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C.M.A.Nos.1468 and 1469 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 03.04.2023

JUDGMENT PRONOUNCED ON: 30.06.2023

Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

C.M.A.Nos.1468 and 1469 of 2020

and

C.M.P.No.10765 of 2020

1.P.Rajendran
2.P.Parthiban
3.P.Govindaraj
4.P.Sundararajan
5.R.Prasanth

...Appellant's in both C.M.A.Nos.

Vs.

K.R.Govindarajan (died)
1.K.R.G.Narayanan

....Respondent in both C.MA.Nos.

2.Rajasekaran
3.Thirunavukkarasu
4.Gopal
5.Mani
6.Natarajan

(No notice is necessary as the respondents
2 to 6 remained absent and set ex parte
throughout and hence notice on respondents
2 to 6 may be dispensed with)

...Respondents in C.M.A.No.1469 of 2020



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Common Prayer: Civil Miscellaneous Appeals are filed under Order 43 Rule 1(u) of Civil Procedure Code praying to set aside the common Judgment and Decree in A.S.Nos.24 and 25 of 2011 dated 23.03.2020, on the file of the learned Principal Subordinate Judge, Villupuram, remanding the suit by setting aside the common Judgment and Decree in O.S.Nos.327 of 2005 and 40 of 2007 dated 15.12.2010 on the file of the Additional District Munsif Court, Villupuram.

For Appellants in both C.M.A.Nos. : Mr. N.Suresh

For Respondents in both C.M.A.Nos. : Mr.C.Munusamy

COMMON JUDGMENT

The plaintiffs in the suit in O.S.No.327 of 2005, on the file of the Additional District Munsif, Villupuram, who were also the defendants in O.S.No.40 of 2007 on the file of the Additional District Munsif, Villupuram are the appellant's in the above Civil Miscellaneous Appeals.

2. The above C.M.A's are filed challenging the order of Remand passed by the learned Principal Sub-Ordinate Judge, Villupuram in the Appeals' As.No.24 of 2011



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and A.S.No.25 of 2011 filed against the Judgment and Decree of the learned Additional District Munsif, Villipuram in O.S.No.327 of 2005 and O.S.No.40 of 2007 respectively.

3.The parties shall be referred to as per their rank in C.M.A for convenience sake.

4.The summary of facts necessary for appreciation of these appeals are as follows:

