



C.M.A.No.1418 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE K.RAJASEKAR

Civil Miscellaneous Appeal No.1418 of 2021

1. C.Tirumalaisamy

2. L. Samiyathal

... Appellants/Plaintiffs

Vs.

1. P. Balasubramaniam

Pongiayana Gounder (Died)

2. K. Sumathi

3. S. Sureshkumar

4. G. Rajkumar

5. S. Oliver Kamalakaran

6.O. Mary Rosalin

7. O. Sril Mathew

... Respondents/Defendants

[R3 to R7 remained ex-parte before the Courts below
and hence notice to them may be dispensed with]

Civil Miscellaneous Appeal filed under Order 43, Rule 1(U) of the Code of Civil Procedure, against the Judgment and Decree, dated 29.01.2021 made in A.S.No.49 of 2019, on the file of the I Additional District Judge, Erode in reversing the Judgment and Decree dated 28.02.2019 in O.S.No.247 of 2011 on the file of the II Additional Sub Court, Erode.

For Appellants	:	Mr. S. Kaithamalai Kumaran
For R1	:	Mr. S. Mukunth, Senior Counsel
		For Mr. N.Krishnakumar
For R2	:	Mr. C. R. Prasannan
For R3 to R7	:	Ex-parte



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JUDGMENT

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The Civil Miscellaneous Appeal has been filed by the appellants against the Judgment and Decree passed by the I Additional District Judge, Erode, dated 29.01.2021 made in A.S.No.49 of 2019 in reversing the Judgment and Decree made in O.S.No.247 of 2011, dated 28.02.201, on the file of the II Additional Sub Court, Erode.

2. The parties are referred to herein according to their litigative status and ranking before the trial Court.

3. The appellants herein is the plaintiffs in the suit filed by the plaintiffs for partition, claiming 1/4th share through his mother namely, Pappayee.

4. According to the plaintiffs, the said Pappayee is the daughter of one Chinnappa Gounder, who died intestate leaving behind the first defendant – Pongiyanna Gounder and the mother of the plaintiff viz., Pappayee. The first defendant is the son of Chinnappa Gounder denied the relationship and contested the suit on the ground that the said Pappayee is



not the daughter of Chinnappa Gounder and after the death of Chinnappa Gounder, the first defendant inherited the properties. Chinnappa Gounder has also executed a Will, dated 24.04.1970 in favour of his grandson, namely Balasubramaniam, the second defendant therein. After the death of Chinnappa Gounder, the Will was came into force and subsequently, the defendants 1 and 2 have also partitioned the suit properties by way of a Registered Partition Deed 28.12.2007 and 07.04.2011. Accordingly, 'A' Schedule property was allotted to the first defendant and 'B' Schedule property was allotted to the second defendant. As per Partition Deed, the defendants 1 and 2 have taken possession of the properties and they are in possession and enjoyment of the properties. They disputed the rights of the plaintiffs. The third defendant, who is the sister of the second defendant and son of the first defendant have supported the case of the plaintiffs, she has also separately claimed 1/4th share in the suit properties.

5. Based on the pleadings made, the Trial Court has framed the following issues:

1. Whether the plaintiffs are entitled to 1/4 share over the suit property?
2. Whether the plaintiffs are entitled to Preliminary Decree as prayed for?



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3. To what other reliefs?

6. Before the Trial Court, the plaintiffs have examined P.W.1 to P.W.3 and also marked Exs.A1 and A2. On the side of the defendants, D.W.1 and D.W.4 were examined and Exs.D1 and D2 were marked. D.W.1, who is the second defendant herein has not come forward to subject himself for cross examination. Hence, after affording opportunity, his evidence has been eschewed. On the side of the third defendant, D.W.2 was examined and her husband was examined as D.W.3.

7. After analysing the evidences placed on record, the Trial Court has decreed the suit and declared that the plaintiffs are entitled for 1/4 share in the suit properties and the third defendant is also entitled for 1/4 share.

8. This Judgment and Decree has been challenged by the second defendant in A.S.No.49 of 2019 and the Appellate Court, after considering the arguments and re-appreciating the evidence has concluded that the suit requires remand and the parties have to be adduced further



evidence more particularly, the evidence of defendants to be recorded to substantiate their defence.

9. While recording the reasons for remanding the matter in Point No.6, the Appellate Court has observed as follows:

“Point No.6: In view of the answers given by the Appellate Court in the above for points No.1 to 5, this Appellate Court answers for this point that, the grounds of this appeal warrant interference by this Appellate Court in the Judgment and Decree passed by the learned II Additional Subordinate Judge, Erode in O.S.No.247 of 2011 on 28.02.2019 and so this Appeal is liable to be allowed and in order to avoid multiplicity of proceedings between the same parties and to give a quitus to the disputes between the parties to the suit, both the plaintiffs and the defendants should be given further opportunity to adduce further oral and documentary evidence to prove their respective cases, specifically to prove the nature of the suit properties and the relationship between the parties through documentary evidence and for the said purpose this suit shall be remanded back to the trial Court in the interest of justice.”



