



C.M.A(MD)No.1635 of 2013

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **30.06.2023**

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1635 of 2013

and

C.M.P(MD)No.2038 of 2019

Subhadra Amma

... Appellant/1st Respondent/
Plaintiff

Vs.

Thanka Nadar(Died)

1.Kumaradhas

... 1st Respondent/2nd Appellant/
5th Defendant

2.Chellammal

3.Sathiadhas (Died)

4.Swamidhas

5.Rani

6.Lyla

7.Sundaradhas

8.Ramadhas

9.Rajeswari

10.Nageswari

... Respondents/Appellants 3-11/
Legal heirs of 4th Defendants



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11.Thilothama Amma

12.Komalangi Amma

13.Balakrishnan Nair

14.Parimala Devi

15.Syamala Devi

16.Chandra Prabha

... Respondents/Respondents 2-7/
Defendants 1-3 & Legal heirs

17.Mary Stella

18.Jerin Asha

19.Jerin Anusha

*(R17-R19 are brought on record as legal heirs of
deceased R3 vide Court order, dated 26.04.2022 in
C.M.P(MD)No.133 of 2022)*

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of Code of Civil Procedure, to set aside the judgment and decree of the lower appellate Court, dated 26.04.2013 passed in A.S.No.75 of 2003 on the file of Camp Court Judge at Kuzhithurai, II Additional Subordinate Judge, Nagercoil, remanding the order, dated 17.09.2003 the suit in O.S.No.51 of 1999 on the file of the Principal District Munsif, Kuzhithurai for fresh disposal and to allow the appeal.

For Appellant : M/s.J.Anandha Valli

For R1,R2,R5,R7 & R9 : Mr.S.C.Herold Singh

For R4,R6,R10,R11,R13,
R14-R16,R17,R18,R19 : No Appearance



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R3 & R12

: Died

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JUDGMENT

The plaintiff in a suit for partition has filed the present appeal challenging the order of remand passed by the first appellate Court.

2. The appellant herein as plaintiff had filed O.S.No.51 of 1999 on the file of Principal District Munsif Court, Kuzhithurai for the relief of partition and separate possession of her 1/4th share in the plaint schedule property. According to the plaintiff, the suit schedule properties originally belonged to one Kumara Pillai, who died intestate and issueless. Therefore, the property devolved upon his brother Sivasankara Pillai. The plaintiff and defendants 1 to 3 are the legal heirs of the said Sivasankara Pillai. The defendants 4 and 5 are strangers to the family and they are attempting to trespass into the suit schedule properties. Hence, they have prayed for decree for partition of 1/4th share.

3. Per contra, though the defendants have admitted the title of Kumara Pillai, had contended that Sivasankara Pillai was not the brother of Kumara Pillai. On the other hand, one Gowri was the sister of Kumara Pillai. After the death of Kumara Pillai, the property devolved upon the said Gowri and the defendants 4 and 5 have purchased the property from



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the sons of Gowri. The defendants further claim that they have been in possession of the property for more than 55 years and they claimed title by adverse possession.

4. The trial Court after framing issues and going through the oral and documentary evidence, ultimately found that the defendants have not established the plea of adverse possessions and proceeded to grant a decree for partition. Challenging the said decree, the defendants 4 and 5 had filed A.S.No.75 of 2003 before II Additional Sub Court, Nagercoil. The first appellate Judge had arrived at a finding that the trial Court has not framed any issue with regard to the fact whether Sivasankara Pillai is the brother of Kumara Pillai. Since the said issue has not been framed, the first appellate Court had set aside the preliminary decree of the trial Court and has remitted the matter back to the trial Court. This order of remand is under challenge in the present appeal.

5. According to the learned counsel for the appellant, both the parties have not raised any pleading or any issue or let in any evidence disputing that Sivasankara Pillai is not the brother of Kumara Pillai. Suddenly, the first appellate Court had assumed that there is a dispute whether Sivasankara Pillai is the brother of Kumara Pillai. Therefore, without any pleading or evidence, the first appellate Court ought not to



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have remitted the matter back to the trial Court to frame an issue. Hence, she prayed for allowing the appeal and directing the first appellate Court to decide the appeal on merits.

6. Per contra, the learned counsel for the respondent had contended that in Paragraph Nos.3 and 5 of the written statement filed by the 4th defendant, they have specifically disputed about the relationship of Sivasankara Pillai with Kumara Pillai. However, the trial Court has not considered the said issue and proceeded to decree the suit only on the ground that the defendants had failed to establish the plea of adverse possession.

7. The appellant/plaintiff had filed C.M.P(MD)No.2038 of 2019 to receive the registration copy of a partition deed, dated 20.02.1954 as additional evidence in this appeal. According to the learned counsel appearing for the appellant, this document would establish the relationship between Kumara Pillai and Sivasankara Pillai.

8. If the trial Court had failed to consider certain issue on its merits, it is for the appellate Court to re-appreciate the oral and documentary evidence independently to arrive at a finding. For the said purpose, an order of remand cannot be passed. Now, the appellant has



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come out with a document purporting to establish the relationship between Kumara Pillai and Sivasankara Pillai through a registered partition deed, dated 20.02.1954. However, this Court is not inclined to accept the said document as an additional evidence in this appeal. Hence, C.M.P(MD)No.2038 of 2019 is closed. The appellant is at liberty to place the said document as additional document before the first appellate Court. The first appellate Court is directed to follow Order 41 Rule 27 and 28 of Code of Civil Procedure in receiving the said document.

9. In view of the above said deliberations, the order of remand is hereby set aside and the matter is remitted back to the file of the first appellate Court to decide the appeal on merits and in accordance with law on the basis of the existing oral and documentary evidence. In case, if additional evidence on the side of the appellant is allowed, the respondents in the first appeal may be permitted to let in contra oral or documentary evidence. However, for the purpose of receiving additional evidence, again an order of remand should not be passed by the first appellate Court. The entire exercise shall be completed by the first appellate Court on or before 31.12.2023.



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10. With the said observations, C.M.A(MD)No.1635 of 2013 stands allowed and C.M.P(MD)No.2038 of 2019 stands closed. No costs.

30.06.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
Note : **Registry is directed to return the original document to the learned counsel for the appellant.**

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To

- 1.The II Additional Subordinate Judge,
Nagercoil.
- 2.The Principal District Munsif,
Kuzhithurai.
- 3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Judgment made in
C.M.A(MD)No.1635 of 2013

30.06.2023