



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on : 19.09.2019

Orders Pronounced on : 27.09.2019

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CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

C.M.A. (MD) No.358 of 2007

and

M.P. (MD) No.1 of 2007

P.Malleeswari ...Appellant/1st Respondent/Plaintiff

Vs.

1.M.Janaki Ammal ...1st respondent / Appellant /1st defendant

2.Rajeswari

...2nd Respondent/ 2nd Respondent/
2nd defendant

PRAYER: Civil Miscellaneous Appeal is filed, under Order XLIII Rule 1(i) of Code of Civil Procedure, to call for the records relating to the judgment and decree, dated 19.12.2006 of the Principal District Judge, Virudhunagar District at Srivilliputhur made in A.S.No.89 of 2004 passed against the judgment and decree dated 19.02.2004 passed in O.S.No.190 of 2001 on the file of the Subordinate Judge, Aruppukkottai and set aside the same in so far as it remands the suit to the file of Subordinate Judge, Aruppukkottai.

For Appellant : Mr.S.Parthasarathy

For R-1 : Mrs.Dhanalakshmi
for Mr.K.M.Vijayakumar

JUDGMENT

This Civil Miscellaneous Appeal has been filed as against the judgment and decree, dated 19.12.2006 passed by the learned Principal District Judge, Virudhunagar District at Srivilliputhur, in A.S.No.89 of 2004, whereby the first appellate Court had allowed the petition in I.A.No.353 of 2005 and set aside the judgment and decree dated 19.02.2004 passed in O.S.No.190 of 2001 by the Subordinate Judge, Aruppukkottai and remanded the matter to the trial Court for the purpose of adducing additional evidence in order to give clear cut conclusion with respect to Ex.B.4-Will. The

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2001 on the file of the learned Subordinate Judge, Aruppukkottai, seeking the relief of partition.

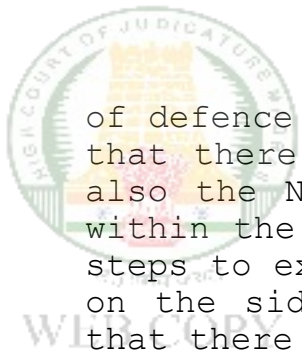
2.The learned counsel for the appellant submitted that the suit property originally belonged to one Uthanu Chettiar. The said Uthanu Chettiar executed a registered settlement deed, which is marked as A1 = B2, dated 02.11.1973 in favour of his two daughters viz., Thayammal and Janaki Ammal (1st defendant). The said Thayammal died leaving behind her two daughters viz., the plaintiff and the 2nd defendant as her legal heirs.

3.Therefore, the undivided half interest possessed by Thayammal devolved upon the plaintiff and the 2nd defendant. The another undivided half interest in the suit scheduled property was held by the first defendant. The plaintiff filed the suit for partition claiming 1/4th share in the suit property. The first defendant has projected an unregistered Will dated 06.07.1991 as Ex.B.4 alleged to have been executed by the deceased Thayammal in her favour and on the basis of which he lodges a claim over the entire suit property. But for the said Will, the first defendant may not have absolute right, except her undivided half share in the suit property.

4.Further, the learned counsel for the appellant submitted that the first defendant did not subject herself for examination, on the other hand, her husband was examined as D.W.1 through whom the alleged Will was propounded in evidence. Further, the first defendant did not produce the Will into Court at the time of filing written statement. Hence, notice under Order 12 Rule 8 of C.P.C. was given to the first defendant for production of the same. Even then, the said Will was not produced and was produced only at the time of examination of D.W.1.

5.The learned counsel for the appellant would further contend that there are suspicious circumstances over the said Will with regard to its execution, attestation, the necessity for discarding the daughters and executing the same in favour of his sister, the first defendant. D.W.1, who is the husband of the first defendant, has no knowledge about the Will and he had no role to play in the said Will. Under these circumstances, he himself came forward and deposed as D.W.1 in the place of his wife. He had no knowledge about the Will. He is neither a witness nor the attester to the Will. Therefore, the Will is not proved by the first defendant in whose favour the said Will alleged to have been executed.

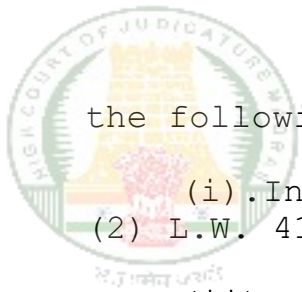
6.The learned counsel for the appellant further submitted that one Mr.Sankaran, said to be the attester of the Will, was examined as D.W.2. After examining D.W.2, at the instance of the first defendant, the trial Court posted the matter for further evidence, but no further oral evidence was produced on the side of the first defendant and an endorsement was made on the side of the first defendant. Further evidence is closed. So at the time of examination



of defence side witnesses, the defendants are well aware of the fact that there are two attestors, which are available for the Will and also the Notary public, who signed the Will. These facts are well within the knowledge of the defendants. But they have not taken any steps to examine the another witness, when they deposed the evidence on the side of defendants and they themselves made an endorsement that there is no further evidence on their side.

