



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE ON WHICH RESERVED : 16.12.2020

DATE ON WHICH PRONOUNCED: 11.01.2021

CORAM:

THE HON'BLE MR JUSTICE G.ILANGOVAN

C.M.A(MD) No.508 of 2010

and

Cross.OBJ(MD) No.60 of 2010

C.M.A(MD) No.508 of 2010

S.Ravichandran ... Appellant/2nd Respondent
2nd defendant

vs.

1.M.Velmurugan
2.M.Senthilkumar
3.M.Krishna Kumar ... Respondents 1 to 3/Appellants /
Plaintiffs

4.Balasubramaniam
(R4 Given up as set Exparte in A.S) ... 4th Respondent/3rd Respondent
3rd Defendant

5.G.Chermakani
6.G.Kalaiselvi
7.G.Rajkumar

8.G.Dhanalakshmi ... Respondents 5 to 8/Respondents
4 to 7 / Legal heirs of 1st Defendant

(R5 to R8 are given up as not necessary parties)

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of Civil Procedure Code against the judgment and decree dated 31.08.2009, made in A.S.No.152 of 2004 on the file of the Subordinate Judge, Tuticorin by confirming and remanding the judgment and decree dated 11.03.2004 made in O.S.No.11 of 2003 on the file of the Additional District Munsif, Tuticorin.

For Appellant : Mr.S.Kadarkarai
For R1 to R3 : Mr.C.Dhanaseelan
For R4 to R8 : Given up (Ex-parte)

Cross.OBJ(MD) No.60 of 2010

1.M.Velmurugan

2.M.Senthilkumar

3.M.Krishna Kumar ... Cross objectors/Respondents 1 to 3



Vs

1.S.Ravichandran

... Respondent/Appellant

2.Balasubramaniam

... 2nd Respondent/4th Respondent

(R2 given up as set ex parte in the Appeal Suit)

Prayer: Cross Objection filed under Order 41, Rule 22 of C.P.C, against the judgment and decree dated 31.08.2009 passed in A.S.No.152 of 2004 on the file of the Subordinate Judge, Tuticorin.

For Cross Objectors : Mr.C.Dhanaseelan
For R1 : Mr.S.Kadarkarai
For R4 : Given up (Ex-parte)

J U D G M E N T

This Civil Miscellaneous Appeal has been filed against the judgment and decree, dated 31.08.2009, made in A.S.No.152 of 2004, on the file of the Subordinate Judge, Tuticorin confirming and remanding the judgment and decree, dated 11.03.2004 made in O.S.No.11 of 2003, on the file of the Additional District Munsif, Tuticorin.

2.The plaintiffs averments made in the claim petition before the Trial Court is that the suit mentioned property was originally owned by one Kasiammal. She had four sons namely, Petchimuthu Nadar, Rajakani Nadar, Mariappa Nadar and Gurusamy Nadar. The first plaintiff is the sons of Mariappa Nadar. The deceased Gurusamy Nadar is the first defendant. Kasiammal had executed a registered Settlement Deed, dated 30.01.1963, in favour of her sons Petchimuthu Nadar and others, with the condition that, after her death, the above named four persons must enjoy the property jointly without making any encumbrance till their life time and that their male heirs would get the absolute estate of the schedule property after the life time of Petchimuthu Nadar and his brothers.

3. But later, after the death of Kasiammal, four brothers have made some family arrangements, by which, for the sake of convenience, they started and enjoying equal portion from the year 1971. While being so, the Petchimuthu Nadar attempted to make alienation in the suit schedule property. So, his brothers namely, Rajakani Nadar and Mariappa Nadar made a publication in 'Dina Thanthi', dated 15.09.2000. But later, the Gurusamy Nadar, without the knowledge of the other brothers, sold the suit mentioned property by way of sale deed, dated 26.04.2002 in favour of the second defendant. That sale deed is void. So, the suit is laid for declaration and injunction that the sale deed, dated 26.04.2002 is void and the said sale deed can in no way bind the other brothers of Gurusmy Nadar or their sons and for consequential injunction restraining the defendants, from claiming right and title over the property.



