



C.M.A. No.1490/2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
06.11.2023	23.11.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

C.M.A. NO.1490 OF 2016

AND

C.M.P. NO.11309 OF 2016

Ramasamy

.. Appellant

- Vs -

1. Jothi @ Selva Jothi
2. Vetrivel
3. Arunachalam
4. Raji

.. Respondents

Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of the Code of Civil Procedure against the judgment and decree of Sub court, Kallakurichi, dated 19.3.2015 made in A.S. No.39/2013 remanding the judgment and decree of the First Addl. District Munsif, Kallakurichi, dated 12.8.2013 made in O.S. No.497/2007.

For Appellant : Mr. A.Arun Babu



C.M.A. No.1490/2016

WEB COPY

For Respondents : No Appearance for RR-1 to 4

JUDGMENT

Assailing the judgment and decree passed by the first appellate court, which, while confirming the order passed by the trial court, however, to the limited extent of granting relief to the appellant herein, who was the 3rd defendant in the suit, remanded the matter back to the trial court for consideration with regard to the relief to be granted insofar as the appellant herein is concerned, towards which the present appeal has emanated.

2. For the sake of convenience, the parties will be referred to as arrayed before the trial court, viz., the respondents 1 and 2 would be referred to as 1st and 2nd plaintiff, the 3rd and 4th respondents will be referred to as 1st and 2nd defendants and the appellant herein would be referred to as 3rd defendant.

3. The brief facts which has resulted in the filing of the present appeal are as under :-



C.M.A. No.1490/2016

WEB COPY

The suit property originally belonged to the Government, which was assigned to one Kandasami Gounder, who is the parental grandfather of the 2nd plaintiff. The said Kandasami Gounder executed a registered Will dated 22.2.1999 and bequeathed the suit property to the 2nd plaintiff and certain other properties were bequeathed in favour of another grandson, Krishnamurthy, who was the son of Ganesan, the eldest son of Kandasami Gounder. It is the further case of the plaintiffs that the said Kandasami Gounder died on 1.7.2003 and that the above Will is the last will of the said Kandasami Gounder. After the death of Kandasami Gounder the plaintiffs are in peaceful possession and enjoyment of the property and the defendants have no right or title over the same.

4. It is the further case of the plaintiff that the 2nd defendant, who is the father of the 2nd plaintiff and husband of the 1st plaintiff, deserted the plaintiffs and eloped with one Neela and is living separately with the said Neela and her children and that the 2nd plaintiff, who was a minor then, was in the care and custody of the 1st plaintiff.



WEB COPY

5. It is the further case of the plaintiffs that due to alleged harassment and assault and threat meted out to the plaintiffs by the defendants 1 and 2, one Ganesan, the brother of the 2nd defendant and his wife Jayammal as also Neela, the 2nd wife of the 2nd defendant, at the instance of the 1st plaintiff, on 18.10.2003, a case in Crime No.9 of 2003 has been filed on the file of the All Women Police Station and that the defendants as also others were granted bail. With a view to take revenge, by an act of collusion, the 2nd defendant, in collusion with one Palaniappan created a promissory note and the said Palaniappan filed a money suit in O.S. No.925 of 2004 before the district Munsif Court, Kallakurichi in which the 2nd defendant endorsed no objection which resulted in a judgment and decree and resultantly an execution petition in W.P. No.308/2005 was filed and the suit property was brought for auction and coming to know of the same, the plaintiffs filed Claim Petition No.191 of 2006, which was allowed vide order dated 23.01.2007.

6. It is the further case of the plaintiffs that the wife of the 1st defendant and the wife of Ganesan, the brother of the 2nd defendant, are sisters and the 2nd defendant, in collusion with his brother Ganesan, created a mortgage deed



WEB COPY

dated 18.6.2003 , purported to have been executed by Kandasami Gounder in favour of the 1st defendant and on the strength of the alleged fabricated mortgage deed, the 1st defendant had filed a suit against the 2nd plaintiff, a minor then, represented by his father and natural guardian in O.S. No.1413 of 2004 on the file of the Principal District Munsif's Court, Kallakurichi and obtained a preliminary decree on 14.4.2005 and final decree on 27.1.2006 and filed E.P. No.306 of 2006 and defendants 1 and 2 colluding with each other, the suit property was brought to auction and sold to the 3rd defendant for Rs.2,25,100/-, which facts came to the knowledge of the plaintiffs on 29.6.2007.