7.The learned Judge, after scrutinizing of both oral and documentary evidence, disbelieving the Will, which is marked as Ex.B.4, had decreed the suit as prayed for. As against the said verdict, the first defendant preferred an appeal in A.S.No.89 of 2004 on the file of the District Court, Srivilliputhur. When the appeal was posted for arguments, the first defendant filed a petition in I.A.No.353 of 2005 under Order 41, Rule 27 of C.P.C. for examination of further witnesses. The said petition was heard along with main appeal. The first appellate Court had allowed the I.A.No.353 of 2005 and set aside the decree and Judgment of the trial Court and remanded the suit before the trial Court for fresh disposal by giving opportunity to the first defendant to prove the alleged Will Ex.B.4 by examining further witnesses.

8.The main case of the revision petitioner is that when Ex.B.4 Will was not proved through the first defendant, on the other hand, it was proved through her husband and at the time of examination of the defence side witnesses, the defendant examined only one of the attestors of the Will-Ex.B4. The first defendant was well aware of the fact that one more attestor is available apart from the Notary Public who signed the Will. But the first defendant has not chosen to examine these two witnesses at that point of time. However, she has examined only one of the attestors in order to prove Ex.B.4-Will. After examining the said attestor the defendants' side evidence was closed. Therefore, it is not the case of the first respondent that the witnesses that they intend to examine in order to prove the genuinenity of Ex.B.4 Will is not available and not within the knowledge of the defendants, but it is very well within her knowledge, but she has not chosen to examine these two witnesses. Now, she is trying to fill up the lacunae in her case and she has filed an application wherein she has stated that D.W.2 witness was not considered by the Court below. Therefore, she needs to examine further evidence and for these purpose alone she filed the present petition before the Court below. The petition was filed for re-marking the evidence and the same was allowed by the appellate Court, which cannot be permitted and it is totally illegal on the part of the appellate Court in remanding the mater. On the other hand, if the lower Court failed to consider one of the depositions of the attesting witness that is D.W.2, the appellate Court itself should have gone through the evidence and should have appreciated the evidence and passed an order on merts. Without doing so, remanding the matter is unsustainable in law. In support of this, the learned counsel for the appellant relied on



the following Judgments:-

(i).In VISALAKSHI AMMAL v. DHANALAKSHMI AMMAL reported in 1989 (2) L.W. 414;

(ii).In KANNATHAL v. ARULMIGHU KANNIAMMAL KARUPPASAMY THIRUKOIL reported in 2007 (2) CTC 49;

(iii).In MALAYALAM PLANTATIONS LTD V. STATE OF KERALA, reported in 2011 (1) CTC 122;

(iv).In UNION OF INDIA v. IBRAHIM UDDIN, reported in 2012 (4) L.W. 359; and

(v).In P.V.CHINNARAJ v. V.NAGARAJ, reported in 2013 (1) L.W. 353.

9.On the other hand, the learned counsel appearing for the first respondent/first defendant would contend that I.A.No.353 of 2005 filed by the first respondent/first defendant under Order 41, Rule 27, was allowed by giving opportunity to the first respondent to prove the alleged Ex.B.4-Will by examining the further witnesses. Further, the learned counsel would contend that under Section 120 of Indian Evidence Act, the husband is the fit witness to depose on behalf of his wife. So in order to prove Ex.B.4-Will, the first defendant examined one of the attesting witnesses Mr.Sankaran, who is the first attester. The learned trial Court failed to appreciate the testimony of D.W.2. Therefore, according to the first respondent/first defendant, it is just and necessary to examine further witness to enable them to prove Ex.B.4-Will. Further she contended that there is no suspicious with regard to the execution and attestation of the Will. Further, she admitted that Ex.B.4-Will is an unregistered Will executed by Thayammal in respect of her 1/2 share in the presence of Notary Public and other witnesses. The suit property is nothing but a house property. During the life time of Thayammal, the first defendant only has taken care of her and her daughters that is plaintiff and the second defendant failed to take care of their mother. Therefore, out of love and affection only the said Thayammal executed the Will in favour of the first defendant, who is none other than her sister. However, she admitted the fact that the last rites of Thayammal was carried out only by her two daughters viz., the plaintiff and the second defendant. Therefore, she contended that the plaintiff and the second defendant do not have any right over the suit schedule property. Further, only the first defendant has been enjoying the property from the beginning and until the filing of the present suit, the plaintiff and the second defendant never interfered with the possession of the property with the first defendant. Ex.A1 and Ex.B2 are one and the same document, which is a settlement deed executed by the father of the first defendant. Therefore, the learned counsel