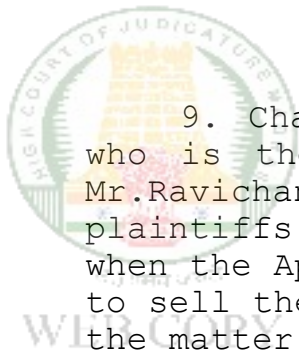
4. The deceased first defendant filed a written statement which was adopted by the defendants 2 & 3. The settlement deed dated 30.01.1963, is admitted. The condition imposed in the above said deed is also admitted. Even in the year 1971, the property was orally divided through partition, by which, 7.5 cents bearing Door No.39B/2 having an extent of 1.898 cents (827 sqft) was allotted to the share of the first defendant and his sons. The partition was effected on behalf of the sons as well as his grand-sons, they are possession and enjoyment of the property. There was only one house in the entire 7.5 cents with Door No.39/B. It was divided into four shares and the same was allotted to the shares of the sons and grandsons. The first defendant was in possession and enjoyment of the property allotted to him for more than 30 years. So, he got perfect title by way of adverse possession. On 26.04.2002, the first defendant sold his share of property to the second defendant. From the date of purchase, the second defendant is in possession and enjoyment of the said property, in which, the plaintiffs have no right.

5. It is denied that when the Petchimuthu Nadar tried to alienate the property, the Mariappa Nadar and the Rajakani Nadar effected paper publication. It is denied that the first defendant sold the property without the knowledge of his brothers. They had the knowledge about the sale. Since the first defendant was under financial difficulty for arranging the marriage of his daughter, he had to sell the property and only by the sale process, the marriage was performed and the second defendant is in possession and enjoyment of the property. So, on the basis of the pleading, the Trial Court framed four main issues and one additional issue.

6. On the side of the plaintiffs, the first plaintiff examined himself as P.W.1 and five documents marked. On the side of the defendants, they examined D.W.1 to D.W.3 and two documents marked.

7. At the conclusion of the trial, it came to the conclusion that the suit was not maintainable and dismissed the same, holding that in the year 1971, there was a partition and thereafter, the first defendant was in possession and so, he was entitled to sell the property and also found that the sale deed is also binding upon the plaintiffs. Challenging the finding, appeal was preferred by the defendants.

8. The Appellate Court, after elaborately discussing the rival contentions, came to the conclusion that the Trial Court has not properly appreciated the dispute between the parties, partition has been effected against the condition imposed in the Settlement Deed and other brothers are also necessary parties. For that purpose, it remanded the suit back to the Trial Court, for fresh trial.



9. Challenging the order of the remand, the second defendant, who is the second respondent before the Appellate Court namely, Mr.Ravichandran, has preferred this appeal by arraying the plaintiffs and other co-defendants as respondents on the ground that when the Appellate Court found that the first defendant has no right to sell the property, the Appellate Court ought not to have remanded the matter back to the Trial Court, for fresh trial. The findings in favour of the appellant. But the operative portion is against them as it is ordered that appeal is dismissed. This is an error apparent on the face of records and the decree has to be modified and set aside.

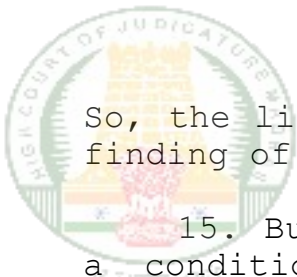
10. Cross objection was also filed challenging the remand order on the ground that since the appeal was dismissed, no remand order should have been passed.

11. The short point which arises for consideration in this Civil Miscellaneous Appeal is ***whether the order of remand passed by the Appellate Court is legally sustainable?***

12. An error has been committed by the Appellate Court as pointed out by the appellant in the grounds of appeal that the appeal has been dismissed and the matter was remanded back. Only on setting aside the decree passed by the Trial Court, the question of remand will arise. Without setting aside the decree and allowing the appeal, no remand is possible. But, it appears that it is only an error committed by the Appellate Court. So, it need not be given any importance and we have to confine only on the reason given by the Appellate Court for remanding the matter.

13. From the pleadings and from the narration of the facts, it is seen that the title over the property was originally owned by one Kasiammal, who is the mother of the four brothers. As detailed above, there is no dispute over it. Similarly, the Settlement Deed executed by Kasiammal through which her four sons derived life estate is not also denied. The certified copy of the Settlement Deed is marked as Ex.A1, on the side of the plaintiffs. So, as per the document only life estate was given to her four children and vested reminders were given to the grand- children.

14. But, against this spirit of Settlement Deed, it appears that the first defendant, contended that during the year 1971, there was a oral partition, in which, the suit mentioned property was allotted to him and the same was sold to the second defendant for performing the marriage of his daughter. So, according to him, the necessity arose for selling the property and therefore, he sold the same. The plaintiffs are the son and grand sons of Mariappa Nadar and they would say that since the sale was effected against the spirit of the Settlement Deed, it is not valid. Going by the recital, it is seen that no alienation was permitted by the sons.



So, the life estate holder cannot sell the property and this is the finding of the Appellate Court.