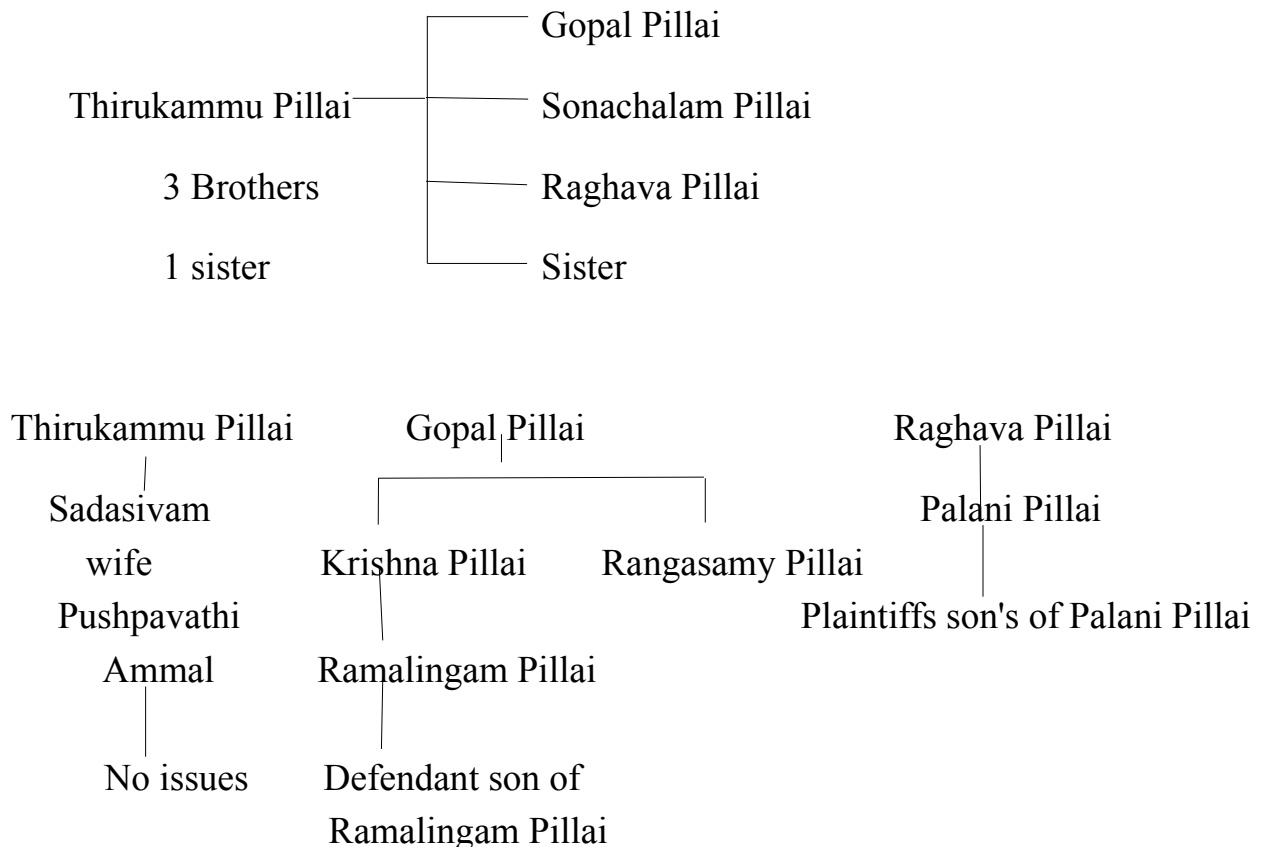
O.S.No.327 of 2005 was filed by the appellants for a declaration that they were alone entitled to administer and manage Arulmighu Mazhukkaram Enthiya Sri Muthumariamman Temple and its adjoining lands and to restrain the defendants from anyway interfering with the administration of the Arulmighu Mazhukkaram Enthiya Sri Muthumariamman Temple among other reliefs.

5.The case of the appellants was that the suit temple was developed by one Thirukamm Pillai who had 3 brothers namely Gopal Pillai, Sonachalam Pillai, Raghava Pillai and one sister. Thirukamm Pillai had a son by name Sadasivam



Pillai. Sadasivam Pillai married one Pushpavathi Ammal and the couple had no issues. To show how the appellants and respondent claim title to the suit temple the

genealogy is traced as follows:



6. After the death of Thirukamm Pillai, his son Sadasivam Pillai inherited the suit temple and was Managing and Administering the same by performing the regular poojas, Kumbhabishekam and other rituals. Sadasivam Pillai earmarked lands Measuring 1.25 Kani's for the maintenance of the suit temple. Whiles, Sadasivam Pillai by a registered Will dated 26.02.1921 bequeathed the properties to his wife



Pusphavathi Ammal and as he had no issues, entrusted the Management of the suit temple to Krishna Pillai, his Junior Paternal uncle. After the demise of Sadasivam

Pillai the Will came into effect and Pushapavathi Ammal became the absolute owner and was in possession and enjoyment of the entire properties. On 01.11.1969, Pushpavathi Ammal executed a registered Will, bequeathing the entire properties to her sisters' son and daughter namely Palani Pillai and Mylammal. According to the appellant's the "A" Schedule property was allotted to Palani Pillai, "B" Schedule property to Mylammal and the "C" Schedule property was earmarked for the maintenance of the temple. The appellant's specifically pleaded that as the properties were bequeathed to two persons, the original Will was handed over to Mylammal. The said Mylammal filed the original Will in a suit filed by her in O.S.No.2010 of 1979 on the file of the District Munsif Court, Villupuram. The appellant's therefore stated that they were unable to produce the original Will and hence only the certified copy of the registered Will dated 01.11.1969 was produced.