for the first respondent/first defendant would contend that since D.W.2's evidence was not considered by the Court below, who is one of the attestors of the Will, therefore, she has moved an application before the First Appellate Court to examine the another attessor and the Notary Public in order to prove the Will. The first appellate Court also agreed with the submission of the first respondent herein and permitted the first respondent/first defendant to prove the Ex.B.4 Will by way of another attesting witness and the Notary Public, who notarized the Will. In support of her contention, the learned counsel for the first respondent/first defendant placed reliance on the following Judgments:-

(i).In KRISTO GOPA v. BAIDYA NATH, reported in AIR 1939 CALCUTTA 87;

(ii).In MANIKKAM AMMAL v. APPAVU MUDALIAR, reported in 2001 (3) M.L.J. 420;

(iii).In MEENAKSHIAMMAL (DEAD) THROUGH Lrs AND OTHERS v. CHANDRASEKARAN AND ANOTHER, reported in 2005 (2) L.W. 731; and

(iv).In K.A.AALIS v. K.A.MARI, reported in 2017 (4) CTC 160.

10.By referring the above Judgments, the learned counsel for the first respondent / first defendant submitted that it is the duty of the first respondent/first defendant to prove the execution of the Will in their favour and that the appellate Courts and the High Courts also upheld that if the party producing any Will, they are duty bound to prove the same by way of examining appropriate witnesses or by way of other documentary proof. In the present case, therefore, the learned counsel argued that the first appellate Court has rightly permitted the first respondent / first defendant in order to prove the execution of Will to examine the further witnesses. Therefore, the order passed by the Court below does not warrant any interference.

11.Heard the learned counsel for the appellant; the learned counsel for the first respondent and perused the materials available on record.

12.The present appeal has been filed by one of the daughters of the deceased Thayammal. The said Uthana Chettiar is the father of Thayammal and the first respondent/first defendant. During his life time, she settled the property through Ex.A.1 = Ex.B.2 which are one and the same, to and in favour of her two daughters viz., Thayammal and first respondent/first defendant equally. During the life time of Thayammal she enjoyed the 1/2 share of the suit scheduled property and the first defendant has been enjoying the another 1/2 share of the suit scheduled property. The said Thayammal was passed away and thereafter, her two daughters that is the plaintiff as well as the second respondent / second defendant are legally entitled for



plaintiff filed the present suit for partition, since the said property is an undivided property and the said Thayammal and the first respondent / first defendant have been enjoyed their respective share during their life time. When the suit was filed, the first defendant filed the written statement claiming that the plaintiff and the second respondent / second defendant are not entitled for the suit property, since the said property was conveyed through the Will (Ex.B.4) by the deceased Theyammal in her favour. However, she has not produced the said Will. Even, when she filed an application under Order 12, Rule 8 of C.P.C., the defendant failed to produce the same. But at the time of examination of D.W.1, the first defendant brought this original Will and marked through her husband/D.W.1. When the first defendant is available, the said Will was not marked through her, but it was marked through her husband, who is no where related to this property.

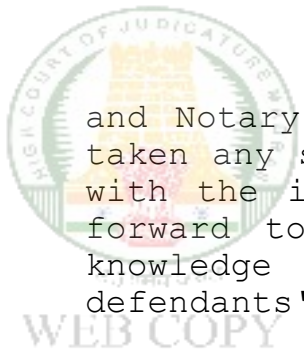
13.In the present case, the first defendant examined one of the attesting witnesses as D.W.2 and after examining D.W.2, the defendants made an endorsement stating that they are not going to examine any more witness on their side, to prove the genuineness of the said Will. Therefore, when the first defendant made an endorsement for closing the witnesses on her side, the first defendant is well aware of the fact that one more attesting witness is available apart from the Notary Public, who notarized the Will. However, she has not taken any steps to examine these witnesses, which were well within her knowledge.

14.Now, the issue here is whether the first respondent / first defendant can examine the additional witnesses to prove the execution of the Will in the appellate stage for the sole reason that the D.W.2 oral evidence is not sufficient to prove the Will?.

15.The answer to this question is 'No'. If it is allowed, it will clearly amounts to fill up the lacunae of the case on the side of the first defendant. Even in the application she has clearly mentioned that she had filed the application because D.W.2 attesting deposition has not been considered by the trial Court. Therefore, she wants to examine the another attesting other witness, which according to this Court's view cannot be permitted and if it is permitted, it will clearly amount to permitting the first respondent / first defendant to fill up the lacunae in this case and improving her case further.

