



C.M.A.(MD)No.1361 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved On : 12.08.2022

Delivered On : 01.09.2022

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A.(MD)No1361 of 2011

and

M.P.(MD)No.1 2011

S.Vellaiammal

... Appellant/ 1st Respondent /

1st Defendant

Vs.

1.Sivanammal

... 1st Respondent/Appellant /

Plaintiff

2.Minor.K.Paramasivakumar

... 2nd Respondent/ 2nd Respondent

/2nd Defendant

3.Velthai

... 3rd Respondent/3rd Respondent

/3rd Defendant

Prayer : This Civil Miscellaneous Appeal is filed under Order 43 Rule 1(U) of the Code of Civil Procedure, to set aside the judgment and decree, dated 11.08.2010, passed in A.S.No.42 of 2009 on the file of the Sub Court, Sankarankoil, reversing the judgment and decree, dated 29.06.2009, passed in O.S.No.66 of 2008, on the file of the Principal District Munsif Court, Sankarankoil.



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For Appellant : Mr.D.Nallathambi
For Respondents : Mr.M.Saravanan for R1
: No appearance for R2 & R3

JUDGMENT

This Appeal is filed to set aside the judgment and decree, dated 11.08.2010, passed in A.S.No.42 of 2009 on the file of the Sub Court, Sankarankoil, reversing the judgment and decree, dated 29.06.2009, passed in O.S.No.66 of 2008, on the file of the Principal District Munsif Court, Sankarankoil. The appellant herein is the first defendant, the first respondent herein is the plaintiff and the respondents 2 and 3 herein are the defendants 2 and 3 in the original suit.

2. The first respondent herein / plaintiff filed a suit in O.S.No.66 of 2008, on the file of the Principal District Munsif, Sankarankoil, for a prayer of declaration and for recovery of possession. The suit was dismissed by the trial Court. Against the same, the first respondent herein / plaintiff filed an appeal in A.S.No.42 of 2009, on the file of the Sub Court, Sankarankoil. In the appeal, the first appellate Court has passed an order remanding the case again to the trial Court for fresh disposal, after appointing a Court



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Commissioner. Against that order, the the first defendant / appellant herein has filed this appeal.

3. Brief substance of the plaint in O.S.No.66 of 2008 is as follows:-

The suit property and other properties originally belonged to one Ganapathy Raman. He executed a Will on 25.07.2001. The first schedule property was bequeathed to his daughter -Seethalakshmi, the second schedule property was bequeathed to the first defendant-Vellaiammal, The third schedule property was bequeathed to the plaintiff. On 21.03.2007, the above said Ganapathy Raman executed a sale deed with regard to the second schedule property in favour of the plaintiff. The plaintiff is in enjoyment of the property till date. Ganapathy Raman died on 10.04.2007. Since Ganapathy Raman executed a sale deed during his life time itself, the Will with regard to the particular property is not valid and the first defendant is not having any right over the property. The Will is valid with regard to the share holders. The properties are in the enjoyment of the respective legal heirs. In the sale deed, the Door number and boundaries were wrongly mentioned and hence, Ganapathy Raman executed a rectification deed on 31.12.2007, the son of the plaintiff, by name, Kanagaraj, married the third



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defendant and the second defendant is their child. The plaintiff permitted his son, daughter-in-law and the child to live in the suit property. The permission is cancelled now. It is stated that the first defendant has executed a sale deed in favour of the second defendant, who was represented by the third defendant, as the guardian. The sale deed is not valid. The plaintiff prayed for a relief of declaration and for recovery of possession.

4. Brief substance of the written statement in O.S.No.66 of 2008 is as follows:-

The suit is not maintainable. The allegations in the plaint are false. The plaintiff is bound to prove the same. There is no cause of action. Court fee paid is wrong.

5. The Trial Court framed the following issues:-

1. Whether the Will, dated, 25.07.2001 alleged to have been executed by Ganapathy Raman is valid?

2. Whether Ganapathy Raman executed a sale deed in favour of the plaintiff with regard to the property allotted to the first defendant in the Will?



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3. Whether the plaintiff is entitled to a relief of declaration and recovery of possession?

4. What are the reliefs available to the plaintiff?

6. On the side of the plaintiff, 1 witness was examined and 6 documents were marked. On the side of the defendants, 1 witness was examined and 1 document was marked. The trial Court after considering both sides, dismissed the suit.

7. Against the order, the plaintiff filed an appeal in A.S.No.42 of 2009. The first appellate Court framed the following issues:-

1. Whether Ganapathy Raman executed a sale deed in favour of the plaintiff with regard to the property allotted to the first defendant in the Will?

2. What are the relief available in the appeal?

8. The first appellate Court allowed the Appeal by setting aside the judgment and decree of the trial Court in O.S.No.66 of 2008, dated 29.06.2009 and remand back the case to the trial Court under Order – 41,



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Rule 23, directing the trial Court to appoint a Court Commissioner, to identify and to measure the property on the basis of Ex.A2, A4 and B1, with the help of Surveyor and Village Administrative Office.

9. Against that order, the first defendant has filed this appeal on the following grounds:-

The first appellate Court without coming to the conclusion that the findings and decisions of the trial Court are incorrect has no right to remand the case for re-trial. The first appellate Court failed to give any findings regarding the judgment of the trial Court. A suit cannot be remanded to the trial Court, to fill up the lacuna on the part of the plaintiff. The first appellate Court has no jurisdiction to remand the case for appointment of a Court Commissioner. The first appellate Court failed to note that the executor of Ex.A4 has no power to execute the rectification deed. The property given to the appellant under the Will, dated 25.07.2001 is entirely different from the property mentioned in EX.A2-sale deed. The Will, dated 25.07.2001 came into effect on 15.05.2007 and the appellant herein got the property and the appellant executed a sale deed in favour of the second defendant on 30.08.2007. Only after the execution of the sale deed, the rectification deed – Ex.A4 was executed in favour of the first respondent



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herein / plaintiff. The first appellate Court failed to appreciate the oral and documentary evidence in the proper prospective and the order to be set aside.

