar

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To

1 The Subordinate Judge, Nagapattinam

2. The District Munsif, Nagapattinam

Copy to:

The section officer,
VR Section, High court, Madras

+1cc to Mr. S. Sounthar, Advocate SR.No. 89711

+1cc to Mr. C. Jagathish, Advocate SR.No. 89207

C.M.A.No.2354 of 2013

& M.P.No.1 of 2013

A.SK(21/03/2019)