

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.02.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No.2713 of 2014

and

M.P.No.1 of 2014

1.Nacharu Ammal (died)

2.Malli Chetty

..Appellants

(Appellant 2: Recorded as LR of the deceased first appellant, Nacharu Ammal vide Court order dated 13.04.2018 in C.M.P.No.3520/2017 in C.M.A.No.2713/ 2014 - SRTJ)

Vs.

1.Ramalakshmi

2.Nagalakshmi

..Respondents

Prayer : Civil Miscellaneous Appeal filed under Order XLIII Rule 1(u) of the C.P.C. read with Section 104 C.P.C., against the judgment and decree dated 29.11.2013 made in A.S.No.59 of 2011 on the file of the Sub-ordinate Judge, Namakkal, remanding back the judgment and decree dated 29.06.2011 made in I.A.No.1061 of 2010 in O.S.No.1693 of 1981 on the file of the Additional District Munsif Court, Namakkal.

For Appellant : Mr.C.Prabakaran for
M/s.T.Dhanyakumar

For Respondents : Mr.D.Shivakumaran

J U D G M E N T

The judgment and decree dated 29.11.2013 passed in A.S.No.59 of 2011 is under challenge in the present Civil Miscellaneous Appeal.

2.The plaintiff is the appellant and the suit was instituted for partition. Suit decreed in favour of the plaintiff and the defendant filed an appeal Suit in A.S.No.59 of 2011. The first Appellate Court remanded the matter back to the Trial Court for the purpose of appointing an Advocate Commissioner to find out the means and bounds of the property and submit the fresh report enabling Court to decide the matter. The reason stated for appointing of fresh Advocate Commissioner is that the property was not partitioned for about 24 years.

3. This Court is of the considered opinion that undoubtedly the reason stated for appointment of fresh Advocate Commissioner is justified. The first Appellate Court is right in arriving a conclusion that a fresh Advocate Commissioner is to be appointed in order to ascertain the status of the property in question. However, for this purpose the first Appellate Court need not remand the matter back to the Trial Court. The first Appellate Court is empowered to appoint an Advocate Commissioner to find out the facts and circumstances and pass final orders. Instead of doing that the matter was remanded back to the Trial Court unnecessarily, which would cause hardship to the parties.

4. Section 107 C.P.C stipulates powers to the Appellate Court to take additional evidence or to receive additional documents for the purpose of passing final orders. A remand is to be made under Order 41 Rule 23 and 23-A, only if, the Trial Court decides the suit on certain preliminary issues.

5. Rule 23 Order 41 contemplates that if the issues are not adjudicated by the Trial Court with reference to the documents and evidences in entirety, then alone the remand is to be made. Thus, in all circumstances the Appellate Courts are expected to decide the matter finally on merits and in accordance with law. An order of remand is made only on exceptional circumstances, if it is not possible for the Appellate Court to decide the matters or records were not available to take a final decision.

6. Rule 24 Order 41 contemplates that the Appellate Court is empowered to receive additional documents or re-appreciate the evidences or documents or to re-examine the witnesses, if necessary, by affording an opportunity to all the parties and pass final orders in the Appeal Suit. Thus, longevity of litigation in all circumstances is to be avoided. In the event of remanding matter for clarification of certain related points, the parties would get prejudiced.

7. Thus, the first Appellate Court is well within its powers to appoint an Advocate Commissioner to find out the facts prevailing as on date, with reference to the suit properties and take a decision finally and dispose of the Appeal Suit on merits and in accordance with law and by affording opportunity to all the parties in the Appeal Suit.

8. Accordingly, the judgment and decree dated 29.11.2013 passed in A.S.No.59 of 2011 is set aside. The first Appellate Court is directed to take all steps to ensure that the present prevailing situation with reference to the suit properties are ascertained through an Advocate Commissioner or by Competent Authority or otherwise and take a decision and pass final orders on merits and in accordance with law by affording opportunity to

all the parties to the Appeal Suit. The said exercise is directed to be done within a period of six months from the date of receipt of a copy of this judgment.