7. It is the further case of the plaintiffs that the 2nd defendant, taking advantage of his appointment as guardian to the 2nd plaintiff by Kandasami Gounder in the Will dated 22.2.1999, misused the authority conferred on him and acted against the welfare of the 2nd plaintiff, his minor son. It is the further case of the plaintiffs that the 1st defendant, in collusion with the 2nd defendant and others, with an intent to grab the suit property from the plaintiffs collusively obtained the preliminary and final decree which resulted in the 3rd



C.M.A. No.1490/2016

defendant purchasing the property in the auction sale on 24.01.2007.

Therefore, the suit in O.S. No.497 of 2007, was laid by the plaintiffs for declaration to declare the preliminary decree and final decree passed by the Principal District Munsif Court at Kallakurichi in O.S. No.1413/2004 in favour of the 1st defendant as invalid and for permanent injunction restraining the 3rd defendant from entering into the suit property as auction purchases along with costs.

8. The 3rd defendant resisted the suit by filing written statement and contended that the court fee paid by the plaintiffs are legally invalid and the relief sought for is inadmissible and the suit is liable to be dismissed *in limine* and further contended that upon assignment of the land by the Government in favour of the Kandasami Gounder, the said Kandasami Gounder entered into a registered mortgage deed as against the suit property with the 1st defendant and passed away without paying the amount, resulting in the filing of O.S. No.1413/2004 in which the order has come to be passed and the act of the plaintiff is wasting the time of the court. It was further contended that the claim of the plaintiffs is only based on the Will which will come into effect only



C.M.A. No.1490/2016

WEB COPY

upon the death of the executants and before the death, the said Kandasami Gounder having entered into a registered mortgage deed, the suit property was rightly brought for auction and, hence, prayed for dismissal of the suit.

9. Before the trial court, the plaintiffs examined themselves as P.W.s 1 and 3 while Ganesan was examined as P.W.2 and Palanivel was examined as P.W.4 and Exs.A-1 to A-10 were marked of which Exs.A-9 and A-10 were marked during cross of D.W.1. On the side of the defendants, the 3rd defendant examined himself as D.W.1 and marked Exs.B-1 and B-2.

10. Framing the necessary points for consideration, the trial court went on to hold that the plaintiffs have proved their case and in the absence of defendants 1 and 2 to appear and contest the case, they having been set ex parte and the 3rd defendant, only being an auction purchaser, the suit requires to be allowed as prayed for and accordingly, granted a decree as prayed for.

11. Aggrieved by the said judgment and decree passed by the trial court, the 3rd defendant, viz., the auction purchaser, filed appeal in A.S. No.39/2013



WEB COPY

before the first appellate court and the first appellate court, while concurring with the findings arrived at by the trial court in decreeing the suit in favour of the plaintiffs, however, insofar as non-grant of any relief to the 3rd defendant, who is the auction purchaser, remanded the matter to the trial court to consider the said issue and pass orders. Aggrieved by the said order, the present appeal has been filed by the 3rd defendant, viz., auction purchaser before this Court.

12. Learned counsel appearing for the appellant herein, viz., the auction purchaser/3rd defendant, submitted that the 3rd defendant is a bona fide auction purchaser through an auction conducted by the court, which aspect has been lost sight of by both the courts and no relief has been granted to the 3rd defendant. It is the further submission of the learned counsel that the courts below had come to the conclusion that the decree obtained by the 1st and 2nd respondent, allegedly by collusion, is a fraud, had deprived the 3rd respondent of his legal right to the suit property, which was purchased in court auction.



WEB COPY

13. It is the further submission of the learned counsel that a WILL can be revoked at any point of time during the life time of the testator for the purpose of entering into fresh deeds and such being the case, the entering into of a fresh mortgage deed by Kandasamy Gounder would in turn automatically revoke the WILL already executed by the testator. It is the further submission of the learned counsel that even otherwise, with respect to the borrowed amount by Kandasamy Gounder, the 2nd defendant, viz., his son and the 2nd plaintiff, viz., his grandson are equally liable to repay the debts.