10. On the side of the appellant, it is stated that the entire dispute is based on the rectification deed – Ex.A4, which was executed after the death of executor of the sale deed. The entire case of the plaintiff is based on the validity of Ex.A4. The appellant traced out the title through the registered Will, executed by Ganapathy Raman, on 25.07.2001. Ganapathy Raman died on 10.04.2007 and the death certificate was marked as Ex.A3. The reason for the remand stated in the judgment of the first appellate Court is that “to prove the Will property”. There is no necessity to measure the property or to note down the physical features. The first appellate Court is not having the right to remand the matter for appointment of a Commissioner, findings of the trial Court was not at all discussed by the first appellate Court. A judgment of this Court reported in **2005-AIR-Madras – 399 (Bhuvaneswari V. Saraswathi Ammal)**, is cited, wherein, it is stated as follows:-

“3. We went through the judgment of the lower appellate Court. As already noted, enough oral and documentary evidence had been let in on the side of the



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plaintiff as well as on the side of the defendant. An order of remand cannot be for the mere purpose of remanding a proceeding to the lower Court. It is governed by the provisions of the Code of Civil Procedure commencing from O. 41, R. 22 onwards. The appellate Judge's view that in order to enable the parties to have the suit properties identified, an Advocate Commissioner had to be appointed and for that purpose, the suit must be remanded back to the trial Court, in our considered opinion, is not warranted on the facts of the case. If it is possible for the appellate Court to evaluate the evidence made available on record and come to its own conclusion one way or the other, then it is not open to the lower appellate Court to come to the aid of the parties for filling up a lacuna which is found wanting in the records.

4. In these circumstances, holding that the order of remand is wholly unwarranted, we set aside the judgment of the lower appellate Court. The lower appellate Judge is directed to dispose of A.S. No. 286 of 1996 on its own merits, after evaluating the entire evidence available on record, in a manner known to law, within a period of ninety days from the date of receipt of a copy of this order."



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11. Another judgment reported in **2008-8-SCC-485 (Municipal Corporation, Hyderabad V. Sunder Singh)**, is cited on the side of the appellant, wherein, it is stated as follows:-

“32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order XLI Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order XLI Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order XLI rule 23A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order XLI Rule 23 of the Code.”

12. On the side of the first respondent /plaintiff, it is stated that the suit was for declaration and for recovery of possession. The first appellate



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Court has given its findings in para 14 and 15, that the property mentioned in Ex.A2 and Ex.A4 and the property in Ex.B1 are to be identified, the first appellate Court set aside the judgment and decree of the trial Court and remanded the matter for appointment of an Advocate Commissioner. The citations produced on the side of the appellant are not applicable to the facts of the present case. If the matter is remanded back and an advocate commissioner is appointed, it will be useful for both the plaintiff and the defendants and it may be give a quietus to the issue.

13. It is seen that the first respondent herein/plaintiff is claiming title over the property through Ex.A2 and Ex.A4. EX.A2 is a sale deed, dated 21.03.2007. The appellant / first defendant is claiming the property through Ex.A1- Will, executed by Ganapathy Raman. Ex.A3 is the death certificate of Ganapathy Raman.

14. On the side of the appellant, it is stated that after the death of Ganapathy Raman, the appellant / irst defendant executed a sale deed in favour of the second defendant represented by the third defendant as a guardian. The sale deed executed by the first defendant was dated 30.08.2007. After the execution of the sale deed, Ex.A6-rectification deed,



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dated 31.12.2007 was executed by one Seethalakshmi in favour of the plaintiff.

15. The plaintiff is claiming that the sale deed - Ex.A2 was pertaining to the property mentioned in the Will of Ganapathy Raman allotted to the share of the first defendant. The appellant is claiming that the property mentioned in Ex.A2 is some other property and the property was not the property mentioned in the Will allotted to the share of the first defendant. As the identity of the property is in dispute, the first appellate Court deemed it necessary to remand back the matter.

16. The entire case of the plaintiff is based on the validity of Ex.A4. Ex.A4 – rectification deed was executed after the death of the executor of Ex.A2. Whether the said Seethalakshmi was entitled to execute the rectification deed, after the death of the original executor is the main issue to be decided.

17. The first appellate Court ought not to have remanded the matter to the trial Court, which may give a chance for the parties to fill up the lacuna in the case. Since the matter in issue is pertaining to the validity



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of Ex.A4, there is no need for the matter to be remanded back for the identification of the property. The identification of the property is not a criteria to be decided in this case. Hence, the order of remand is not necessary.

18. For the above said reasons, the judgment and decree of the first appellate Court is set aside. The matter is remanded back to the first appellate Court for fresh disposal in accordance with law. Since the matter is an old one and the original suit was of the year 2008 and the appeal was of the year 2009, the first appellate Court is hereby directed to dispose of the case within a period of four months from the date of receipt of copy of this order.

19. With the above directions, this appeal is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

01.09.2022

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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.



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- To
- 1.The Sub Court,
Sankarankoil.
 - 2.The Principal District Munsif,
Sankarankoil.
 - 3.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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R. THARANI, J.

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Pre-devlivery Judgment made in
C.M.A.(MD)No1361 of 2011
and M.P.(MD)No.1 2011

01.09.2022