9. The Parties to the appeal are directed, not to seek adjournments unnecessarily on flimsy grounds. In the event of adjournment on genuine grounds, the first Appellate Court shall record reasons for such adjournments.

10. Accordingly, C.M.A.N.2713 of 2014 stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

12.02.2021

This matter having been listed under the caption for being mentioned on 22.03.2021. Pursuant to the order of this court dated 12.02.2021 and made herein in the presence of the above said counsels on the either side the court made the following order:

The matter is listed today under the caption "for being mentioned".

2. The learned counsel appearing for the respondent raised an apprehension that the impleading of the second appellant may be wrongly interpreted with reference to his right under the Will. It is made clear that mere impleading of the second appellant in the present appeal would not confer any rights and his rights are to be established through evidence or any other document including the Will which is the subject matter in the appeal suit before the First Appellate Court. The First Appellate Court is bound to decide the issues independently and uninfluenced by the observations made by this Court.

सत्यमेव जयते Sd/-

Asst.Registrar (CS I)

/true copy/

Sub Asst. Registrar

pns
To

1. The Subordinate Judge, Namakkal.

2. The Additional District Munsif, Namakkal.

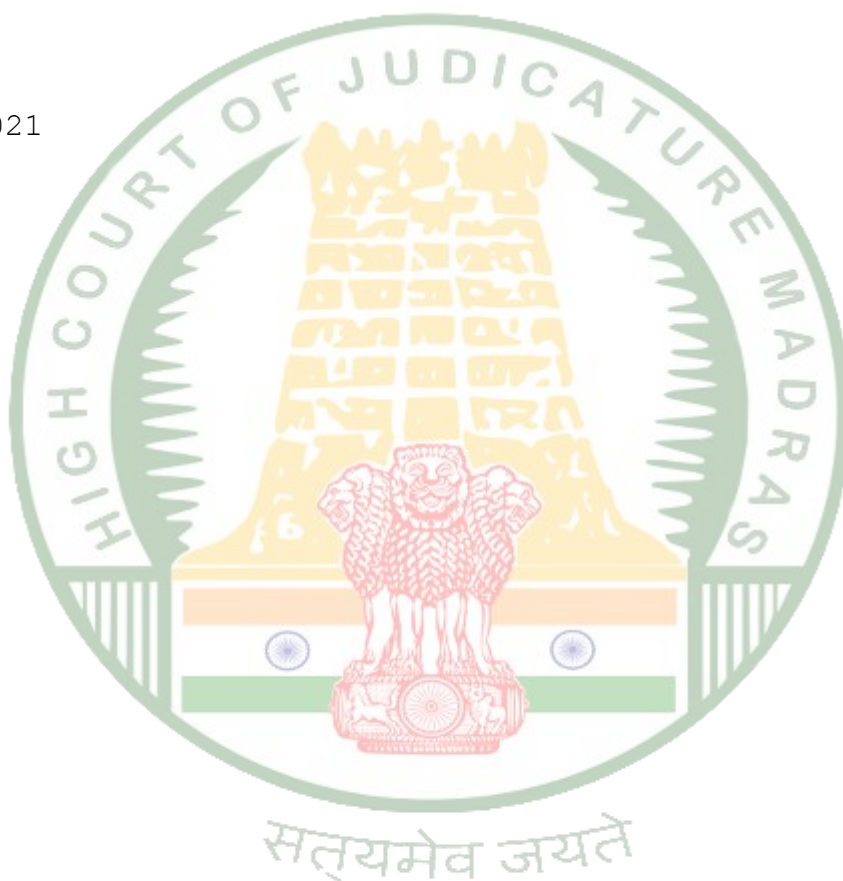
Copy to

The Section Officer
VR Section
High Court, Madras

+1 cc to Mr.Shivakumaran Advocate sr18375

C.M.A.No.2713 of 2014

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