14. It is the further submission of the learned counsel that the order of remand passed by the first appellate court is grossly erroneous as it is within the domain of the first appellate court, as the court of record, to grant the relief, which has not been granted by the trial court and, therefore, no necessity arises for the first appellate court to remand the matter to the trial court for determination of the relief that needs to be granted in favour of the 3rd defendant, viz., auction purchaser. Accordingly, he prays for allowing the present appeal.



C.M.A. No.1490/2016

WEB COPY

15. In spite of notice, there is no appearance for the plaintiffs/respondents 1 and 2. As has happened before the trial court, inspite of notice, there is no representation for the 1st and 2nd defendant/3rd and 4th respondent. In view of the fact that this Court is ordained with the task of looking into the legal issues and also taking into consideration the fact that the appeal is of the year 2016 and the respondents have not taken any interest in contesting the appeal, this Court is constrained to decide the same on the materials available before this Court.

16. This Court gave its careful consideration to the submission advanced by the learned counsel appearing for the appellant and also perused the materials available on record, including the exhibits, which were marked by the contesting parties before the trial court.

17. At the time of admission of the appeal, the following substantial questions of law were framed for consideration :-

- i) *Whether the courts below are justified in law in decreeing the suit after coming to the conclusion*



WEB COPY

that the appellant herein is not a party to the fraudulent transactions alleged.

- ii) *Whether the lower appellate court is justified in ordering remand when ingredients of Order 41 Rule 23 are not satisfied.*

18. The trial court has given a graphical representation of the conduct of defendants 1 and 2, who are alleged to have acted in collusion in bringing the suit property for auction. There is a categorical finding recorded by the trial court that to the notice issued, defendants 1 and 2 did not chose to appear and the interim application in I.A. No.2611 of 2011 filed by the 1st defendant for restoration under Order 9 Rule 9 was subsequently dismissed as not pressed. This conclusively shows that defendants 1 and 2 were not at all interested to contest the suit, lest being satisfied with the decree obtained by them in O.S. No.1413 of 2007, by an act of collusion. Even before this Court, as noticed above, the defendants 1 and 2 have not partaken in the proceedings or contested the appeal. Therefore, there could be no reason for this Court for traversing beyond the finding recorded by the trial court, which has been upheld by the first appellate court.



WEB COPY

19. Further, one other aspect which stares on the face of record is the fact that a registered WILL was executed by Kandasami Gounder in favour of the 2nd plaintiff on 22.2.1999, which registration was subsisting on the date when the suit in O.S. No.1413 of 2007 was filed. In fact, the said registration was in subsistence on the date when the registered mortgaged deed is alleged to have been entered into with the 1st defendant by Kandasami Gounder.

20. It is to be pointed out that the alleged mortgage deed was entered into on 18.6.2003 and the said Kandasami Gounder is said to have breathed his last on 1.7.2003, within a span of less than two weeks from the date of entering into the alleged mortgage. Further, if it is the case of defendants 1 and 2 that Kandasami Gounder had entered into the mortgage deed and received money from the 1st defendant, it would be for the purposes for which Kandasami Gounder required the funds. However, the statement of the 2nd defendant, pursuant to the summons issued in E.A. No.821/2008 reveal that it is the 2nd defendant, who claims to have obtained money for the studies of the 2nd plaintiff. If the 2nd defendant had obtained money from the 1st defendant



WEB COPY

towards the studies of the 2nd plaintiff, this Court is at a loss to understand as to how the said Kandasami Gounder could have entered into the mortgage deed. Further, the act of the 2nd defendant in not appearing before the Court at the time of hearing, but appearing with regard to the summons issued during the execution proceedings coupled with the evidence of P.W.2, the brother of the 2nd defendant, who were all inimical towards the plaintiffs clearly establish beyond a pale of doubt that the mortgage deed alleged to have been entered into by Kandasami Gounder with the 1st defendant is a fabricated document and is a farce, which cannot be acted upon and the veracity of the said document stands established as a fabricated one.