7.The appellants further stated that Krishna Pillai was given only the right to

manage and administer the temple under the Will of Sadasivam Pillai dated



26.02.1921. The said right was personal to Krishna Pillai and it ended with him and therefore the defendants could not claim any right of inheritance to the management right given to Krishna Pillai. On the aforesaid pleadings among others, the plaintiffs prayed for declaration of their exclusive right to administer and manage the suit temple and also restraining the defendants from interfering with the management and administration of the suit temple among other reliefs.

8. The respondent filed a written statement in the suit O.S.No.327 of 2005 denying all the plaint allegations and specifically stated that as per the Will of Sadasivam Pillai dated 26.02.1921, Krishna Pillai was entrusted with the management of the temple and after his demise, his son Ramalingam Pillai managed the same by conducting all festivals, regular poojas and other rituals and therefore the suit temple belonged to the respondent family and the appellants had no right to the same. As a counter blast, the deceased first respondent filed a suit in O.S.No.40 of 2007 for a declaration of respondents family's trusteeship to maintain the suit temple and its property as per Will dated 26.02.1921, for permanent injunction and other reliefs.



9. The respondent in his suit, traced his family's right to the management of the suit temple under the Will of Sadasivam Pillai dated 26.06.1921. According to the respondent, under the Will of Sadasivam Pillai, his grand-father Krishna Pillai was nominated as a trustee to the suit temple and after his life time, his son Ramalingam Pillai inherited to the trusteeship and thereafter the respondent as a legal heir of Ramalingam Pillai became the trustee and was managing and administering the temple. The respondents relied on several documents to establish the management and administration of the respondents family of the suit temple. The respondents on the basis of said pleadings, filed suit O.S.No.40 of 2007, for the relief of declaration and other reliefs.

10. The appellants who were the defendants in suit O.S.No.40 of 2007, reiterated the averments made by them in their plaint in O.S.No.327 of 2005. The 3rd appellant filed a written statement reiterating the averments made in the plaint in O.S.No.327 of 2005. The appellant put the respondent to strict proof of the Will dated 26.02.1921 executed by Sadasivam Pillai, on which the respondent relied. The appellant further submitted that the failure to file the original Will was fatal to the



respondent's case. The appellants therefore prayed for dismissal of the suit in O.S.No.40 of 2007.

11. One more aspect which needs to be mentioned here is that a third suit O.S.No.456 of 2005 was filed by the appellants for permanent injunction restraining the defendants from interfering with their administration and management of the suit temple, on similar pleadings, as in O.S.No.327 of 2005. The respondent filed a written statement similar to the written statement in O.S.No.327 of 2005 and prayed for dismissal of the suit. The Trial Court jointly tried the 3 suits and passed a common Judgment.

12. Before the Trial Court, the appellants examined 2 witnesses and marked Ex.A.1 to Ex.A.66. The respondent examined 3 witnesses and marked Ex.B.1 to Ex.B.14 and 3 documents Ex.X.1 to Ex.X.3 were marked as third party documents.

13. The Trial Court framed the following issues in the three suits and thereafter recast the issues as follows:



Issues in O.S.327/2005:-

1. Whether Pushpammal has got title to execute any document with regard to the suit property?
2. Whether the Will dated 1.11.1969 is true, valid and acted upon?
3. Whether the Plaintiff is entitled for declaration as prayed for?
4. Whether the Plaintiff is entitled for injunction as prayed for?
5. To what other relief the plaintiff is entitled to?

Issues in O.S.456/2005:-

1. Whether the Will dated 26.02.1921 and 01.11.1969 are true, valid and acted upon?
2. Whether the mortgage deed dated 21.01.1983 is a true and valid?
3. Whether the suit is barred by Resjudicata?
4. Whether the suit is barred by non-joinder of necessary party?
5. Whether the plaintiff is entitled to get the relief as prayed for?
6. To what other reliefs the plaintiff is entitled to?