16.Secondly, when the first defendant was examining the witnesses, whether she had no knowledge about the present witness for the purpose of examination or the present witness is purely a new one, which is not available at the time of examination of defendants side witnesses?

17.The answer to this issue is certainly 'No'. The first
<https://hccerectortn.gov.in/cservices> defendant is well aware of the fact that another attesting witness



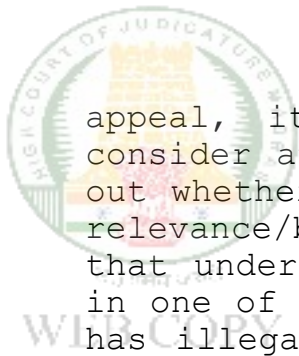
and Notary Public were available for examination, but she has not taken any steps and she has examined only one attesting witness and with the intention to fill up the lacunae only, now she has come forward to examine the other witness, which is well within the knowledge of the first defendant at the time of examination of defendants' side witnesses.

18.In such being the case, the first defendant has failed to utilize her opportunities to examine the witnesses on her side, now, once again troubling the Court and unnecessarily knocking the door of the Court to examine the witness, which cannot be permitted.

19.Hence, this Court of the view that it is not the business of the appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial Court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower Court is not entitled to the indulgence of being allowed to give further evidence. So a party who had ample opportunity to produce certain evidence in the lower Court but failed to do so or elected not to do so, cannot have it admitted in appeal. In the present case the first defendant had knowledge about both the attestors and Notary Public but she choose to examine only one attestor as D.W.2 and closed the first defendant side evidence. The said view has been appreciated by the Hon'ble Apex Court in the decision STATE OF U.P. v. MANBODHAN LAL SRIVASTAVA reported in AIR 1957 SC 912.

20.Further, an inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. Therefore, the appellate Court should not have remanded the appeal to the lower Court, instead it should have disposed of the appeal itself.

21.Further, the unsatisfactory consideration of an issue by the first Court, while deciding an issue and the need to take additional evidence, should not always be counted in favour of making an order of remand. These lacunae, can be rectified by the appellate Court itself, unless there are very compelling circumstances to make an order of remand. An order of remand should not be taken to be matter of course on the above grounds. The power of remand should be sparingly exercised. There should be always endeavour to dispose of the case by the appellate court itself, when the commissions and omissions made by the first Court could be corrected by the appellate Court. But the appellate Court failed to do so.



appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) Whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case.

23. In the present case, the only contention of the respondent herein is that the trial court did not consider the evidence of D.W.2. Therefore, she wanted to examine more witnesses. However, this Court is of the view that the appellate Court should have decided the issue whether the trial Court has right in refusing to consider the evidence. But however, instead of doing such exercise, the appellate Court wrongly relegated the matter to the Court below for fresh adjudication, which is totally unwarranted. Further, in the present case, the first appellate Court has not taken any decision before remanding the matter whether the examination of the additional witnesses were not available at the time of trial, despite the exercise of due diligence. Admittedly, it is not the case of the first defendant that the evidence that they have intended to examine by way of remand is not available at the time of the trial. Admittedly, the another attesting witness and the Notary Public were very much available at the time of examination of the defendants' side witnesses. However, only the first defendant examined only one attesting witness and has not chosen to examine another attesting witness and the Notary Public. When that being the case, the first appellate Court should not have remanded the matter and on the other hand, it should have disposed of the appeal itself, without remanding the matter to the trial Court for fresh adjudication. Further, the decisions relied upon by the learned counsel appearing for the first respondent / first defendant are not applicable to the case on hand, because, in those decisions, it was decided about the genuineness of execution of the Will on the suspicious circumstances. But in the case on hand, the issue here is whether the first respondent / first defendant can be permitted to examine additional evidence in the appellate stage and that the first appellate Court has right in remanding the matter to the trial Court for adjudication.

24. In view of the above, the order passed by the Court below in A.S.No.89 of 2004 dated 19.12.2006 is set aside and this Court directed the Court below to dispose of the appeal in A.S.No.89 of 2004, within a period of three months from the date of



receipt of a copy of this order.

25. In result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

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Assistant Registrar (CS-III)

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Sub Assistant Registrar (CS)

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To

1. The Principal District Judge, Virudhunagar
District at Srivilliputhur.

2. The Subordinate Judge, Aruppukkottai.

+1 CC to M/s.S. PARTHASARATHY, Advocate (SR-90148[F] dated
27/09/2019)

+1 CC to M/s.K.M. VIJAYAKUMAR, Advocate (SR-90773[F] dated
01/10/2019)

Judgment made in
C.M.A. (MD) No. 358 of 2007
27.09.2019

JMN(24.10.2019) 9P : 5C