21. However, it is to be stated that in the entire jigsaw, the 3rd respondent auction purchaser had no role to play, but to come into the fray and submit his quote for the suit property at the time of auction before the Court. The time when the 3rd defendant/appellant came into the picture is when the suit property was auctioned by the court, which was taken in auction by the 3rd defendant leading to the filing of execution application and the further legal proceedings, which were taken up thereafter. Though this Court



WEB COPY

can sympathise with the 3rd respondent that he is not a party to the fraudulent transaction, yet, the auction cannot be held in favour of the 3rd respondent for the simple reason that as the guardian of the then minor 2nd plaintiff, a duty was cast upon the 2nd defendant, the father of the 2nd plaintiff to set that the interests of the minor 2nd plaintiff stood protected. But the evidence available on record, more particularly, in the form of the deposition of P.W.2 clearly reveal that the spew venom on the plaintiffs, who are the wife and son of the 2nd defendant, the 2nd defendant had gone to the extent of jeopardizing the very life of his son, the 2nd plaintiff which no prudent and affectionate father would do. However, this Court is not inclined to comment any further about the conduct of the 2nd defendant, but to merely hold that the collusion between the 1st and 2nd defendants in the fabrication of the mortgage deed stands established and there is no material to infer otherwise.

22. It is also to be pointed out that when the registered WILL is subsisting, even if at all Kandasami Gounder intends to enter into any transaction involving the suit property, even to the extent of disposing of the



WEB COPY

same, the legal approach would have been to adhere to Section 62 of the Indian Succession Act, which for better appreciation is quoted hereunder :-

“62. Will may be revoked or altered.—A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.”

23. Testator of a WILL is within his rights to revoke or alter the WILL at any point of time. However, in the case on hand, the WILL has not been revoked or altered by the testator, viz., Kandasami Gounder. Even after the alleged execution of the mortgage deed on 18.06.2003 and before his untimely demise on 1.7.2003, the testator, viz., Kandasami Gounder had not taken any steps to revoke the registered WILL. Upon the death of the testator, the registered WILL transfers the suit property in favour of the 2nd plaintiff and the 2nd defendant, being the guardian of the 2nd plaintiff, is bound to safeguard the interest of the 2nd plaintiff and cannot do anything that would not be in the interest of the 2nd plaintiff. Further, it is to be stated without any contradiction that a subsequent WILL altering the contents of the already registered WILL or a deed of revocation of the registered WILL alone would be the manner in which a registered WILL could be revoked or altered. The execution of a



C.M.A. No.1490/2016

WEB COPY

mortgage deed during the subsistence of a registered WILL would not revoke the WILL already executed and registered. Adherence to Section 62 of the Indian Succession Act is mandatory and it cannot be diluted by any other means, such as entering into a mortgage deed, as in the case on hand.

24. Further, the 1st defendant, though had entered into the mortgage deed on 18.6.2003 with Kandasami Gounder and the said Kandasami Gounder having passed away on 1.7.2003, there is no material to show the steps that were taken by the 1st defendant to realise the money from the sons of Kandasami Gounder, viz., the 2nd defendant and one Ganesan, viz., P.W.2. Keeping silent for more than a year, the suit has come to be laid against the 2nd plaintiff, though the person, who had received the alleged money was Kandasami Gounder and the sons of the said Kandasami Gounder were not taken to task.

25. From a careful analysis of the entire transaction, it is very clear that all aspect bristles with fraud and collusion between the 1st and 2nd defendant and also the other siblings of the 2nd defendant and his relatives. It is clear that



C.M.A. No.1490/2016

WEB COPY

it is to defeat the legitimate rights of the 2nd plaintiff, the grandson of Kandasami Gounder, to whom Kandasami Gounder had bequeathed his property by means of the registered WILL. All the aforesaid aspects have been properly appreciated by the courts below while granting the declaration and permanent injunction as prayed for and the said findings do not require any interference at the hands of this Court. ***Accordingly, issue No.1 necessarily has to be decided in favour of the plaintiff to the extent but holding that the 3rd defendant is not a party to the fraudulent transaction.***

26. However, it should not be lost sight of, as pointed out above, that the 3rd defendant, the auction purchaser, was not in collusion with the defendants as also the other relatives and, in fact, the 3rd defendant is in no way related to the other defendants. However, the trial court has not granted any relief to the 3rd defendant, though he is not a party to the said collusive act and had taken part in the proceedings and contested the suit.