Issues are recast as follows:-

1. Whether the Will dated 26.02.1921 and 01.11.1969 are true, valid and acted upon?
2. Whether the suit is barred by Resjudicata?
3. Whether there is any cause of action to file the suit?
4. Whether the plaintiff is entitled for injunction as prayed for?
5. To what other reliefs the plaintiff is entitled to?



Issues in O.S.No.40/2007:-

1. Whether the plaintiff is a family trustee as per will 26.2.1921?
2. Whether the plaintiff is entitled for declaration?
3. Whether the plaintiff is entitled for injunction?
4. To what other reliefs?

14. The Trial Court held that the appellants had proved due execution, attestation and genuineness of the Will under Ex.A.1 dated 01.11.1969. The Trial Court further held that the appellants had proved that they were alone in management and administration of the suit temple and its properties and therefore rejected the respondents suit in O.S.No.40 of 2007 for declaration as prayed for. The Trial Court further held that appellants were entitled to the relief of permanent injunction also. In effect, the Trial Court decreed the suit in O.S.No.327 of 2005 and O.S.No.456 of 2005, filed by the appellants and dismissed the suit in O.S.No.40 of 2007 filed by the respondent.

15. Aggrieved by the common Judgment of the Trial Court, the respondent preferred the appeals in A.S.No.24 and 25 of 2011, challenging the Judgment and



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Decree, in so far as it related to O.S.No.327 of 2005 and O.S.No.40 of 2007. No appeal was filed challenging the Decree and Judgment passed in O.S.No.456 of 2005.

16. The lower Appellate Court by the impugned Judgment, allowed the appeals and remanded the suit to the Trial Court, to decide the matter after providing opportunities to the parties to prove their respective registered Wills and on failure to prove the registered Wills, to proceed in accordance with law.

17. Aggrieved by the Judgment in A.S.Nos.24 and 25 of 2011 the above appeals are filed by the plaintiff in suit O.S.No.327 of 2005, who are also the defendants in suit O.S.No.40 of 2007.

18. The learned counsel for the appellant submitted that the order of remand is bad in law, as it is well settled that there cannot be a remand for the asking. The learned counsel further submitted that the power of remand is Circumscribed by the provisions of Civil Procedure Code under Order 41 Rule 23, 23-A of the CPC and therefore there cannot be an order of remand beyond the provisions of the code. The



learned counsel further submitted that on the facts of the case, it was clear that the evidence on record was more than sufficient for the Appellate Court to decide the issue by itself and therefore, the order of remand was in violation of Order 41 Rule 25 of CPC. The learned counsel submitted that the Appellate Court even without setting aside the findings of the Trial Court on the issues, framed by it, remanded the matter for re-trial and hence the same was illegal and unsustainable.

19. The learned counsel for the appellants referring to the facts of the case submitted that both the appellant as well as the respondent relied on Will of Sadasivam Pillai dated 26.02.1921. Both the parties traced their title to Will dated 26.02.1921. The registration copy of the Will executed by Sadasivam Pillai dated 26.06.1921 was marked by the appellant as Ex.A.30. The respondent had categorically admitted that the original Will was with him, but for reasons best known to him, he did not produce the same before the Trial Court and so the Trial Court rightly held that, failure to produce the original Will by the respondent was fatal to his case. The lower Appellate Court without even considering the reasoning of the Trial Court that, non production of the original Will was fatal to the respondent's case



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remanded the matter only to give an opportunity to the respondent to prove the Will, which was not permissible in law.

20. The learned counsel further submitted that the appellant had justified the production of the certified copy of the registered Will dated 01.11.1969, but inspite of the same the Appellate Court on untenable grounds rejected the same.

21. The learned counsel for the respondent on the other hand submitted that there was absolutely no infirmity in the order of remand. The Appellate Court had categorically found that both the Wills were not proved and so remanded the matter to the Trial Court and hence the same could not be faulted.