15. But, the Trial Court findings is that even though there is a condition even in the year 1991 itself, there was a oral partition, in which, suit property was allotted to the first defendant. But, this finding of fact, did not find favour with the Appellate Court. So, when the Appellate Court came to an independent conclusion that the necessity of remanding the matter does not arise.

16. The contention on the part of the appellant by relying Order 41 Rule 23 and 23A of CPC, would contend that sufficient evidence is available on record, it may itself decide the matter and the necessity for the remand does not arise. A perusal of the judgment of the Appellate Court shows according to it necessary parties were not included in the suit, since their right is also involved. But, no plea has been raised by the parties to the effect that the children of Kasiammal and grand sons are necessary parties. No issues were also framed on that point. The suit was filed by one of the branch, namely, the branch of Mariappa Nadar. The Appellate Court thought that no issue have been framed with regard to non-jointer of necessary parties. But, without pleading no issues can be framed. So, the only point to be decided is **1) whether the oral partition effected between the brothers and the first defendant is valid ?** and **2) whether it was proved ?** Sufficient evidence were available before the Appellate Court. So, the necessity of the remanding, does not arise at all.

17. The cross objection is also filed, challenging the remand order.

18. Under what circumstance, remand is permissible, has been elaborately discussed in the judgment in **Vadla Veerabhadrapa Vs Challa Venkatappa** reported in **AIR 1961 AP 226**. Contingencies upon which the remand is permissible is summarised, as follows:-

"5. It has been more than once pointed out by this Court that the power of remand exercisable by the appellate Courts should be sparingly exercised and should strictly be in conformity with Order 41, Rule 23 CPC., as amended by the Madras Amendment in force in this State, which is in the following terms:

" Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case, and may



WEB COPY

further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence(if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

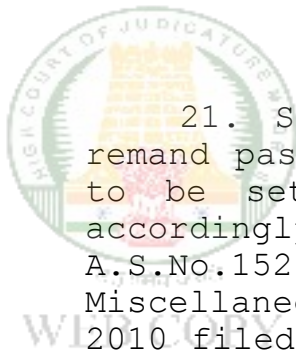
It may be seen from this rule that it is only in two contingencies that an appellate Court would be justified in ordering remand of a suit.

(1) the Court below must have disposed of the suit on a preliminary point and the appellate Court considered that the decision of the Court below on the preliminary point was wrong and bad to be reversed and consequently the suit had, accordingly, to be heard and disposed of on the merits of the various issues left undetermined by reason of the disposal on the preliminary issue,

(2) the appellate Court after fully hearing the appeal and considering the entire facts and circumstances of the case, must have come to the conclusion on the merits of the appeal, that the decree under appeal should be reversed or set aside and should, thereafter, also have come to the decision that it was necessary in the interests of justice to remand the case.

19. Further, this Court has relied upon the judgment in **Palanichamy Vs Apparsamy** reported in **AIR 2003 Madras 56**, wherein, it has been observed that with the required materials available on record, the Appellate Court must decide the same on its own and remand power should not be resorted to. This judgment was based upon the decision of the Hon'ble Supreme Court in **AshwinKumar K.Patel Vs Upendra J.Patel** reported in **AIR 1999 SC 1125** and **P.Purushottam and others Vs Pratap Steels Ltd.**, reported in **AR 2002 SC 771**.

20. As mentioned earlier, all the materials were available before the Appellate Court. When that is being so, and having recorded findings with regard to the validity and power of the defendant to sell, ought not to have exercised its jurisdiction to remand the case. More over, there must be a finding to the effect that remand is necessary in the interest of justice. No such finding is recorded by the Appellate Court.



21. So, I am of the considered view that the order of the remand passed by the Appellate Court is not well-founded and it is to be set aside and the appeal is liable to be allowed and accordingly, the order of remand passed by the Appellate Court A.S.No.152 of 2004, is set aside. Accordingly, the Civil Miscellaneous Appeal is allowed and the Cross Objection(MD)No.60 of 2010 filed by the respondents 1 to 3 is also to the extent of order of remand is allowed. No costs.

22. Since the main matter was filed in the year 2003, the Appellate Court shall give priority to the appeal and dispose of the same in accordance with law as expeditiously as possible.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

dss

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

- 1.The Subordinate Judge,
Tuticorin.
- 2.The Additional District Munsif,
Tuticorin.
- 3.The Record Keeper, (2 copies)
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

Judgment made in
C.M.A(MD) No.508 of 2010
and
Cross.OBJ(MD) No.60 of 2010
11.01.2021