27. On the appeal filed by the 3rd defendant to the first appellate court, while the first appellate court confirmed the findings aforesaid with regard to



WEB COPY

the collusive nature of the transaction, with which this Court is also in agreement, however, it was not right on the first appellate court to relegate the 3rd defendant, viz., the auction purchaser to seek his relief before the trial Court.

28. Order XLI relates to appeals from original decrees. Rule 23 therein relates to remand of case by appellate court and for better appreciation, the same is quoted hereunder :-

“23. Remand of case by Appellate Court.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point or where the Appellate Court, in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, the Appellate Court may, by order remand the case, and may 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, which 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.”



WEB COPY

29. From the above, it is clear that only when the decree in an appeal was disposed of on a preliminary point, then in such cases, the case could be remanded to the court below. However, when the findings are not on preliminary issues, but on all the issues and the appeal has been decided on merits, then, if at all, any relief has not been granted to any party to the *lis*, the first appellate court is very well within its power to decide the relief that is to be granted to the party in the appeal and not remand the matter to the court below.

30. In ***Lisamma Antony – Vs – Karthiyayini & anr. (2015 (11) SCC 782)***, the Apex Court held that where the suit was decided by recording findings on all the issues and in the appellate judgment under appeal, findings have been recorded on some of the issues, not preliminary and additional issues framed leaving them to be tried and decided by the trial court is wholly not justified. The Apex Court held that neither Rule 23 nor 23A of Order 41 applies. It further held that an appellate court should be circumspect in ordering remand when the case is not covered by either Rule 23 or Rule 23 A



C.M.A. No.1490/2016

WEB COPY

or Rule 25 of CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

31. In the case on hand, the issues, which have been dealt with by the trial court are not preliminary issues. Findings have been rendered on all spheres of the issue and the appeal has been dealt with on merits. Such being the case, the rigors of Rule 23 or 23-A of Order 41 stands squarely attracted and the first appellate court ought not have remanded the matter to the trial court to decide the relief that is to be granted to the 3rd defendant/appellant herein. The first appellate court ought to have taken up the issue and decided the same on merits on the basis of the materials available on record and, if need be, could have even taken additional evidence to arrive at a conclusion. However, erroneously the first appellate court had remanded the matter to the trial court, which deserves to be set aside.

32. This Court, though sitting in the second appellate stage is bound to consider only the legal issues, however, in view of the discussion aforesaid, the findings having been holistically rendered by the courts below on the basis of



WEB COPY

the materials available before it and has come to the just and reasonable conclusion that the 3rd defendant was not in collusion with the 1st and 2nd defendant and the 3rd defendant is a bona fide purchaser of the suit property in the auction for valuable consideration for a sum of Rs.2,25,100/=, ought to have safeguarded the interest of the 3rd defendant. Therefore, in the interest of justice, this Court is bound to safeguard the interest of the 3rd defendant/appellant herein and to that extent, ***issue No.2 needs to be answered in favour of the appellant/3rd defendant.***

33. For the reasons aforesaid, this appeal is allowed in part, by issuing the following directions :-

- i) *The judgment and decree of declaration and permanent injunction granted in favour of the plaintiffs by the trial court, as affirmed by the first appellate court is confirmed;*
- ii) *The auction purchase in O.S. No.1413/04 is set aside and the auction purchaser, viz., the 3rd defendant/appellant herein is permitted to*



WEB COPY



C.M.A. No.1490/2016

*withdraw the amount deposited to the credit of
O.S. No.1413/2004, on the file of the Principal
District Munsif, Kallakurichi, by making
appropriate application before the concerned
court;*

- iii) *The auction purchaser, viz., the 3rd
defendant/appellant is granted liberty to initiate
appropriate legal action against the 1st and 2nd
defendants for recovery of any further amounts
due to him;*
- iv) *Consequently, connected miscellaneous petition is
closed. There shall be no order as to costs in this
appeal.*

23.11.2023

Index : Yes / No

GLN

To

1. The Sub Court



C.M.A. No.1490/2016

WEB COPY Kallakurichi.

2. The First Addl. District Munsif
Kallakurichi.



WEB COPY



C.M.A. No.1490/2016

M.DHANDAPANI, J.

GLN

**PRE-DELIVERY JUDGMENT IN
C.M.A. NO. 1490 OF 2016**

**Pronounced on
23.11.2023**



WEB COPY



C.M.A. No.1490/2016