22. I have heard both the learned counsels and have perused the materials placed on record.

23. The short point to be considered in these appeals is whether the order of remand passed by the Appellate Court is justified or not.

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24. The facts of the case are not disputed. The genealogy is also not disputed.

The suit temple and property originally belonged to one Thirukamm Pillai, who had three brothers Gopal Pillai, Sonachalam Pillai and Ragava Pillai and one sister. Thirukamm Pillai had one son by name Sadasivam Pillai who was married to one Pushpa Ammal and the couple had no issues. Gopal Pillai had two son, Krishna Pillai and Rangasamy Pillai. Krishna Pillai had one son named Ramalingam Pillai and the deceased respondent in the appeal was the son of Ramalingam Pillai. Raghava Pillai other brother of Thirukamm Pillai had one son Palani Pillai and the appellants are the son's of Palani Pillai. The respondent traced his right and title to the suit property to the Will of Sadasivam Pillai dated 26.02.1921 and the appellants tract it to both the Wills (i.e) of Sadasivam Pillai dated 26.02.1921 and Pushpammal's Will dated 01.11.1969.

25. According to the appellants, under the said Will of Sadasivam Pillai, the suit properties were bequeathed to Pushpammal and only the management of the suit temple was entrusted to Krishna Pillai, the younger paternal uncle of Sadasivam Pillai. According to the appellants, on the death of Krishna Pillai, the management



right of Krishna Pillai came to an end and therefore Pushpammal become absolute owner of the suit temple along with right to manage and administer the temple.

Pushpammal on 01.11.1969, executed a registered Will in favour of Palani Pillai and Mylammal her sister's son and daughter. Under the said Will schedule 'A' property was given to Pushpammal, 'B' schedule property to Mylammal and 'C' schedule property was earmarked for maintenance of the suit temple.

26. It is the appellants case that after the life time of Pushpammal, the appellants father, as a legatee, became entitled to the suit temple including the right to exclusive management and enjoyment of the same. The appellants filed several documents to establish their right title and management of the suit temple. The appellants in their plaint clearly stated that as Pushpammal had bequeathed her properties to Palani Pillai as well as Mylammal, the original Will was entrusted to Mylammal, who had filed the original Will in the suit in O.S.No.2010 of 1979. The appellants therefore pleaded that the certified registration copy of Will was filed as secondary evidence. To establish that, the original Will was filed in O.S.No.2010 of

1979, the appellants marked Ex.A.65, which was the certified copy of plaint in



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O.S.No.2010 of 1979. The appellants further examined P.W.2, attesor of the Will of Pushpammal to speak about the execution and attestation of the Will.

27. The learned counsel for the respondent on the other hand relied on the registered Will dated 26.02.1921 of Sadasivam Pillai, to show that the management and administration of the suit temple was entrusted to his grand-father Krishna Pillai, and that after the demise of Krishna Pillai his father Ramalingam Pillai was administering the suit temple and thereafter on his father's death, he was administering and managing the suit temple. According to the respondent, Krishna Pillai was given trusteeship of the temple and therefore on his demise, the trusteeship was inherited by his father and thereafter by him. The Will of Sadasivam Pillai relied on by the respondents was not filed by them, but the certified registration copy of the said Will was filed by the appellants as Ex.A.30.

28. The Trial Court dismissed the suit of the respondent, on the ground that the respondent having admitted that the original Will dated 26.02.1921 was with him had failed to produce the same and therefore non-production of the original Will was fatal



to his case. As far as the Will of the appellants was concerned, the Trial Court found that the appellants had made out a case for receipt of secondary evidence by producing certified copy of the plaint in O.S.No.2010 of 1979 which was marked as Ex.A.65. On the basis of the evidence of P.W.2 who was a attestor to the Will, the Trial Court held that the appellants had proved the Will and hence Decreed the suits of the appellants. The lower Appellate Court did not give any cogent reasons for over turning the finding of the Trial Court on the various issues framed by it. The lower Appellate Court failed to note that the original Will was not produced by the respondent, eventhough it was admitted that the original was with him. The lower Court instead of remanding the matter for the purpose of proving the Will of Sadasivam Pillai ought to have itself considered the same as the certified copy of the registered Will dated 26.02.1921 was filed by the appellant's as Ex.A.30.

