



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 26.07.2021

Delivered On : 30.07.2021

WEB COPY

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A.(MD)No.741 of 2013
and M.P.(MD)No.1 of 2013

1.P.Muthupalaniandi
2.T.N.Subramanian
3.Kanagaraj

.. Appellants/Respondents/Defendants

Vs.

1.P.Subbammal
2.Gomathi Ammal

.. Respondents/Appellants/Plaintiffs

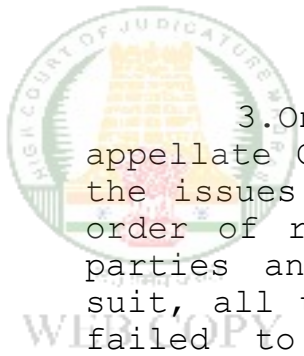
Prayer: This Civil Miscellaneous Appeal is filed under Order 43 Rule 1(u) of CPC, to set aside the judgment and decree dated 26.09.2007 made in A.S.No.44 of 2006 on the file of the Principal District and Sessions Judge, Theni remanding the case to the trial Court after set aside the judgment and decree dated 06.09.2006, made in O.S.No.59 of 2005 on the file of the Sub Judge, Periyakulam.

For Appellant	: Mr.R.Suriya Narayanan
For 2 nd Respondent	: Mr.M.Mariappan
For 1 st Respondent	: Died

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the judgment passed in A.S.No.44 of 2006 dated 26.09.2007, on the file of the Principal District and Sessions Judge, Theni.

2.The appellants herein are the defendants and the respondents herein are the plaintiffs in the suit. The respondents has filed a suit in O.S.No.59 of 2005, seeking a relief of partition. The suit was dismissed by the learned Sub Judge, Periyakulam on 06.09.2006. Against which, the respondents herein have filed an appeal in A.S.No.44 of 2006 before the learned Principal District Judge, Theni and the first appeal was allowed and the judgment and decree of the trial Court was set aside and the case was remanded back to the lower Court. Against the same, the appellants herein have preferred this appeal.

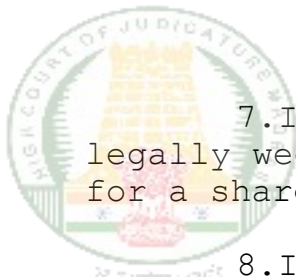


3. On the side of the appellants, it is stated that the first appellate Court exceeds its power by remanding the matter, when all the issues were already tried and answered by the trial Court. The order of remand directing the plaintiffs to implead the necessary parties and adduce evidence amounts to re-trial. In a partition suit, all the necessary parties are to be impleaded. The plaintiffs failed to implead the necessary parties and liberty to the plaintiffs to implead the necessary parties at the first appellate stage is unwarranted. There was a specific finding regarding the omission to implead the necessary parties. The trial Court framed all necessary issues and has given a specific findings and there is no necessity to remand the case again. The questions regarding the benefit to the purchaser on the basis of equity in respect of Ex.B2 and Ex.B3 and the question whether the sale would benefit the plaintiffs were not necessary issues in a suit for partition and prayed the judgment of first appellate Court to be set aside.

4. On the side of the appellants, it is stated that the suit was dismissed for non joinder of necessary parties. The respondents filed an appeal before the first appellate Court, wherein it is admitted that there was non joinder of necessary parties. The wife and daughter of the deceased were not impleaded. P.W.1 has admitted that the wife, Kalakammal and the daughter, Chinthamani were necessary parties. Seven issues were framed by the trial Court. Three issues are for the non joinder of necessary parties. All the issues were discussed and decided by the trial Court. Since all the issues are already discussed, the petition under Order 41 Rule 23 is not sustainable.

5. It is further stated that non joinder of necessary parties is not fatal to the case. The dismissal of the suit for non joinder of necessary parties cannot be a preliminary issue. When all the issues are already answered, the appeal has to be dismissed in total. Already properties are partitioned between the first defendant and his son. They already sold properties and prayed the order of the first appellate Court to be set aside.

6. A perusal of the records reveals that the original suit was filed for a prayer of partition. The original suit was dismissed for non joinder of necessary parties. The plaintiffs filed the appeal and the first appellate Court remanded the matter back to the trial Court permitting the plaintiffs to implead necessary parties and permitting both the parties to adduce additional evidence. The defendants in the suit is questioning the remand order now by filing this present appeal. Admittedly in a partition suit, all the necessary parties are to be impleaded. D.W.1 has given evidence before the trial Court stating that Palanisamy Servai was having a wife by name, Kalakammal and they have a daughter by name, Chinthamani.



7.In the above circumstances, whether Kalakammal is the legally wedded wife of Palanisamy and whether Kalakammal is eligible for a share in the property are to be decided.

8.It seen that the daughter and son of the first defendant sold some properties to third parties and they are also necessary parties in the partition suit. D.W.1 has deposed that the son of the first defendant, Ravindran and daughter of the first defendant Bhuvaneshwari are having equal rights in the property and they are necessary parties to be impleaded in the suit. The property is an ancestral property of the parties to the suit. In the written statement, it was stated that the first defendant was having three sons, namely, Murugan, Ganesan and Saravanan and they got shares in the property as the legal heirs of the Palanisamy Servai and they are also necessary parties in the suit.

9.To divide the ancestral property in a partition suit, all the members of the family are necessary parties. Without giving those parties an opportunity, the suit cannot be thrown out and to decide the partition suit, all the persons who are the legal heirs of the Palanisamy Servai are to be impleaded. There is nothing wrong in the judgment passed by the first Appellate Court in remanding the matter back to the trial Court giving an opportunity for the plaintiffs to implead the necessary parties and by giving opportunity for both sides to adduce evidence.

10.In the above circumstances, there is nothing sufficient enough to interfere in the judgment passed in A.S.No.44 of 2006 dated 26.09.2007, on the file of the Principal District and Sessions Judge, Theni. Hence, this Civil Miscellaneous Appeal is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

MRN

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 Principal District and Sessions Judge, Theni.

2.The Sub Judge, Periyakulam.

Copy to

The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

C.M.A. (MD) No.741 of 2013
30.07.2021

RK (17.08.2021) 4P 5C