



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 22.03.2022

Pronounced on : 30.03.2022

WEB COPY

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

C.M.A(MD)Nos.317 and 405 of 2012

and

M.P(MD)Nos.1 and 1 of 2012

C.M.A(MD)No.317 of 2012

Dhanalakshmi :Appellant/Appellant/3rd Defendant

.vs.

1.Mani :1st Respondent/1st Respondent/Plaintiff

2.Muthulakshmi

3.Gomathi :Respondents 2&3/Respondents2&3/Defendants 1 & 2

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of the Civil Procedure Code, to set aside the judgment and decree dated 22.12.2011 passed in A.S.No.45 of 2011 on the file of the of the Principal Sub-Court, Tirunelveli, insofar as remanding the suit in O.S.No.102 of 2007 on the file of the 2nd Additional District Munsif Court, Tirunelveli, for fresh disposal by setting aside the judgment and decree dated 28.02.2011 is concerned.

C.M.A(MD)No.405 of 2012

Mani :Appellant/1st Respondent/Plaintiff

.vs.

1.Dhanalakshmi :1st Respondent/Appellant/3rd Defendant

2.Muthulakshmi :2nd Respondent/2nd Respondent/1st Defendant

3.Gomathi :3rd Respondent/3rd Respondent/2nd Defendant

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(U) of the Civil Procedure Code, to set aside the judgment and decree dated 22.12.2011 passed in A.S.No.45 of 2011 on the file of the Principal Sub-Court, Tirunelveli, remanding the judgment and decree dated 28.02.2011 passed in O.S.No.102 of 2007 on the file of the 2nd Additional District Munsif Court, Tirunelveli.



For Appellant in CMA(MD)No.317 of 2012
& For 1st Respondent in CMA(MD)No.405 of 2012.

:Mr.H.Arumugam

For 1st Respondent in CMA(MD)No.317 of 2012
& For Appellant in CMA(MD)No.405 of 2012.

:Mr.D.Nallathambi

For R2 and R3 in
both C.M.As

:Dispensed with
vide EB

COMMON JUDGMENT

The plaintiff in the suit in O.S.No.102 of 2007 is the appellant herein.

2.For the sake of convenience, the parties are referred to as per their ranking in C.M.A(MD)No.317 of 2012.

3.The first respondent filed a suit for bare injunction against the respondents 2 and 3 and the appellant herein. After contest, the learned II Additional District Munsif, Tirunelveli, has granted a decree as prayed for, while answering the issues that whether the suit property is in peaceful possession and enjoyment of the third defendant along with the plaintiff as joint owner as alleged in the written statement.

4.On the side of the plaintiff, P.W.1 and P.W.2 were examined. Ex.P.1 to Ex.P.13 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.D.1 to Ex.D.9 were marked.

5.The trial Court has held that the third defendant in the suit filed a proof affidavit that she is the co-owner of the suit property. Consequently held that the suit is maintainable. Further held that she is not the co-owner or co-sharer and hence, negatived the aspect of possession. The first respondent aggrieved against the said order, has preferred A.S.No.45 of 2011. After hearing the rival submissions, the learned Principal Subordinate Judge, Tirunelveli, has come to the conclusion that the suit ought to have been filed for declaration of title and whether the alleged Will and Ex.B.1 are proved in the manner known to law. For those two points, it has remanded the case for retrial by the learned Principal Subordinate Judge, after amending the plaint, if the plaintiff is so advised.

6.Aggrieved against the said order of remand passed in A.S.No.45 of 2011, the third respondent has preferred C.M.A(MD)No.317 of 2012 and the plaintiff has preferred C.M.A(MD)No.405 of 2012, after hearing the rival submissions and also taken note of the fact that both the plaintiff and the contesting third defendant have filed appeal as against the order of remand.



7. On a perusal of the judgment passed by the lower appellate Court, the appellate Court cannot remand the matter back to the Lower Court to fill-up the lacuna on the part of one of the parties thereto. It remains to be stated that it is the specific plea of the third defendant that as per Ex.B.3-Will, he is in joint possession of the suit property. When one of the party to the Will, relied upon the said Will he has to satisfy the Court as per Section 68 of the Indian Evidence Act and as per Section 63 of the Indian Succession Act. Instead of examining whether the party who rest his claim upon the Will has to prove the Will as laid down therein in the above stated provisions of law. The lower appellate Court ought not to have remanded the matter to fill-up the lacuna on the part of one of the party.

8. The point for determination in the appeal is whether the lower Court has committed an error in remanding the matter back to the trial Court. Furthermore, on appointment of an Advocate Commissioner to inspect the properties mentioned in Ex.A1 and Ex.B.1 with the help of a surveyor and Viillage Administrative Officer to assisst the Court to arrive at a conclusion and to adjudicate the dispute within the power of the appellate Court under Order 41 r/w Section 96 of the CPC and hence, this Court comes to the conclusion that the findings rendered by the lower appellate Court is hereby stand vacated and the order of remand passed in A.S.No.45 of 2011 by the lower Appellate Court is hereby set aside. Both C.M.As are allowed and the matters are remitted back to the Principal Subordinate Court, Tirunelveli to take the case on file in A.S.No.45 of 2011 and dispose of the same in accordance with law, within a period of four months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Ns

To

1. The Principal Subordinate Judge,
Tirunelveli.

2. The II Additional District Munsif,
Tirunelveli.



Copy to:

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

+ 1 CC to M/s.D.Nallathambi, Advocate, SR.No.16179

+ 1 CC to M/s.H.ARUMUGAM, Advocate, SR.No.16226

C.M.A(MD)Nos.317 and 405 of 2012

and

M.P(MD)Nos.1 and 1 of 2012

30.03.2022

MGJ(18.04.2022) 4P 7C