29. The lower Appellate Court ought to have seen that though the respondent admitted that the original Will was with him, he had not produced the same and hence the production of certified registration copy of the Will by the appellant could be admitted as secondary evidence. Therefore there is absolutely no justification for the



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Appellate Court to remand the suit for the purpose of proving Ex.A.30. The lower Appellate Court on an erroneous view that Ex.A.64, the certified registration copy of plaint in O.S.No.2010 of 1979, showed that only a copy of the certified registration copy was filed and not the original Will held that the Will of Pushpammal was not proved.

30. It is seen from Ex.A.64, that, in the list of documents the registered Will executed by Pushpammal dated 01.11.1969 was shown and not a copy of the registered Will. Therefore the Trial Court was right in its finding that the original Will was filed in the said suit. The Trial Court reasoned that if it had been a xerox copy of the document, the same would have been referred to as xerox copy. It is not known as to how the Appellate Court found that only a copy of registration copy was marked and not the original. This basic fallacy in appreciating Ex.A.64 lead to an erroneous finding that the Will dated 01.11.1969 marked as Ex.A.1 was not proved.

31. The learned counsel for the appellant relied on the Judgments reported in

AIR 1965 MADRAS 417, AIR 1999 SC 1125 and 2002 (2) SCC 686 and the Judgment

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reported in 2020 (4) CTC 321 to reiterate his submission that there cannot be an order of remand for asking and the lower Appellate Court's power to remand the case was Circumscribed by the provisions of Order 41 Rule 23-A and Rule 25. In the Judgment reported in 2002 (2) SCC 686, the Hon'ble Supreme Court clearly held that validity of remand has to be tested by reference to Rule 25. In the present case the lower Appellate Court inspite of sufficient evidence before it chose to remand the case, which in my view is in clear violation of Order 41 Rule 25 CPC.

32. The learned counsel for the respondent relied on the Judgment reported in 2016 (16) SCC 483 in support of his case. I have gone through the Judgment and I find that same is actually against the respondent. The Hon'ble Supreme Court in the said Judgment at para 22 held as follows:

“In that view of the matter, there is compliance with the provisions of Section 65 of the Evidence Act. Merely because the signatures in some of the documents were not legible and visible that cannot be a ground to reject the secondary evidence. In our view, the trial court correctly appreciated the efforts taken by the appellant for the purpose of leading secondary evidence.”



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33. In the present case also, one of the reasons assigned by the Appellate Court for rejecting the secondary evidence of the Will dated 01.11.1969, is that signatures of attestors and attesting evidence do not appear. From the aforesaid Judgment, it is clear that the said reason cannot be a ground for rejecting the secondary evidence.

34. For all the above reasons, I am of the view that the order of remand passed by the lower Appellate Court is unsustainable and therefore the same is set aside. I would add a note of caution that, if any observations on the merits of the case have been made, it is only to test the validity of the order of remand and the same shall not affect the Judgment of the lower Appellate Court while deciding the appeal.

The appeals are therefore allowed. Consequently connected Miscellaneous Petition is closed. There shall be no order as to costs in both the appeals.

30.06.2023

dsn

Speaking Order: Yes/No

Index: Yes/No

Neutral Citation: Yes/No



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To

1.The learned Principal Subordinate Judge,
Villupuram.

2.The Additional District Munsif Court,
Villupuram.

Copy to

The Section Officer,
V.R.Section,
High Court, Madras.



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N.MALA.J.,

dsn

PRE-DELIVERY JUDGMENT IN
C.M.A.Nos.1468 and 1469 of 2020

JUDGMENT DELIVERED ON
30.06.2023