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10. This Order of remand has been challenged by the plaintiffs

before this Court.

11. The learned counsel for the plaintiffs has submitted that the scope of remand as enumerated under Order 41 Rule 23 to 26A of CPC are not made out, for remanding the matter as stated by the Appellate Court in its Judgment. More particularly, the Appellate Court has taken a view that the defendants have to be given sufficient opportunity for adducing their side evidence. Admittedly, the defendants have not made any grievance that they have not given sufficient opportunity. In the grounds of Appeal made by them nowhere, they have stated that no opportunity was given to them.

12. The learned counsel for the third defendant has also appeared before this Court and supported the case of the plaintiffs and supported the Judgment of the Trial Court.

13. Countenancing the arguments of the plaintiffs as well as the learned counsel for the third defendant, the learned counsel for the second defendant has submitted that the Trial Court has categorically held that the plaintiffs have failed to prove the nature of the properties which is sought to



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be partitioned. The Appellate Court has also held that there is no sufficient evidence adduced by the plaintiffs to prove the relationship since there is a specific denial of relationship. Hence, for the purpose of enabling both the parties to adduce additional evidence, the Appellate Court has remanded the matter and hence, there is no need for disturbing the same.

14. I have considered the rival submissions made on both sides and also perused the records available.

15. Admittedly, in this case, the plaintiffs have taken a stand that the suit porperties were originally belongs to one Chinnappa Gounder. Their mother Pappayee, is daughter of Chinnappa Gounder. The first defendant is one of the son of Chinnappa Gounder. The second defendant is the grandson of Chinnappa Gounder. The third defendant is the daughter of first defendant and thereby, the plaintiffs claimed 1/4 share, and that the defendants 1 and 2 each are entitled for 1/4 share and the third defendant claimed 1/4 share.

16. The defendants 1 and 2 have disputed relationship between



the parties. To prove the relationship between the parties, the plaintiffs have examined two other witnesses and they have deposed in support of the first plaintiff to state that the plaintiffs are the children of Pappayee and the Pappayee is also the daughter of Chinnappa Gounder. Even though, there was no documentary proof produced by the plaintiffs in support of their claim this oral evidence have not been disputed by the defendants by adducing any contra evidence more particularly, disputing the evidence adduced on the side of the plaintiffs so as to probalilize their case.

17. The evidence of P.W.1 to P.W.3 have been unchallenged by way of adducing contra evidence. The plaintiffs have adduced sufficient evidence and the same has been accepted by the Trial Court and nowhere, the Appellate Court has held that this finding is perverse and it has only pointed out insufficient evidence to accept the relationship. Similarly, the defendants 1 and 2 eventhough they are disputed the relationship of the parties in the appeal, they have never raised that they have not given proper opportuniry to adduce their evidence. Admittely, they have availed sufficient opportuniry to adduce evidence but failed to utilise the same and even after come forward to give chief examination, they wantedly avoided to subject



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themselves for cross examination. More particularly, after alleging that the said Chinnappa Gounder has executed the Will and they have not shown any interest to prove the Will so as to substantiate their case.

18. In such a case, this Court is of the view that the Appellate Court has taken a wrong view that the parties are required additional evidence. On perusal of records and pleadings and more particularly, in the appeal pleadings, no party has sought for adducing any additional evidence or additional materials or they have raised a grievance that no opportunity has been given. Under the said circumstances, this Court finds that remanding the matter in this case is not necessary and the Appellate Court has to decide the matter afresh on merits based on the materials placed on record. The Order of remand passed by the Appellate Court is liable to be set aside. However, considering the fact that the Appellate Court has not rendered any separate finding regarding the claim of parties more particularly, the proof of relationship and rights of parties, this Court is of the view that the same has to be decided only by the Appellate Court.



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19. Accordingly, the C.M.A.No.1418 of 2021 is allowed. The

Judgment and Decree passed in A.S.No.49 of 2019, dated 29.01.2021, by the I Additional District Judge, Erode in reversing the Judgment and Decree in O.S.No.247 of 2011, dated 28.02.2019, on the file of the II Additional Sub Court, Erode is hereby set aside. The Appellate Court is directed to decide the matter with the available materials placed on record and pass the Judgment afresh, without influenced by any or the observations made by this Court with regard to the merits of the claim of the parties. There shall be no order as to costs.

21.11.2023

ssi

Index:Yes/No

Speaking Order:Yes/No

Neutral Citation Case: Yes/No

To:



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1. The I Additional District Judge,
Erode.
2. The II Additional Sub Judge,
Erode.
3. The Section Officer,
V.R. Section,
High Court,
Madras.

K.RAJASEKAR,J.

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